

APPENDIX.

PART I.

MESSENG

1776. July 19.

ARCHIBALD GILCHRIST, Merchant in Edinburgh, *against* JOHN SUTHERLAND
of Wester.

JOHN RUSSELL, Messenger in Wick, repeatedly delayed to execute a caption sent to him at the instance of Messrs. Archibald Gilchrist and Company, against Brook and Miller, merchants in Wick, notwithstanding the most express and peremptory order for that purpose. On account of this gross neglect of duty, Messrs. Archibald Gilchrist and Company brought an action against this messenger, and Mr. Sutherland of Wester as his cautioner, concluding against them conjunctly and severally for the several sums, for payment of which the caption had been raised.

The Lord Auchinleck Ordinary, after fully hearing parties, pronounced, (6th July 1775,) the following interlocutor: 'Having considered the libel, ' letters of correspondence libelled on, and what is above set furth, finds the ' defender, John Russell the messenger, liable in payment to the pursuers of ' the debt claimed by them as libelled in the first instance; but finds the other ' defender, John Sutherland, *qua* cautioner for him, *subsidiarie* liable in payment ' thereof, and decerns; finds the pursuer entitled to expenses, and allows an ' account to be given in.'

Mr. Sutherland the cautioner reclaimed to the Court, upon these grounds, That the pursuer could not qualify any damage arising from the caption not having been put in execution, as both Miller and Brook were fully in as good circumstances now, as they were at that time: That the diligence was improper and ought not to have been executed; it having been raised in the name of Gilchrist and Company as a body corporated, or associated, long after the

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Particulars of
the case
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p. 8892.
referred to.

No. 1. dissolution of that Company; and as a civil, or a natural death must, according to the principles of law, produce the same effect, this caption must be as useless and inept, as diligence in the name of any individual becomes, after the death of the person in whose name it is raised. And the Court has repeatedly found, that the death of the person who raised the diligence puts an end to all further proceedings in virtue of that diligence; 11th of June 1745, Stewart against Hay and Husband, No. 21. p. 834; and 2d December 1766, Stewart against Fogo, No. 42. p. 8136. where the Court, 'in respect it is admitted that Auchterlony died eight days before the pointing ' was executed, which diligence proceeded in Auchterlony's name, found that ' the said pointing was void,' &c. which decision gave rise to another one of the same nature, Fogo and Galloway against Scott in 1669. In the answers given in for the pursuer, it was stated, that he was not bound to qualify any actual loss sustained, by the messenger not having done his duty. But the presumption, that if the debtors had been imprisoned they would have paid the debt, is a sufficient foundation for this action.

With regard to the objection that the diligence had not been regular, the messenger never pretended to make that an excuse for his conduct, nor ever was such an objection insinuated until the cause had come into Court. But besides that, as the messenger's office is purely ministerial, he must execute the diligence agreeably to the warrants sent to him, if *ex facie* it is regular. Because, if the diligence is improperly raised, it cannot hurt him but his employer. Besides, when one or more persons withdraw from a copartnership, or the company is dissolved, the person having right to the debts takes every diligence, and every legal step for securing these debts in the name of the company. This is not only the daily practice of this country, but is founded upon the well known maxim in law, that an assignee may either use diligence in his own name or in that of his cedent. There is the greatest difference betwixt diligence proceeding in the name of a person deceased, and the present case, where the company and all the right they ever had, still exists in the person of Archibald Gilchrist.

The Court, upon advising the petition for Mr. Sutherland, with answers for Archibald Gilchrist, refused the petition, and adhered to the Ordinary's interlocutor.

Lord Ordinary, Affleck.

Act. A. Elphinstone.

Alt. D. Armstrong.

D. C.