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question of *solatium*, which is one of discretion, will be moderated and regulated in its amount where it is combined with such a case. In all cases of *solatium* I consider it to be my duty to advise a Jury to attend to the situation of a defender, and not to give such damages as will lead to lengthened imprisonment; but cases may occur in which damages are in the nature of a debt. In such cases there ought to be no regard to consequences in giving the damages.

Verdict,—“ Find for the pursuer on the  
“ first issue damages L. 1800, and on the se-  
“ cond issue L. 200.”

*Moncreiff, Cockburn, and Keay*, for the Pursuer.

*Jeffrey, J. A. Murray, and Cuninghame*, for the Defenders.

(Agents, *John Tait, jun. w. s.* and *Jas. Stuart, w. s.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

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1818.  
March 19.

Damages assessed for an illegal use of a caption.

THIS was a petition and complaint, containing a claim of damages for an illegal and oppressive use of diligence.

DEFENCE.—The diligence was not used.

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ISSUES.

“ Whether, on or about the 5th day of No-  
“ vember 1811, the pursuer was apprehended,  
“ taken into custody, and carried as a prisoner  
“ to Edinburgh, to the injury and damage of  
“ the said pursuer, by Archibald Watson, a  
“ messenger, by directions from the defender,  
“ and in virtue of the caption produced in pro-  
“ cess, raised at the instance of James Baillie  
“ of Falahill, against the pursuer ?

“ Whether the pursuer was detained in cus-  
“ tody of said messenger, acting under the  
“ authority aforesaid, for some time after he  
“ was brought to Edinburgh, and until the  
“ pursuer granted a letter, promising or bind-  
“ ing himself to appear before the said defend-  
“ er, upon the 8th of November 1811, or about  
“ that time, to the injury and damage of said  
“ pursuer ?”

By a series of transactions, which it is unnecessary to detail, James Baillie of Falahill obtained ultimate diligence on a bill for L. 20 against the pursuer, who resided with his father, a farmer at Muirhead. This sum the defender, Mr Francis Fraser, writer, was employ-

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ed as agent for the pursuer to pay. Some difficulty arose as to the discharge to be granted, and a litigation ensued, in which Mr Baillie was unsuccessful.

When the debt was paid, the caption and other documents were put into the hands of the defender. In his pleadings in the Court of Session, though he denied that the caption had been used against the pursuer, he maintained that he was entitled to use it, in order to enforce payment of an account of expences, amounting to L. 19, 8s. 1d. due to himself. The pursuer, on the other hand, denied that he owed any thing, as he had enabled the defender to pay the L. 20 due to Mr Baillie, and any expence connected with the discharge ought to have been paid by that gentleman. The account of expences was subsequently paid, and it appeared from the discharge granted by the defender, that only L. 2 of it was due by the pursuer; the rest being for business done for his father.

The defender stated that the caption had been put into the hands of Watson the messenger, to be delivered up along with the other documents, in case the account was paid, and Watson made a similar statement at the trial. His story was, that, being in the neighbour-

hood, he called for the pursuer with the papers, and that the pursuer voluntarily accompanied him to West Craigs, and from that to Edinburgh in a Glasgow coach.

On the other hand, it was proved that the pursuer made known that he intended to be in Edinburgh the day following that in which he came with Watson, and that while in Watson's company he stated to a man on the road to West Craigs, and also to the landlord of that inn, that he was a prisoner.

The innkeeper at West Craigs was called, and asked what the pursuer said when brought there.

LORD CHIEF COMMISSIONER.—Is this evidence?

*Jeffrey*, for the pursuer,—I am entitled to lay the ground of a cross-examination. It is not competent in general to prove the statements by a party, but if it be a statement made at the time, in presence especially of the accredited agent of the opposite party, who would immediately contradict it if not true, I am entitled to prove it.

LORD CHIEF COMMISSIONER.—My objection was, that you was proving a statement of the pursuer, and bringing that to affect the de-

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Before a witness for the pursuer is called on to prove statements made by him, it must be proved that the person in whose presence they were made was the accredited agent of the defender.

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fender. This cannot be evidence unless he was present. You have come too soon with this evidence ; you ought first to prove that Watson was the accredited agent of this party.

A party may in certain circumstances discredit his own witness.

During the examination in chief of Watson the messenger, he was peremptorily called upon by the pursuer's counsel to give an explicit answer to a question. The defender, who acted as his own agent, personally, submitted that this was an improper threat.

LORD CHIEF COMMISSIONER.—If this was not a person who had been employed by you, and if he had not shown himself a very unwilling witness, I would have checked this stile of examining. A party cannot discredit his own witness ; but, if a witness turn out adverse and unwilling to speak the truth, justice may require a relaxation of this rule.

In the course of his examination the witness stated, that he kept a book in which he entered all his business done as a messenger, and that there were entries for business done for the defender.

The counsel for the defender then asked the nature of these entries. On a suggestion from the Bench that this was irregular,

*Jeffrey*, for the pursuer, said,—Far from objecting to the production of this book, I shall consider it an indulgence if the Court will allow the witness, in custody of a macer, to go for the book ; this is sometimes done in the Court of Justiciary.

The book was accordingly sent for, and there appearing to be one or more leaves taken out, a long examination of the witness took place.

Before calling the next witness, Mr Jeffrey stated that he thought it fair to mention who the other witnesses were whom he offered ; there was here such a *penuria testium*, that he thought it proper to offer the father, mother, brother, and sister of the pursuer ; he was aware that they must be received *cum nota*, but it was proper to offer them, as Sinclair the concurrent, the only indifferent person present, was dead. He also meant to call the former agent in the cause to prove that the messenger at one time admitted having brought the pursuer as a prisoner.

*Boswell*.—The manner in which the offer is made, shows that the other party are aware that it is incompetent. By law, such witnesses are utterly excluded.

LORD CHIEF COMMISSIONER.—We must

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Hyslop v. Miller, *supra* 49  
Earl of Fife,  
&c. *supra* 133.

sustain the objection to the near relations. It has also been already decided that we cannot inquire into a former statement made by a witness.

After the case was opened for the defender, but before he led his evidence,

*Jeffrey*, for the pursuer, said,—I think it right to intimate now, that if the defender does not produce his own books, (to which I wave any objection,) showing the payments made to this messenger, I shall found on it as a matter of argument to the Jury. He may now send for his books.

*Boswell*, for the defender, said he had no objection ; but did not produce them.

LORD CHIEF COMMISSIONER.—The defender could not make his own books evidence for him ; he cannot therefore be expected to have them here. He could not be prepared for what has occurred.

A witness, who had been an apprentice of the defender in 1811, was asked by his counsel whether the pursuer came as a prisoner to the office of the defender.

LORD CHIEF COMMISSIONER.—This is a conclusion to be drawn by the Jury. The ques-

tions ought to be, How did he come? Was any one with him? &c.

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*Jeffrey*, in opening the case, and also in reply, contended,—This is a gross and oppressive use of legal diligence. After the lamentable exhibition the messenger has made, you must judge from the real evidence in the case.

The defender, in his pleadings, contends that he was justified in using the caption, and admits that he gave it to the messenger; with this opinion in law you will judge whether he was likely to tell him not to use it. If the messenger exceeded his instructions, still his employer is liable. In the case of *Stewart*, quoted on the other side, where a messenger imprisoned a man a second time on the same diligence, the agent was held liable.


*Anderson v. Ormiston*, 3d January 1750.  
Kilk. 489.  
M. 13949.

*Boswell*, for the defender,—It is painful to see a witness who does not at once speak out distinctly; but there is no proof of the caption being executed. The defender would have been justified in taking an assignation to the debt and using the diligence. The instructions given were to deliver up the papers, not to execute the caption. *Watson* acted as agent, not as messenger; the pursuer has not proved

*Stewart v. Macdonald and Others*, 6th July 1784.  
M. 13989.



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the instructions to apprehend, and the defender is not liable for any excess by the messenger.

LORD CHIEF COMMISSIONER.—It is unnecessary to go into the details of the origin of the case ; it arises from this, that after a caption was exhausted, it was put into the hands of a messenger, and the question is, whether it was executed.

The issues were framed after much consideration and even altercation, and, to throw light on them, it is proper to mention, that there is a subsequent interlocutor of the Lord Ordinary, in which he finds that the defender had no right to use this diligence.

The first is the material issue, and under it there are three propositions which you must consider ; 1st, That the pursuer was taken ; 2d, That this was done by virtue of the exhausted caption, and by direction of the defender ; 3d, If you find these two in the affirmative, then you must assess the damages. The evidence of the second issue is extremely slight, and rests on some admission in the pleadings in the other Court.


The testimony given as to what was said in presence of the messenger is negative testimony ; there is no proof that he heard the

statement ; he is not proved to have done any thing in consequence, and this evidence could not be taken in opposition to positive testimony. The messenger, too, is deaf, but you must suppose the man who went with him was not ; the innkeeper states that they had a good deal of conversation on the subject, and that neither of them contradicted the statement. This goes far to establish the apprehension or taking ; and if the pursuer was apprehended and brought to Edinburgh,—if deprived of his liberty, this is as much an imprisonment in law as if he had been in the closest prison. Either by persuasion or compulsion he is prevented from bringing his cart to Edinburgh, &c. and you must consider whether it is likely he would have acted in this way if left to the freedom of his will.

You must look to all the probabilities in judging of Watson's evidence. It requires a strong case to entitle a pursuer to treat a witness brought by himself as this witness was treated by the pursuer ; but to the general rule there is an exception, and, from what appeared very early in the testimony of this witness, I think the Court did right in allowing it here.

After commenting on the evidence in detail, his Lordship said,—If you think that the mes-

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senger used the caption, or that he made the pursuer believe he had a caption to enforce payment, then you will find in the affirmative ; if you think he had it merely to be delivered up as a document, then you will find in the negative.

On the second point, I state to you, that if Watson brought the pursuer as a prisoner, then this is the act of the party who put the caption into his hands ; the directions given by the defender depend on the credit due to Watson compared with the other circumstances of the case. You see that this party, from 1812 to 1818, maintains his right to use this diligence, (which was dead and at an end,) and you must consider whether he did not convey the same opinion into the instruction to Watson, and whether Watson did not act upon it.

The only other point is the damages, which ought in all cases to be given as compensation, not as punishment.

Verdict for the pursuer, damages L. 125.

*Jeffrey and S. More*, for the Pursuer.

*W. Boswell*, for the Defender.

(Agents, *And. Paterson and Party.*)