

This defence the Commissaries sustained, and assoilzied the defender, whereof the pursuer complained by bill of advocation, and referred to a passage from Sir Thomas Hope, in his Minor Practiques, fol. 30. § 97. where his words are, 'Albeit, commonly the confirmation bear, that the caution is found by the executor, yet if the executor be pupil or minor, and gives not up, nor makes faith upon the inventory himself, but the inventory is given up by the mother or tutor, or nearest of kin, &c. in this case the caution is understood to be found by those who give up the inventory, and not by the minors, and the minors may pursue those that gave up the inventory, and intromitted with the goods and gear confirmed; and obtain sentence against them; and if they shall not be found *solvendo*, after discussing them, they may pursue the cautioner in the confirmed testament: And it will be no relevant defence to the cautioner to allege, that he is cautioner for the executor, and that therefore he can have no action against him, but ought to relieve him, in respect the caution is holden to be found, not by the minor, but by the ingiver, as said is.'

Conformably whereto, the Lords, on the 6th December 1749, found, 'That Sir James Nicolson was cautioner in the confirmation for Scott of Milleny, the the administrator-in-law, and therefore found the defender, as representing her husband, liable in payment of the sums pursued for;' and, upon the 6th February 1750, 'adhered.' Notwithstanding that Sir Thomas Hope's opinion was, for the defender, said to be singular, confirmed by the opinion of no other author, nor supported by antecedent practice, nor by any decision since; the LORDS having considered it to be the just and rational construction of the caution when found, as by the form of the Commissary-court, it must be, even by the father, who otherways is not bound to find caution *rem pupilli salvam fore*.

Fol. Dic. v. 3. p. 117. Kilkerran, (CAUTIONER.) No 3. p. 118.

1758. July 8. GRANT against FORBES and HENDERSON.

JOHN GRANT became cautioner for John Henderson, a messenger, to the Lord Lion, in the following words: 'I John Grant, the younger of Rothmaise, by the tenor hereof, bind and oblige me, my heirs, executors, and successors, as cautioner and surety for John Henderson in Giach, to the Honourable Alexander Brodie of Brodie, Esq; Lion King of Arms, that the said John Henderson, where he shall dwell and remain, shall leally, truly, and honestly, use and exerce the office of a messenger, to all and sundry our Sovereign Lord's lieges, upon their reasonable expenses: And if he does in the contrary, what damages, skaith, or expenses, any of them shall happen to sustain through the negligent, fraudulent, and informal execution of the said messenger in the said office, we bind and oblige us, conjunctly and severally, both cautioner and messenger, to pay the same to the party interested and wronged.'

The commission from the Lord Lion to Henderson was clogged, as all commissions to messengers are, with the following clause: 'And I (*i. e.* the Lord

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The cautioner for a messenger is liable for malversations done to those against whom, as well as for whom, the messenger is employed.

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‘ Lion) ordain these presents to be registered in my court-books, within eight days next after the date hereof, otherwise to be null.’ But Henderson’s commission was never registered in these books.

Further, the bail-bond was taken to the late Lord Lion alone, and not to his successors in office, and Henderson never renewed his commission with the present Lord Lion.

Afterwards Henderson was guilty, in concurrence with several others, of a very violent abduction, oppression, and extortion against Thomas Forbes.

Forbes having pursued Henderson and his accomplices for these criminal acts, made John Grant likewise defendant in the suit, not as an accomplice, but as cautioner for Henderson the messenger.

John Grant’s defence was, That though he, as surety, was bound to all persons employing Henderson, that Henderson should serve them faithfully; yet he was not bound to those against whom Henderson was employed, to make reparation to them for all the misdeeds and outrages which Henderson might commit against them. That there was a good reason to take surety for the sake of the employers, to wit, that there were but few messengers, and if these refused the employment of any one, no other person could do the office; but, that it was not the genius of the British law, or of any law, to demand surety for a person that he should not do mischief.—That the act 46 Parl. 1587, which gave rise to the taking bail-bonds in Scotland from messengers, ordained, ‘ That every person so admitted of new, (i. e. into the office of messenger), shall find guid and responsible soverties for observation of the injunctiones contained in the end of this present act, to our Sovereign Lord’s use, with costes, skaithes, dammages, and interest of parties greeved, be the *falsehood, negligence, or informality* of any officer.’ From which it appeared, that the surety the law demanded, was only to protect from the *falsehood, negligence, or informality*, of officers; all of which might create an injury to the employer, but could create none to the party against whom the employment was directed: That when the injunctions to messengers referred to in this statute are looked into, it appears there are none of them which respect abuse or oppression upon a person against whom diligence was to be executed; they are entirely confined to certain regulations intended for enabling messengers, with the greater certainty, to do their duty to their employers.—That the 73d act of the same parliament enacts, ‘ That noþe be retained, or hereafter remitted to that service, but he that with his utheris injunctiones shall find soverty to be always furnished with a sufficient ready horse, quhairupon to serve his Hienesse and lieges; and that his soverty shall be answerable for the damnage and interest of his *falsehood, slouth, and informal doing*, in his Hienesse service, or uther parties, gif any shall happen.’ From which it appears still further, that the law required surety only for the damage occasioned by the *falsehood, slouth, i. e. negligence and informality* of the messenger.—That in other statutes, particularly the 84th act of the same parliament, due and separate provisions are made for the security of those

against whom the messenger may commit abuse or oppression. By this act it is enacted, 'That officers of houses committand faked or oppressions of the lieges, in execution of their office, shall be called therefor before the justice or his deputy, or justice-aires or, particular diettes, and punished to the death in case they be found culpable.'—That the bail-bond goes exactly upon this plan, and follows the very words of the statutes: It obliges the surety to pay what damage, &c. any of the lieges shall sustain through the negligent, fraudulent, and informal execution, &c.; and obliges the surety that the messenger shall exerce his office to the lieges upon their reasonable expenses; which last words show, that the surety was found for the sake of the employer, and not for the sake of the person against whom the employment was directed; seeing, by the law of Scotland, the messenger was paid his expences by the person who employed, and not by the person against whom he was employed.

It was answered for Mr Forbes, That as messengers were invested with powers which no one durst resist, the law was doubly attentive to protect the subjects from the abuse of those powers; and as greater oppressions could be committed by messengers against those whom they were employed to seize, than against those who employed them, it was absurd to limit the surety found to these last. That the words *falsehood, slouth, and informality*, must be explained by the spirit of the law, which intended to secure the subject against every malversation; and if the two statutes of the year 1587 were explained by the strict meaning of their words, such manner of interpretation would tend to explain away these, and many more of our old statutes, which are worded so as to explain the intendment and spirit of them, but not to annunciate every possible case falling under them.—That the act 212. 1594, 'ordained all the saids officers that has not found sufficient caution for due administration in their office, or where cautioners are deceased, or are not sufficient, to find caution of new, betwixt and the 1st day of August next to come; otherwise the not finding of the said caution is presently declared to be the cause of their deprivation; which deprivation shall be immediately published at the market-cross of the sheriffdomes where the said officers remainis.' Here the act, referring to the former ones, makes use of the general words, *undue administration*, which shows, that the whole subjects were to be protected by the caution found.—Sir George Mackenzie, in his *Criminals*, title *Deforcement*, says, 'If a messenger do any wrong in the execution of his office, he is liable therefor *ad damnum et interesse*, and finds caution for that effect to the Lion at his entry.' And in his observation upon the 73d act, 1587, he says, 'Messengers find caution to the Lion at their admission *de fidei administratione*;' showing thereby his opinion, that the obligation of the surety was general, as the pursuer contends, not limited, as the defender contends.

THE LORDS found John Grant the cautioner, conjunctly and severally with Henderson, liable in damages to Forbes, and likewise in Forbes's expenses of process against both Henderson and John Grant.'

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In reclaiming against this interlocutor, John Grant *contended*, With regard to his being made liable in the costs of suit, which had been incurred in pursuing Henderson, That supposing him, as surety, liable for the damage occasioned by the messenger; yet he could not be liable for the expence of process in ascertaining that damage, unless it had been expressly provided for in the obligation; that no surety can be liable till the debt is liquidated against his principal, and the only proof of that debt is an extracted decree; that in that event he is indeed liable in the debt itself, for which he had bound himself; but not for the expense of proving that debt, for which he had not bound himself.

It was *answered* for Forbes, That the words of the bail-bond extend to all damage, skaith; or expenses, any of the lieges should sustain; and therefore must comprehend the expense incurred by the party in ascertaining the damage he has suffered.

‘THE LORDS adhered.’

Separatim, it had been *objected* by John Grant, *imo*, That as the late Lord Lion's commission to Henderson was granted under a condition, that the commission should be registered in the lion-court books within eight days of the date of it, which condition Henderson never had fulfilled, the commission in itself was void; and therefore, that John Grant, who was only surety on the supposition that Henderson was a messenger, was free, and no surety, when it appeared that Henderson was no messenger.

Answered for Forbes, That whatever nullity there might be in the commission; yet Henderson had acted as messenger, was reputed to be such, and thereby the surety stood bound in the same manner as if Henderson had acted under a proper authority.

It had been *objected*, *2do*, for John Grant, That as the late Lord Lion, to whom the bail-bond had been taken, was dead at the time of the offences said to have been committed against Forbes; and, as the bail-bond was not taken to his successors in office, John Grant, the cautioner in the bail-bond, was free: That the late Lord Lion was the only creditor in the obligation, and the obligation ceased with his death.

Answered for Forbes, As by the conception of the bail-bond, damages are made payable to the party interested and wronged; so every person must be understood to be a creditor to whom the wrong or damage was done, whether the Lord Lion, who took the bail-bond, was dead or alive, when such wrong or damage was committed.

‘THE LORDS repelled these objections.’

Act. Miller, And. Pringle, Advocatus, Hamilton-Gordon. Alt. J. Dalrymple, Montgomery, Lockhart. J. Dalrymple.

Fac. Col. No 118. p. 216.

7th March 1759.—THE HOUSE OF LORDS ORDERED AND ADJUDGED, That the appeal of this cause be dismissed, and that the interlocutors complained of, be affirmed.

Lord Kames reports the same case :

5th January 1759.—JAMES GRANT, desirous to have a lease of a certain farm from Thomas Forbes, and despairing of obtaining it by fair means, proceeded in the following unlawful course : Being creditor to Thomas Forbes by bond in a small sum, he put the caption following upon it in the hands of Henderson a messenger, and instead of putting it regularly in execution, they secreted Forbes, and dragged him about from place to place in a country scarce inhabited, till glad to obtain his liberty at any rate, he granted the lease wanted. As soon as Forbes obtained his liberty, he brought a reduction of the lease, and a process of damages against James Grant, and Henderson the messenger. Upon a proof, both were found liable, and L. 100 decerned *in solatium*, besides a great sum for costs of suit.

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The defendants being in low circumstances, and unable to pay the sums decerned, a process was brought against John Grant, younger of Rothmaise, cautioner for the messenger, in order to make him liable. The bond of cautionry was in the following terms : ' I John Grant, younger of Rothmaise, bind and oblige me, my heirs, &c. as cautioner and sovrty for John Henderson to Alexander Brodie of Brodie, Lion King at Arms, that the said John Henderson shall leally, truly, and honestly use and exerce the office of a messenger to all the lieges upon their reasonable expenses ; and if he do in the contrary, what damage, skaith or expense any of them shall happen to sustain through the negligent, fraudulent and informal execution of the said messenger in the said office, we bind and oblige us, conjunctly and severally, both cautioner and messenger, our heirs, &c. to pay the same to the party interested and wronged.'

The cautioner's defence was, That by the tenor of his bond of cautionry, he is liable for damages to the person only who employs the messenger, and by no means to repair the hurt that may be done by the messenger to the person against whom he executes diligence, or to any who is not his employer. The Judges over-ruled this defence, and found the cautioner liable for the sums awarded against the messenger, both damages and costs of suit.

It appeared to me, that the Judges, intent to punish oppression, and to give satisfaction to a man greatly injured, were here inadvertently carried beyond the bounds of law, and rendered deaf, the plurality I mean, to the following considerations urged for the cautioner. 1^{ma}, There is a solid foundation in the principles of law for confining the caution to the persons who employ messengers. Where public officers are appointed for performing certain legal acts, and the lieges are confined to these officers, without liberty of choice, it is highly just and expedient that caution should be found by such officers *de fidei administratione*, i. e. to execute faithfully what is committed to their charge. But it is not the practice, nor is it just, to oblige any man, public or private, to find caution not to oppress or hurt others. A man who has a tendency to do mis-

No 16. chief, shown by one or more overt acts, may be put under caution not to commit such wrongs in time coming. But to oblige an innocent person to find caution to abstain from doing mischief of any kind, is hard and unjust. It is punishing a man who has done no fault. *2do*, The statutes enjoining caution to be taken from messengers, go all of them upon that plan. The act 46, parl. 1587, enjoins caution to be taken from messengers, 'for the damage and interest of parties grieved by the falsehood, negligence, or informality of any officer.' Here are three delicts condescended on, which regard the pursuer only, viz. falsehood, *i. e.* returning a false execution; the second, negligence; and the third, informality, *i. e.* giving an informal execution. The act 73, of the same parliament, is in the same strain, only more explicit, 'That the sovery shall be answerable for the damage and interest of his falsehood, sloth, or informal doing, in his Highness' service, or other parties; *i. e.* in the service of his Highness, or in the service of other parties. *3tio*, The bond of cautionry in question, being of the same tenor with all other bonds of the kind, is in every article conformable to the foregoing statutes. The three delicts are the same with what are condescended on in the statutes; and the obligation is confined to those who employ the messenger, because no other person is bound to pay him reasonable expenses. *Lastly*, Another remedy is provided by law, where messengers, under pretext of executing their office, oppress any of the lieges, and that is by the act 84, parl. 1587, declaring this crime to be capital.

Fol. Dic. v. 3. p. 117. Sel. Dec. No 150. p. 205.

SECT. IV.

Cautioner, how far Liable.

1593. *May 25.* GUTHRIE *against* WADDEL.

No 17. AN executor's cautioner was found only bound for what was contained in the inventory, not for concealments.

Fol. Dic. v. 1. p. 125. Haddington, MS.

* * * See This case *voce* EXECUTOR.

1628. *July 2.* NASMITH *against* MENZIES.

No 18.
A cautioner
in a contract
of marriage,
bound to em-

IN a suspension, Nasmith *contra* Menzies, the relict, upon her contract of marriage, having charged the cautioner for employment of 1000 merks upon annualrent to her use in her lifetime; and the party exhibiting the money at the