

accordingly possessed the estate in question more than forty years from the date of the infestment in February 1673, to the commencement of this action in 1720, no *lawful* interruption having been made during that space.

1759.

 SINCLAIR, &C.
 v.
 THE EARL OF
 BREADALBANE,
 &C.

3. That the appellant's claim was now lost and expired, as it had not been prosecuted within the years of prescription established by the Act 1469. And in this case, more than forty years had elapsed, from the expiry of the redemption in 1678, and the appellant had moved no claim or taken any document on the deed of reversion.

Upon advising the cause, the Lord Ordinary pronounced this interlocutor: "Find the defenders (respondents) have produced sufficient to exclude; and therefore assoilzie and decern; superseding extract till the 8th of June then next." On reclaiming petition to the Court their Lordships unanimously adhered.

Feb. 21, 1751.
 Nov. 22, 1751.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are, hereby affirmed.

For the Appellants, *C. Yorke, Al. Wedderburn.*

For the Respondents, *R. Dundas, Al. Forrester, Fred. Campbell.*

NOTE.—Unreported in the Court of Session.

[Fac. Coll. vol. ii., p. 216; et Mor. 2081.]

JOHN GRANT the Elder, and JOHN GRANT
 the Younger, *Appellants;*

THOMAS FORBES, *Respondent.*

1759.

 GRANT, &C.
 v.
 FORBES.

House of Lords, 29th March 1759.

CAUTIONER—DAMAGES FOR OPPRESSIVE AND ILLEGAL EXECUTION OF DILIGENCE.—An action of damages was raised by the respondent for oppressive and illegal execution of a caption against him for debt, brought against the cautioner of the messenger and another, who was accessory to these proceedings. Held the appellants liable in £100 damages. Affirmed on appeal.

1759.

GRANT, &C.
v.
FORBES.

James Grant having a debt and diligence against the respondent, put the diligence into the hands of Henderson, a messenger, to apprehend the respondent. The respondent was accordingly apprehended by Henderson at Fochabers, on the 16th September, and was carried away, attended by Grant, also his brothers and others.

From that date to the 27th of September, the respondent stated, that though he often insisted on being carried to prison, yet both Henderson and the Grants refused, but continued carrying him from house to house, by solitary roads through the country, and by endangering his life, forced him to grant certain deeds or leases, upon which he was set at liberty, and the messenger thereupon left him.

John Grant the younger was the cautioner for the messenger, and was called in that capacity; and his father, as having been accessory to the proceedings by which the deeds were impetrated from him.

The present action was therefore raised against James and Donald Grant, John Henderson, and the appellants, John Grant, elder, and John Grant, younger, insisting for exhibition of the several deeds and writings he was thus compelled to execute while under confinement; and concluding that the same should be declared void and null. That James and Donald Grant, John Henderson, and the appellant John Grant, younger, who was surety and bail for the messenger, should be decreed jointly and severally, to pay to the respondent the sum of £500 in name of damages. That the other appellant, John Grant, elder, as accessory to the illegal and oppressive measures before mentioned, and approving and enforcing them as an arbiter, should likewise be decreed to pay the sum of £200. The bond of caution for the messenger bore to indemnify whatever damages may be sustained “through the negligent, fraudulent, and informal execution of “the said messenger in the said office.”

July 8, 1758.

The Lords pronounced this interlocutor: “Find it proven
“that James Grant, in Greenton, Donald Grant, in Dalvey,
“and John Henderson, messenger, are guilty of the several
“acts of oppression specified in the complaint; and therefore
“find them, and John Grant, younger, of Rothmaise, cau-
“tioner for the said John Henderson, messenger, conjunctly
“and severally, liable to the complainer in damages, which
“they modify to one hundred pounds sterling, and in the
“expense of process, of which they ordain an account to
“be given in. But find it not proven that Grant, elder, of

“ Rothmaise, and George Meston, Tolmads, were accessory
 “ to the acts of oppression charged in the complaint, and
 “ therefore assoilzie them, and decern and declare accord-
 “ ingly.” On reclaiming petition the Court adhered. A
 subsequent interlocutor was pronounced as to the expenses.

1759.

 GRANT, &C.
 v.
 FORBES.
 Jan. 5, 1759.

Against these interlocutors an appeal was brought in regard to the case of John Grant, the elder, and John Grant, the younger, cautioner for Henderson, the messenger.

Pleaded for the Appellants.—The appellant, John Grant, the elder, though he knew of Mr Forbes being a prisoner, yet was altogether ignorant that the application to him was the effect of force upon Forbes, if, indeed, there was any force used against him to bring about the application. Forbes’ letter to him removed all doubts that could possibly arise in his mind; he avoided interfering at first, and was persuaded into it by Macpherson; he was the friend of Forbes, and not of the Grants. In this state of matters, the transaction he brought about by his mediation appeared to him the most expedient for getting Forbes out of the hands of the Grants.

2. With regard to the other appellant, the late Lord Lyon’s commission to Henderson was only conditional, provided the commission was registered within eight days.

3. The bond of surety is, that he shall “ truly and honestly
 “ exercise the office of messenger, and if he does to the con-
 “ trary, whatever damages, &c., any of them shall happen to
 “ sustain through the negligent, fraudulent, and informal exe-
 “ cution of the said messenger, in the said office, we bind and
 “ oblige us conjunctly and severally, both cautioner and mes-
 “ senger, to pay the same to the party interested and wronged,”
 which clearly relates to the employers of the messenger in the execution of process, but not to those whom the messenger may insult or outrage in that execution. Such offences he must answer criminally, and the fine is imposed as a punishment for his misdemeanour, but the surety neither is, nor was ever meant to be, answerable for the consequences the messenger might draw upon himself by such offence; and this construction is enforced by several statutes relative to messengers, as well as by the nature of the office of messenger.

Pleaded for the Respondent.—It appears that the appellant, John Grant, elder, was closely connected with Henderson, the messenger, or bailiff, who was the chief instrument of the acts of oppression found proved by the interlocutor of the 8th July 1758, which, in this particular, is not appealed from.

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And, in all the oppressive proceedings complained of, he con-
nived with the Grants, and committed manifest iniquity and
injustice, in acting as arbiter in the transactions referred to.

2. The cautioner for the messenger, Henderson, who so
illegally and oppressively executed the diligence against him
is, by the terms of his bond, liable to indemnify the lieges for
any damage or injury they may sustain in the unlawful exe-
cution of his office; and the party injured or wronged, not the
employer merely, is entitled to such indemnification. The
party who is injured has as good a claim against the surety of
the messenger as the employer of the messenger has for any
loss the latter may sustain through the negligent execution of
the office.

After hearing counsel,

It was ordered and adjudged that the interlocutors com-
plained of be, and the same are, hereby affirmed.

For the Appellants, *Al. Forrester, John Dalrymple.*

For the Respondent, *Robt. Dundas, C. Yorke.*

[Fac. Coll., vol. iii., p. 181; et Mor. 9933.]

SIR DAVID CUNNINGHAM, Bart., . . . *Appellant;*

1762.

CUNNINGHAM
v.
WARDROBE,
& C.

WM. WARDROBE; Mr JOHN WARDEN;
JAMES WADDEL; Mr JOHN SCOT;
GEORGE WHITE; WILLIAM MEEK, and
Others, Heritors and Inhabitants of the
Parish of Whitburn, . . . } *Respondents.*

House of Lords, 20th December 1762.

CHURCH PATRONAGE—RIGHT TO PRESENT.—The parish of Living-
stone, of which the appellant was patron, was large; and it
occurred to some of the heritors and inhabitants, that a new
church, and a division of the parish would be a desirable object.
They subscribed funds to purchase lands, and to mortify the
same for the support of a minister. The deed of foundation
vested the management of these, and the election of the minister
in the heritors and kirk-session of Whitburn, and excluding the
patron therefrom. The parish was divided, and a new erection
obtained under the name of the parish of Whitburn. The
patron had given a qualified consent to this erection, reserving
his own rights. In an action at the patron's instance, held that