

1759.

GRANT, & C.
v.
FORBES.

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

he had no right to present the minister, or to the vacant stipends. Reversed in the House of Lords, and held him to have right to both.

1762.

CUNNINGHAM
v.
WARDROPE,
&c.

At one time the appellant was sole patron of the parish of Livingstone, in the county of Linlithgow. At that time the parish was large, extending from about seven miles from east to west. The inhabitants of the west end were divided from the east by a river often impassable, while the parish church was at the east end.

It occurring to the inhabitants that it would be advantageous to the spiritual well-being of the parish if it were divided, they, in 1630, applied to the presbytery for that purpose, and they, in 1647, found it necessary that the parish should be divided, and declared, by an Act 1650, that the parish was a sufficient charge for two ministers; and they described limits and bounds for the new church and parish.

At last, in the year 1789, a number of heritors and inhabitants of the parish made a subscription for raising a fund sufficient for endowing a church and maintaining a minister, and for that purpose entered into a deed of mortification, whereby they mortified the sums subscribed, for a fixed annual provision for the minister.

This deed of mortification appointed certain heritors of the parish to be trustees and managers of the money subscribed, and declared that these trustees should continue their management until a legal erection of the said new parish, which was to be called Whitburn, and a kirk-session should be lawfully constituted, and after that erection, the management was to be in the hands of the heritors and kirk-session lawfully constituted.

This deed further declared, "That all the ministers of the said parish shall be elected and called by the plurality of the kirk-session, lawfully constituted as aforesaid, heritors and liferenters, having real interest in the said parish;" and there was also a clause "excluding hereby all patrons or other persons expressly whatsoever, from the power of presenting or nominating any person whatsoever, to be minister of the said parish; as also from the disposal of the aforesaid stipend, or other parts of the produce of the aforesaid mortified funds in times of vacancies."

In 1731, an action was brought for disjoining the parish of Whitburn from that of Livingstone, and for erecting Whitburn into a new parish. The consent of Sir James Cunningham, as patron of the parish, was obtained, but under

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reservation of any right he might by law be found to have, either to vacant stipends, or to the rights of presentation as patron of the parish of Livingstone.

Decree of division of the parish, and new erection of the parish of Whitburn followed.

In two presentations to the new parish of Whitburn which followed, one to Mr Wardrobe, and another to Mr Porteous, Sir James Cunningham asserted his right to present those ministers, who happened to be the very persons chosen by the kirk-session and electors themselves, but against this, a protest was taken on their part, which led Sir James to bring the present action for the vacant stipends, and a declarator to have his right of patronage and presentation declared.

These actions being conjoined, the appellant contended, that being patron of the parish of Livingstone, the new erection of part of the parish could not deprive him of his right over any part; and the new parish must still be subject to his right of patronage, which had been so determined in the parish of Haddington, 18th November 1680. 2 Stair's Decisions, 1799.

Mor. p. 9901.

It was answered by the respondents, that the patron's right must either arise *ex collatione fundi, ex constructione Ædis, aut ex donatione ecclesiæ*, but neither the appellant nor his predecessor contributed to any of those, but the whole endowment arose by the bounty of voluntary subscribers, under whom the respondents now claim, who, having bought the ground, built the church and manse, and also purchased the lands for payment of the stipend, and the glebe for accommodating the minister, the right of presentation by the rules of law, ought to belong to them, and not to the appellant. That the original subscribers had a right to annex what qualities and conditions they thought fit to their donation, and they had expressly reserved the right of presenting the minister, which reservation must have effect according to their intention, and debar him from any claim as patron of the entire parish.

Jan. 21, 1762.

Upon report of Lord Minto, the Lords pronounced this interlocutor:—"Find that Sir David Cunningham, the
"pursuer, has the right of patronage of the parish of Whit-
"burn, and of presentation of a minister to the said parish;
"and that he has also right to the administration of the rents
"of the lands purchased for a stipend to the said minister,
"during a vacancy, and decern."

On reclaiming petition, the Court pronounced this inter-

locutor, by a great majority:—"Sustain the defences, and
 "assoilzie from the declarator; prefer the petitioners to the
 "right of administration of the rents of the lands purchased
 "for a stipend to the minister, during a vacancy, and de-
 "cern."

1762.

 CUNNINGHAM
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 WARDROBE,
 &c.
 Feb. 26, 1762.

Against this interlocutor the present appeal was brought to the House of Lords.

It was ordered and adjudged that the interlocutor of 26th February 1762 complained of, be reversed: And it is further ordered and adjudged, that the interlocutor of the said Lords of Session of the 21st of January 1762, be affirmed.

For the Appellants, *C. Yorke, Thos. Miller.*

For the Respondents, *Al. Forrester, Al. Wedderburn.*

WM. THOM, Esq., Advocate in Aberdeen, claiming the office of Civilian in the King's College of Old Aberdeen; Dr JOHN CHALMERS, Principal; Mr ALEXANDER BURNETT, Sub-Principal, and Mr RODE- RICK MACLEOD, and Mr JOHN LESLIE, Regents of the said College; GEORGE BURNET, Esq., Rector, and Messrs THOM- SON, ROBERTSON, SKENE, and BURNET, *Procuratores Nationum* of the University of Old Aberdeen, . . .

Appellants;

1763.

 THOM, &c.
 v.
 DALRYMPLE,
 &c.

DAVID DALRYMPLE, Esq., claiming the office of Civilian; Mr JOHN GREGORY, Professor of Medicine; Mr THOMAS GORDON, Professor of Humanity; Mr THOMAS REID, Regent in the said Col- lege; Mr JOHN LUMSDEN, Professor of Divinity, and Mr GEORGE GORDON, Pro- fessor of Oriental Languages in the said University; GEORGE MIDDLETON, Esq., pretended Rector, and Messrs FORBES, MOSSMAN, GORDON, and WILSON, pre- tended *Procuratores Nationum* of the said University, . . .

Respondents.