

HALL
v.
OTTO.

Jury, are satisfied the information was false, then you must hold it malicious.

Verdict,—“ Find upon the first issue that
“ the pursuer did not get due warning in pro-
“ per time to quit the defender’s service, and
“ upon that issue find the pursuer entitled to
“ L.95 of damages. Upon the second issue find
“ for the pursuer, and find L.200 damages due
“ to the said pursuer, and the Jury assess said
“ sums accordingly.”

Jeffrey and Cockburn, for the Pursuer.

Clerk, Moncreiff, and J. A. Murray, for the Defender.

(Agents, *A. Smith*, w. s. and *J. Mowbray*, w. s.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1818.
July 14.

HALL *alias* STEWART v. OTTO.

THIS was an action of damages by a married woman for assault and battery.

DEFENCE.—A denial of the facts alleged.

ISSUE.

“ Whether, on the 21st January 1817, or

Damages for
assault and
battery.

“ about that time, the defender did assault,
 “ strike, or beat the pursuer, Janet Hall, *alias*
 “ Stewart, to her great harm and injury, in
 “ the house of the said defender at Path-
 “ head?”

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“ Damages laid in the summons at L. 200.”

The defender, a surgeon at Pathhead, had borrowed a small sum of money from the pursuer's husband, a farmer in the neighbourhood. On the day mentioned in the issue, she sent a servant for payment. The defender having given his own discharged account in part payment, the pursuer seemed to be a good deal irritated, and went in the evening to his house. He left some friends who had dined with him to speak to her, and a noise was soon after heard from the defender's consultation room, where it was alleged he committed the assault.

On her return home a surgeon was called, but was unable to attend. A neighbouring farmer took some blood from her, which was approved of by the surgeon who saw her a day or two after.

A witness for the pursuer was asked by her

In an action of damages for assault and battery, it is not competent to prove what the pursuer said of her feelings at the time of the assault libelled.

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counsel, whether she complained of pain from bruises on her body?

LORD CHIEF COMMISSIONER.—You may desire the witness to state what he observed, and whether she showed him any bruises, but what she said of her feelings is not evidence. As this is a circumstantial case, I am extremely anxious not to allow the defect of proof to be supplied by declarations of the party.

Another witness having stated, that the pursuer called for assistance, was then asked what she said at the time.

LORD CHIEF COMMISSIONER.—Was the defender present? If not, the question is incompetent.

The witness, on his cross-examination, was asked whether the pursuer was quarrelsome?

Jeffrey.—Her character is not in issue. We are not in an inquiry whether she was habite and repute quarrelsome.

LORD CHIEF COMMISSIONER.—This question appears to me incompetent.

Jeffrey, in opening the case, said,—As no person was present, this case must depend on circumstantial evidence, but that is often better than direct. We shall prove that the pursuer

went into the defender's room without having any marks of violence on her person, and that when she left it, her head-dress was disordered, and her face cut, bruised, and bleeding. The defender alleges, that she assaulted him and his wife, but this is incredible, and cannot bar the claim of damages. If two *men* are in a room, and the weaker comes out much hurt, while the other suffers no injury, the presumption is very strong that the other committed the assault, but in the present case it is irresistible.

The L.200 claimed is not, as is usual, a random sum, but was fixed after consultation.

Cockburn stated,—There is no ground for subjecting the defender in damages, whatever suspicions the pursuer may have raised against him. The pursuer is a respectable man, and would on no account resist this action except to clear his character from such an imputation. There is no proof of the existence of the assault, but even if this were doubtful, the defender is entitled to the benefit of the doubt. If she remained in his house after he ordered her out, he was entitled to push her out, and in her passion she may have run against the door or hurt herself with her umbrella.

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If damages are due, they must be very small; she has only proved 10s. 6d., and the situation of the defender can make no difference in the sum to be given; damages being given as reparation, not as punishment.

LORD CHIEF COMMISSIONER.—This is a very short case, and it is the first instance of an assault not resting on positive ocular proof, but entirely on facts and circumstances, that has fallen within the scope of my experience in a practice of thirty-five years. You must, however, take these facts and circumstances into consideration, but must not give damages on mere suspicion; you must in your consciences be satisfied that the defender assaulted and beat the pursuer.

The counsel on the one side rest on the improbability of a woman assaulting a man, and on her appearance when she left the room, not having gone into it with any marks of violence on her person. On the other, they rest on the evidence of the temper in which she was when she came to the house. You must weigh these and the other circumstances dispassionately, and though counsel say the sum claimed in the summons was inserted after consultation, I am persuaded if you think damages due,

you will limit the sum to a very moderate amount.

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Verdict for the pursuer, damages L. 35.

Jeffrey and Borthwick, for the Pursuer.

Cockburn and Ivory, for the Defender.

(Agents, *Jas. Greig*, w. s. and *Jas. Malcolm*.)

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you will find the sum to be very moderate
 without. It is not to be taken as a
 gift. I request, however, that you
 should be careful to see that the
 money is not used for any other
 purpose than that for which it is
 given. I am, Sir, very respectfully,
 Yours,
 J. H. [Name]

APPENDIX,

CONTAINING

THE CONDESCENDENCE, ANSWERS, AND ISSUES, IN
THE FOLLOWING CASES.

No. I.

RAEBURN *v.* KEDSLIE.

CONDESCENDENCE, p. 451.—*ANSWERS*, p. 453.—*ISSUE*, p. 457.

No. II.

PAUL *v.* OLD SHIPPING COMPANY.

CONDESCENDENCE, p. 457.—*ANSWERS*, p. 461.—*ISSUE*, p. 463.

No. III.

MANUEL *v.* FRASER.

CONDESCENDENCE FOR MANUEL, p. 464.—*ANSWERS FOR FRASER*,
p. 468.—*CONDESCENDENCE FOR FRASER*, p. 471.—*ANSWERS*
MANUEL, p. 478.—*ISSUE*, p. 482.

APPENDIX

CONTAINING

THE CORRESPONDENCE, PAPERS, AND ISSUES, IN

THE FOLLOWING CASES.

No. I.

BARBURN & KIDDER.

Contract entered into by 401. — 401. — 401. — 401. — 401.

No. II.

PAUL & OLD SHIPBING COMPANY.

Contract entered into by 401. — 401. — 401. — 401. — 401.

No. III.

MANNING & FRASER.

Contract entered into by 401. — 401. — 401. — 401. — 401.

Contract entered into by 401. — 401. — 401. — 401. — 401.

MANNING & FRASER.

APPENDIX.

No. I.

CONDESCENDENCE for RAEBURN and Others.

THE suspenders condescend and say,—

1st, That Mr Kedslie, in the beginning of summer 1814, erected, in the village of Stockbridge, a certain building, containing a steam engine of great power, viz. 18 horses' power, and which consumes, while going, an average quantity of two tons of coals per day.

2d, That the smoke which issues from this engine, and the sulphurous gases which exale from it, are offensive and injurious to the health of the neighbourhood: That those offensive vapours fill the houses which lie in the direction to which the wind blows, while the engine is going, and destroy the vegetables in the gardens, and this to a distance of many hundred yards from the engine: That the furniture in the houses is blackened and soiled by the smoke, the vegetables acquire a bitter taste, and the clothes and linen of the families in the neighbourhood are prevented from being dried or bleached: That, in some houses, even at the distance of many hundred yards, the inhabitants have been prevented from opening their windows on account of the smoke of the engine, and have found it impossible to sit with comfort in the apartments on that side of their houses which is next to the engine, while the smoke issues in that direction.

3d, That the discomfort occasioned by the smoke is so great as to have prevented the feuing of the ground in the

neighbourhood which had been advertised for building-ground.

4th, That many of the finest streets, squares, and crescents of the New Town, according to the plan, part of which has been executed, lie exposed to the full influence of this nuisance: That King Street and Howe Street are occasionally annoyed with the smoke, as the wind happens to blow in the direction towards those streets.

5th, That a great part of the ground in the neighbourhood of this engine has, to a great extent and value, for several years, been laid out and advertised for building ground for dwelling-houses, and it is chiefly of value in that view; but the nuisance of this engine has much reduced the value of the ground in that situation.

In respect whereof, &c.

(Signed) GEORGE JOS. BELL.

On revising the condescendence and answers, in obedience to the above interlocutor, the suspenders further aver,—

1st, That there is no apparatus for consuming the smoke; that no such apparatus is a sufficient security against the nuisance; and that, accordingly, the thick and offensive vapour of which the pursuers complain, has proved an annoyance to the neighbourhood at all times, when the present occupiers have had occasion to use the engine, as well as while it remained in the occupation of Mr Kedslie.

2d, The ovens of the village of Stockbridge are not offensive, nor have the neighbourhood been in the least annoyed with smoke, when the engine in question was not going.

3d, Whatever in theory a man of science may report, the fact of the nuisance and offensive smoke can be established only by a proof at large.

In respect whereof, &c.

GEORGE JOS. BELL.

ANSWERS for SAUNDERS and Others, Purchasers
from KEDSLIE.

THERE is a scarcity of mills in the neighbourhood of Edinburgh, for the purpose of grinding wheat and other grain to supply the consumption of the city. Every fall of water in the neighbourhood has long been occupied, so that it has been found impracticable to extend the manufacture of this part of the necessaries of life, by erecting additional water mills. Moreover, the Water of Leith, on which the flour mills are erected, although it might still prove sufficient in rainy seasons, is nevertheless extremely apt to become inefficient for the movement of machinery, not only in consequence of frosts in winter, but also by drought in summer and autumn. This has very often happened of late years, so as to render it necessary to obtain, at a great expence, corn to be ground for the consumption of the city, at Haddington, Dalkeith, Musselburgh, and other places, and in particular at Burntisland, where there is a steam-engine erected for grinding wheat.

2. Various plans have at different times been suggested to remedy the above inconvenience, which is a growing evil, and at one time a party of bakers obtained a feu of some ground, with the view of erecting a mill for grinding wheat, the machinery to be moved by a steam-engine.

The scheme was delayed, and ultimately deserted, from accidental causes. In the mean time, Andrew Kedslie, the author of the respondents, who was then proprietor of Stockbridge Mills, resolved to erect a steam engine to work his machinery at those times when the power derived from the Water of Leith should fall, in consequence of frost or drought.

3. The Stockbridge Mills are of ancient constitution. They have been constantly employed in grinding wheat, and have been employed for many years to greater extent than any other mills within twenty miles of Edinburgh,

excepting only the flour-mills belonging to the incorporation of bakers. The steam-engine which Mr Kedslie constructed was attached to these mills, to the effect only which has been already mentioned, of assisting the water power when deficient, and not for the purpose of giving motion to any new mill distinct from the old mills. The respondents purchased these mills and machinery for their own accommodation as tradesmen, and they only mean to use the steam-engine as Mr Kedslie did. It is cheaper to use the water power than the steam-engine; accordingly, when the water does not fail from drought or frost, the engine is not used.

4. The steam-engine in question is of the newest and best construction, upon the principle contrived by Watt. Moreover, it is furnished with an apparatus for burning its own smoke. It is what is denominated by artists a seventeen horse power. The smoke that proceeds from it is not *greater* than that which proceeds from an ordinary baker's oven; it does not consume more than a ton of coals in twelve successive hours.

5. The suspender, Mr Raeburn, has lately erected an oven in the neighbourhood of the mills, the smoke of which is equal to that which proceeds from the engine. There is another oven at Stockbridge, and the smoke of the two greatly exceeds the smoke given out by the steam-engine when it is employed.

Steam-engines, especially those of an improved construction, similar to that in question, are no where regarded as a nuisance. Numbers of them exist in Glasgow, Manchester, and London. Moreover, there are several steam-engines in Edinburgh at the present moment. One is employed by Mr Marshall, at Portobello, amidst handsome houses upon ground destined for feus. There is also a steam-engine at Silvermills. There is nothing in the particular situation of the steam-engine in question, which can render it a nuisance to the particular neighbourhood in which it is placed, and it is there used for the purpose of supplying one of the necessaries of life to the inhabitants of the city. Having made these statements, the respon-

dents shall take the liberty to make the following remarks in answer to the averments in the condescendence.

1. Heriot's Hospital is no party to the process. The averment here made is therefore irrelevant, and it is unsupported by evidence.

2. Admitted that a steam-engine has been erected, but it is only a seventeen horse power. It may consume two tons of coal in twenty-four working hours, but it only consumes about half that quantity in a working-day of twelve hours.

3. When Mr Kedslie first set the engine a-going, he and his servants did not understand how to manage it, and the consequence was, that it emitted a considerable quantity of smoke, which was just so much fuel wasted. But a person acquainted with the management of such engines was afterwards employed. It was then found that the engine produced no more smoke than a baker's oven, as already mentioned. Indeed, except for a single minute or two when it is fed with fresh coals, it produces no more smoke than a common kitchen fire. The respondents, therefore, deny, generally, the statements contained in this article of the condescendence. The engine does not give out nearly so much smoke as a common smithy, some of which exist in the very heart of the New Town of Edinburgh.

4. The steam-engine in question has not prevented the feuing of the neighbouring grounds. It is well known, that for some time past, the feuing of ground for new buildings has every where been at a stand, and it cannot appear surprising that this dulness in that branch of trade should have reached Stockbridge.

5. The smoke of the engine cannot affect the streets, squares, and crescents meant to be constructed in the New Town. That notion was broached in the discussion relative to the steam-engine at Silvermills, but was justly disregarded.

6. The smoke issuing from the steam-engine in question could not affect the value of the neighbouring ground. Indeed, Mr Raeburn's oven, as already noticed, produces

as much smoke as the steam-engine. It is remarkable, that nobody in Stockbridge complains of the steam-engine, although there are more than a score of washerwomen who gain their bread in the village by that occupation, not one of whom has either left the village or uttered a single complaint against the steam-engine.

Before concluding, it may be proper to remark, that a proof at large on such a subject as this, is liable to be extended to an enormous length. The respondents, therefore, beg leave to suggest the propriety of endeavouring to bring the dispute to a close, by directing an inspection of the steam-engine to be made by a man of science, for instance, by Professor Leslie of the University of Edinburgh, and a report to be returned on the points in dispute, concerning its tendency to prove a nuisance to the neighbourhood.

In respect whereof, &c.

RO. FORSYTH.

In addition to the above answers, the defenders condescend and say,—

1. The ovens, smith shops, yarn-boiling, and other manufactures in Stockbridge and its neighbourhood, some of them belonging to the suspender, Mr Raeburn himself, and others of them to that gentleman's own brother, emit as much smoke as the steam-engine in question, and the suspenders probably mistake the one smoke for the other.

2. The feu-duty of the ground lying within a few yards of the steam-engine, has been fixed within these few days at the very high rate of 5s. per foot in front.

3. The chargers humbly apprehend that it would be expedient for your Lordships to take a report from Professor Leslie, which would be of more consequence than the examination of ignorant people. And,

Lastly, The respondents may remind your Lordships that there are a number of material averments made by them in their answers, not met in the additional statement made by the suspenders.

In respect whereof, &c.

RO. FORSYTH.

ISSUE.

IN obedience to the order of Lord Pitmilley, bearing date the 10th day of December 1815, I report, that the following Issue is calculated to try the question betwixt the parties, viz.

Whether Mr Kedslye, the charger, did, in the course of the year 1814, in the village of Stockbridge, erect a building containing a steam-engine, the smoke or exhalations from which are or may be injurious to the health, or comforts, or property of the possessors of the houses and gardens upon the property of the suspenders in the neighbourhood of the said steam-engine, and are or may be likewise injurious to the said property of the suspenders, and in what respect, and to what extent?

And I further report, at the instance of the charger, that the following issue is calculated to try the hypothetical point upon which he insists in the answers to the condescence:—

Whether, according to the averment of the charger, machinery or other means can be applied, which will render the smoke and exhalations from the said steam-engine innoxious, and what these means are?

(Signed) WILLIAM CLERK,
1st Clerk of Jury Court.

 No. II.

CONDESCENDENCE for JOHN PAUL.

UPON hearing parties, the Lord Ordinary was pleased, of this date, (June 23, 1815,) to pronounce the following interlocutor: ' Having heard parties' procurators, before

‘ answer, Appoints the pursuer to give in a special con-
 ‘ descendance of the facts and circumstances he avers and
 ‘ offers to prove in support of his action; said conde-
 ‘ scendance-to be given in within eight days.’

In obedience to the above interlocutor, the pursuer condescends and says,

1. That, on the 15th and 16th of April 1814, the pursuer, who is a considerable dealer in flax-seed, wrote to Messrs Robert and John Hewetson, merchants in London, requesting them to purchase for him 100 barrels of Riga sowing flax-seed, provided they could get the same forwarded from London to Leith by a smack immediately, or at furthest by Thursday the 21st of that month, and with earnest injunctions to lose not a moment in shipping and dispatching the seed.

2. That, in consequence of this communication, Messrs Hewetson made inquiry at the wharf on the river Thames, occupied by the defenders, the Old Shipping Company, and were informed by the people employed by them, that their smack Lord Melville was the first vessel which had room, and that she was to be dispatched for Leith on Friday the 29th April 1814.

3. That, although this was later than the pursuer had required, yet, on the faith of the day of sailing being kept, Messrs Hewetson, finding they could implement the pursuer’s order, immediately purchased 100 barrels of Riga sowing flax-seed, which they delivered, on the 27th April 1814, to the manager of the Old Shipping Company, to be dispatched to Leith, on Friday the 29th April 1814.

4. That the manager received the said seed, and put the same on board the smack Lord Melville.

5. That, previous to the delivery of the seed, the smack Lord Melville had been seized by the customhouse officers, on account of having contraband goods on board, and was actually under seizure at the time the seeds were received and shipped on board of her.

6. That neither the manager, nor any of the people employed by the defenders, gave any intimation to

Messrs Hewetson, that the Lord Melville was under seizure.

7. That Messrs Hewetson shipped the seeds on the express faith and understanding that the Lord Melville was to sail on Friday the 29th April 1814, as had been held out by the defenders and their servants to the public.

8. That if Messrs Hewetson had been informed that the Lord Melville was under seizure at the time, or that there was any thing to prevent her sailing on Friday the 29th April 1814, they would not, under the order they had received, have allowed the seed to be put on board of her.

9. That the manager for the defenders, finding he could not get the seizure of the Lord Melville taken off, sent other goods, then in his custody, in order to be sent to Leith, by another of the company's smacks, called the Queen Charlotte, and dispatched her from London to Leith, on Saturday the 30th April, or Sunday 1st May 1814. But, instead of sending the pursuer's seeds by the Queen Charlotte, he allowed the same to lie for a considerable time, along with the contraband goods on board of the Lord Melville, then under seizure.

10. That all the smacks which sailed from London on Thursday the 28th April 1814, and even those which sailed on Saturday the 30th April, and Sunday the 1st May, (and among others the Queen Charlotte,) arrived at Leith on the 3d, 4th, and 5th of May 1814, after a passage of from four to six days. That if the Lord Melville had sailed at the time appointed, the seeds would have arrived at Leith on the 3d May, in good time for the market, when seed was exceedingly scarce, and high priced; and that, if the seeds had been forwarded by the Queen Charlotte, they would have arrived at Leith on the 5th or 6th May 1814.

11. That the Lord Melville, with the pursuer's seeds on board, did not sail from London until about the 6th of May 1814, and that she arrived in Leith harbour on the 15th May 1814, being twelve days later than she would have done had she sailed at the time appointed;

and as the seed market was over when she arrived, the pursuer's seed was not worth one half the price it would have brought ten days before.

12. That, as the pursuer could obtain no accounts of the Lord Melville with his seed, though daily assured by the manager in Leith that she would arrive immediately, he wrote to Messrs Hewetson, requesting them to make inquiry after the ship.

13. That Messrs Hewetson, accordingly, on the 13th May 1814, saw Mr Lawrie, the manager for the defenders, in London, and having inquired at him after the vessel, Messrs Hewetson were informed by Mr Lawrie, that the Lord Melville had sailed from London on the 29th of April 1814, which information was not true, as the Lord Melville had not sailed from London till about the 6th of May 1814.

14. That Messrs Hewetson having informed the pursuer of the purchase of the above 100 barrels of Riga sowing flax-seed, the pursuer, upon the 6th May 1814, sold the said 100 barrels of seed to Mr John Baillie, merchant in Andrie, at the price of L.5 per barrel, amounting to L.500, deliverable in Leith on or before the 9th May; but, in consequence of the non-arrival of the seed, the pursuer could not deliver it, and Mr Baillie thereupon threw up the sale.

15. That upon the arrival of the Lord Melville, the defender, Mr Black, as manager of the Old Shipping Company, accompanied by some of the directors, called upon the pursuer, and requested him to receive the seed. That the pursuer refused to do so, as he could only then sell the seed at a very great loss, which he stated to them arose from their fault, and which they were liable for. And that at last it was agreed upon, that as the Dundee seed market is a little later than Leith, the 100 barrels in question should be consigned to Mr Patrick Anderson, banker in Dundee, in order to be disposed of, for behoof of all concerned; and that afterwards a submission should be entered into between the parties, as to whom the loss should fall on; which agreement was reduced into writ-

ing, by missives between the parties, produced in process.

16. That the seed was, in terms of these missive, immediately forwarded to Mr Anderson, who disposed of it, but owing to the then late season, it only yielded L. 227, 9s. 6d. of free proceeds.

17. That, therefore, a loss of no less than L. 272, 10s. 6d. arose between the price at which the seed was sold by the pursuer to Mr Baillie, and that at which it was afterwards disposed of by Mr Anderson.

18. That sowing flax-seed is an extremely perishable article, and during the sowing season is worth in value from two to three times more than it is after the sowing season is over.

In respect whereof, &c.

GEORGE JOS. BELL.

ANSWERS for JOHN BLACK.

THERE is a very singular and suspicious discrepancy between the allegation in this article and the averment in the first page of the summons. In his summons, the pursuer stated that he had commissioned this flax-seed by a letter dated on 22d April 1814; whereas he now affects to say, that the commission was given on the 15th and 16th April, to be dispatched by the 21st.

The respondents aver, that the first communication which they had from Mr Hewetson respecting this flax-seed, was by a *verbal* application on the Corn Exchange on Monday the 25th of April; and all that the manager then said was, that the first vessel on his list to sail was the "Lord Melville," (which was truly the case,) and that he expected she would sail on the 29th April. But the vessel was not publicly advertised for that day. On the contrary, the only hand bill circulated respecting her made her day of sailing the 24th.

Ans. to Art. 3.—The respondents deny that the sailing of the vessel positively on the day expected was made a *condition* of the shipment.

4.—Admitted.

5. and 6.—It is denied that the Lord Melville was ever under *seizure* by the Customhouse officers for contraband goods. All that happened was, that 20 puncheons of whisky, brought by the vessel to London, could not be landed till the duties were paid; and as this whisky had been shipped by Mr Haig, the respondents' manager had every reason to believe that they would be settled on or before the 29th April.

7.—The respondents here beg to refer to their answer to the third article.

8.—This is a matter of inference, which will depend on the facts to be afterwards ascertained.

9.—The greater part of the statement in this article is erroneous. The loading of the Lord Melville was complete on the 28th April; and it is denied that any articles, intended to be sent by the Lord Melville, were shipped in the Queen Charlotte, in respect of any detention of the former vessel.

10.—In this article also, the pursuer has fallen into a total mistake. The Queen Charlotte did not sail from London till the *third* May, and it was actually the 14th of May before she arrived at Leith.

11.—The Lord Melville certainly did not sail from London till the 6th of May; but the respondents know nothing of the remaining part of the statement in this article.

12.—The statement in this article does not seem to be material.

13.—As to the statement in this article, either the pursuer or Messrs Hewetson must have fallen into an egregious mistake, and totally misunderstood the respondents' manager, Mr Lawrie. He has no such personal interest in this matter, as to make it credible that he or any man would advance a gross falsehood to deceive an employer; and still less a falsehood that admitted of immediate detection.

14.—The respondents can know nothing of the accuracy of the pursuer's statement on this article. If the process goes forward, therefore, the pursuer's allegations must

be proved, and the respondents will be allowed a conjunct probation.

15, 16, 17, and 18.—The last observation applies to these articles also.

While the defender has made these answers on the *fact*, he humbly begs leave to enter his protest against the *relevancy* of the pursuer's averments in point of law. In particular, he denies that even when a vessel is advertised to sail against a specific day, that merchants understand that this imposes a *peremptory* obligation on the owner of a *general* ship to dispatch the vessel against that day. But, on the contrary, if a shipper deems it indispensably necessary for his interest, that his goods should be dispatched against a particular day, and that he is to be entitled to damages for the failure then to dispatch the vessel, he is bound to make the period of dispatch a *condition* of the shipment, and thus to put the owners on their guard of the hazard which they run in taking his goods.

In respect whereof, &c.

JOHN CUNINGHAME.

ISSUE.

IN obedience to the interlocutor of Lord Alloway, of the 20th December 1815, I report that the following Issue is calculated to try the question between the parties :

Whether, on or about the 27th day of April 1814, certain goods, viz. one hundred barrels of flax seed, were shipped on board a certain vessel belonging to the defenders, called the Lord Melville, then lying in the port of London, taking in goods on freight for the port of Leith? and,

Whether, at the time of receiving said flax-seed on board, or at some time before, the defenders, by themselves, or others acting in their name and by their authority, did undertake to the shipper or shippers of the said flax-seed, that the said vessel should set sail from the

said port of London, with the said flax-seed on board, on or before the 29th day of April 1814? and,

Whether, as the said vessel did not sail on the voyage aforesaid, on the day last aforesaid, the pursuer has thereby suffered loss and damage, by losing the opportunity of disposing of the aforesaid flax-seed to the best advantage; for which loss and damage the defenders are liable?

(Signed) WILLIAM CLERK,
1st Clerk of Jury Court.

No. III.

CONDESCENDENCE for JAMES MANUEL.

1. JOHN MANUEL, merchant in Edinburgh, the pursuer's brother, obtained a cash credit several years ago from Sir William Forbes and Company for L. 250. James Manuel, senior, the pursuer's father, and James Baillie of Falahill, became cautioners in the bond, along with John Manuel. About the end of the year 1806, John Manuel failed in his business, and the two cautioners were obliged each of them to pay one half of the sum drawn out of the cash account. But the pursuer, though he had no concern with the original debt, agreed to join his father in granting three bills to Mr Baillie for his relief. Mr Baillie granted an acknowledgment to the pursuer's father in the following terms: "In consequence of receiving three bills this day, (Sept. 26, 1807,) signed by you and your son James, payable at six, twelve, and eighteen months, for L. 20 Sterling each, I accept of them as full payment of your part of the cash account for which you and I were bound to Sir William Forbes and Company, Edinburgh, on account of your son, John Manuel, and for which you shall have my discharge upon a proper stamp." Two of the bills here mentioned were regularly

paid when they fell due ; and the money was ready to pay the third, when the pursuer was advised by the defender, Mr Fraser, that he ought not to pay this third bill till Mr Baillie granted the stipulated discharge upon stamped paper.

The pursuer, knowing very little of business, was entirely guided by the advice of the defender, who, it seems, had it in view to present a bill of suspension, upon the ground that no proper discharge had been granted. At the same time, the defender took money from the pursuer for payment of the bill, and granted an acknowledgment for it to the pursuer in the following terms: ‘ I acknowledge that you have this day (May 1, 1809) put into my hands the sum of L.20 Sterling, *to be consigned in a suspension at your and your father’s instance, against James Baillie of Falahill.*’ The pursuer never had any account with the defender whatever, except the account in relation to the business with Baillie.

2. It is proper to mention, that ultimate diligence had been raised by Mr Baillie upon the third bill ; and it appears that the defender actually presented a bill of suspension, founded upon the ground above-mentioned, that Mr Baillie could not demand payment until he granted a regular discharge. Mr Baillie, who was in the army, being about to leave this country to join his regiment, was either on that account glad to yield to the defender’s demand, or he had considered the reasons of suspension to be well-founded. Accordingly, he accepted from the defender of L.10, 7s. 8d. in full of the L.20 bill, after deducting the expences of the suspension ; and the matter being thus settled, he granted to the pursuer a full assignment of the debt, and diligence raised upon it. He, at the same time, delivered up to the defender, as the pursuer’s agent, the L.20 bill, with the horning and caption which had been raised upon it ; after which, he went abroad to join his regiment. The diligence being thus delivered up to the defender, then the pursuer’s agent, as extinguished and retired documents, upon the debt being paid, it could not be used by the defender against the pur-

suer in any shape, or to any effect, either in the name of Mr Baillie, the creditor, or in the defender's own name.

3. Matters remained in this state till Tuesday the 5th of November 1811, when the pursuer, without any warning or premonition, was apprehended in his *father's* house at Muirhead, *where he then resided*, by Archibald Watson, a messenger at arms, by virtue of that very caption, at Mr Baillie's instance, which had been discharged more than five months before. Mr Watson came in one of the Glasgow forenoon coaches, to the Inn at Westcraigs, which is about three miles distant from Muirhead, where the pursuer resides. He had a concurrent along with him, whom he employed to find out the pursuer's residence. After this was done, he came to the pursuer's father's house, where the pursuer resided, whom he found at home; and saying he had some business with him, he was desired to step into a room, which he did, along with his concurrent. The messenger then told the pursuer that he came in the character of a King's messenger, with a caption against him and his father, at the instance of Mr Baillie of Falahill. The pursuer immediately explained how the matter stood, and showed the letter he had received from the defender, Mr Fraser, acknowledging the receipt of L.20, on account of Mr Baillie's debt. The messenger, upon this, stated, that the defender had an account against the pursuer, or his father, for L.19, and that if this sum was not paid, or a bill granted for it by the pursuer, he must proceed to apprehend him. The pursuer declared he would submit to no such demand, upon which the messenger stated, that his orders were peremptory, and that he must proceed with the diligence. At the same time he showed his blazon, and took his baton out of his pocket, with which he touched the breast of the pursuer, and said, "You are my prisoner." The concurrent then addressing the messenger, said, "Nail them both;" upon which he also touched the pursuer's father upon the breast, and declared him likewise to be a prisoner. The pursuer's mother happening to be present, appeared so much affected at this proceeding, that

the messenger himself was moved, and said he would take the young man only, and let the father stay at home.

4. The pursuer carries, periodically, the iron goods manufactured by the Shotts Iron Company, to their warehouse, or to their customers in Edinburgh; and it happened that, on the morning of the day on which he was apprehended, as above-mentioned, he had loaded his carts at the Shotts Ironworks, with which he was to proceed to Edinburgh, and to be there next morning by nine o'clock. On account of this circumstance, he remonstrated against being carried to Edinburgh that night, and gave the messenger an assurance that he would meet him there next morning at nine o'clock. The messenger answered he could give no such indulgence, and that the pursuer must immediately go to the Inn at Westcraigs, and wait for the coach, in which he would be carried prisoner to Edinburgh. The pursuer then made another request, that the messenger, instead of carrying him three miles across the country, in the situation of a prisoner, and exhibiting him as such in a public-house, to wait perhaps for some hours, till the coach arrived, would stay in the pursuer's house till another of the Glasgow coaches, which came by the Shotts road, and which passed very near the place, and at the same hour, should arrive, with which they might all go to Edinburgh. Even this request was refused. The pursuer was carried across the country to Westcraigs, as a prisoner, and he was detained in the public-house there for nearly two hours, waiting for the coach.

5. When the coach arrived, the pursuer was mounted upon the top as a prisoner, in an extremely stormy and disagreeable night; and, upon his arrival at Edinburgh, he was carried, in the first place, to the defender's house. It was then so late that the defender had gone to bed, and Mrs Fraser said he could not be seen that night. The messenger, however, was admitted up stairs, while the pursuer was left in the hands of his concurrent. Upon his return, the messenger said he was ordered not to put the pursuer into jail that night, but to take him to some

lodging-house, and keep him there till next day. The pursuer was carried to the messenger's own house, where he was detained as a prisoner during the night, and next morning he was carried back to the defender's house. Having positively refused to comply with the defender's demand, Mr Fraser seemed to think it imprudent to proceed farther, and he accordingly allowed the pursuer to be liberated, upon his granting a letter obliging himself to appear before the defender on Friday the 8th of November. This, as the pursuer understood, was in the nature of a letter of presentation.

6. The damages sustained by the pursuer, from this unprecedented abuse of legal diligence, have been very great. Shortly before he was apprehended, he had commenced business as a farmer, and had got a considerable part of his stock on credit; but the publicity with which he was apprehended and carried prisoner to Edinburgh, entirely ruined his credit and respectability in that part of the country where he resides. His business, too, was interrupted for several days; and, upon the whole, he submits, that he makes a very reasonable claim when he demands an award of L.200 of damages against the defender.

In respect whereof, &c.

J. S. MORE.

ANSWERS for FRANCIS FRASER.

1. THE defender has no access to know whether the pursuer paid the two first bills referred to in this article of the condescence. The third bill being payable eighteen months after 26th September 1807, fell due on 29th March 1809, and was protested on the 30th, as appears from the registered protest produced in process by the defender, along with the bill itself. The pursuer did not offer payment till 11th April, when he required from Mr Baillie a discharge to his father of the debt due to the bank, which was refused; and in consequence of its hav-

ing been so, he applied to the defender to obtain that discharge. The defender, with strict regard to the interest of his employer, not only obtained it, but took, at the same time, an assignation to the bank-bond, in favour of the *pursuer*, that he might rank on the sequestrated estate of his brother, the principal debtor, to the extent of the three bills, and Mr Baillie paid L. 9, 12s. 4d. of expences. It has been explained in the counter condescendence for the defender, that the consignation of the L. 20 became unnecessary, as the suspension was not brought into Court by the charger, and that sum was of course placed to the credit of the pursuer, in account with the defender.

2. In the second article of the condescendence, equally as in the first, it is insinuated most improperly, that the refusal of Mr Baillie to produce a discharge of the bank debt was proper; and that the defender unnecessarily occasioned any procedure which took place. It has been said, that Mr Baillie was induced, by the circumstance of his being on the eve of going abroad, “to yield to *the defender’s* demand;” and it is added, that he granted to the pursuer an assignment to the debt, and to the diligence proceeding on it, “accepting from *the defender* “L. 10, 7s. 8d. in full of the L. 20 bill, after deducting “the expences of the suspension.”

The pursuer has all along endeavoured to confound two things distinct in themselves, viz. the bank debt due by his father and Mr Baillie, as cautioners for his brother, and his own debt, due by bill, as a collateral security to Mr Baillie for his proportional relief from the father of the bank debt. The defender was applied to, in his professional capacity, to demand from Mr Baillie what he had promised to grant to the pursuer’s father, on retiring the bills granted by the pursuer, and which, as already stated, he ultimately not only succeeded in obtaining, but he also obtained an assignation to the bank debt and diligence in the pursuer’s favour, that he might rank on his brother’s estate to the extent of the three bills, and at same time, he obtained possession of the last bill and diligence; all

which the defender retained, as he was entitled to do, as his own evidents, until reimbursed of his advances ; and who, as stated in the counter condescendence, would also have been entitled to use the diligence issued on the bill as unextinguished, in order to enforce repayment of the sum so advanced by him to Mr Baillie, in so far as not extinguished by the balance due to the pursuer, then in his hands.

3 & 4. The defender has stated in the counter condescendence, that he did not employ, or give instructions to Mr Watson, in the character of a messenger at arms ; and agreeably to the statement of Mr Watson, the accuracy of which the defender has no reason to doubt, and to the best of his, the defender's, knowledge and belief, Mr Watson did not act as a messenger, nor apprehend the pursuer.

On looking into the petition and complaint, which forms the libel in this action, and with reference to which the allegations in the condescendence must be considered, the statement of the condescendence will be found to differ from it materially. In the petition, the pursuer entirely suppressed any mention of Mr Watson having presented to him the account of business, of which he had been requested to obtain, if possible, a settlement, which forms a prominent statement in the condescendence ; and averred, that it was from the defender himself, after he, the pursuer, had been brought to Edinburgh, that he first learned that the alleged diligence was used, not at the instance of Mr Baillie, but for the purpose of recovering a balance due to the defender. It was there stated, that, " on the morning of Tuesday, he was carried to the personal presence of Mr Francis Fraser, and was not a little astonished to hear from Mr Fraser himself, that it was *he* who had employed Mr Watson to execute the caption in Mr Baillie's name, and that the *object of it was to obtain* payment of a balance of account, said to be due to him, Mr Fraser."

5. Every part of the statement embraced under this article of the condescendence, the defender knows and be-

believes to be groundless or inaccurate ; and on comparing the greater part of it with the statement made in the petition and complaint, it will be found to be inconsistent with it. It is now only alleged, that the pursuer was detained one night in the house of the messenger, and that he was liberated the next day, on giving a letter to the defender personally, stating that he would appear on a future day. In the petition and complaint, it was stated, that the messenger for some time pretended that he had no discretionary powers, and ultimately " said, that *he* " would accept of a letter of presentation for the petitioner's appearing on the next day, Friday the 8th. The " petitioner accordingly granted this letter ; and, agreeable " thereto, he not only waited till the 8th, but on that day, " he *actually presented himself*, that Mr Fraser, if he was " disposed to do it, might again enforce the caption ;" and it was further averred, that he was permitted " to return home, after having been detained, and for the most " part in legal custody, *for the space of four days.*"

The statement in the condescendence is thus wholly different from that given in the petition and complaint, under which it is offered. The real state of the fact has been given in the counter condescendence.

6. The defender, of course, denies that he is liable in damages, or that damages to any extent were sustained through him, or in consequence of orders given by him. The pursuer was, and is at this moment, justly indebted to him in the sum of L. 19, 8s. 1d., being the balance of account produced, with interest.

In respect whereof, &c.

WILLIAM BOSWELL.

CONDESCENDENCE for FRANCIS FRASER.

THE petitioner having, by alterations irregularly made on the record copies of the condescendence and answers put in by him, varied still farther the statements originally made by him, and introduced new matter, tending to

create an appearance of intricacy in the present case ; the respondent considers it proper to submit the facts on which it must be decided, in connection, and more fully, in the form of an amended condescence, to avoid the confusion which might occur, were he to meet the new statements of the pursuer, by altering or adding to the condescence and answers on his part, already in process.

1. In 1801, John Manuel, the brother of the pursuer, entered into business as a spirit-dealer in Edinburgh, and obtained a cash credit, to the extent of L. 250, with the house of Sir William Forbes, James Hunter, and Company, his cautioners being Mr Baillie of Falahill, and James Manuel senior, his father. He became bankrupt in 1805, at which time a balance of L. 262, 15s. 4d. was due on this cash credit ; for one-half of which, being L. 131, 7s. 5d. with interest from 31st January 1805, James Manuel senior was liable. Besides this obligation to Sir William Forbes and Company, James Manuel senior was cautioner for his son John, in a credit with John Dunlop, spirit-merchant, to a considerable amount. And on the bankruptcy of his son, he conveyed, by a private transaction, his whole property to the pursuer, *James Manuel junior*, the complainer, another of his sons, and became a pauper in his house.

Mr Baillie, the joint cautioner to Sir William Forbes and Company, in place of receiving from James Manuel senior bills for one-half of the balance due on the cash credit with that house, as averred in the petition and complaint, amounting, with interest, to above L. 150, (Sept. 25, 1807,) agreed to receive from the petitioner, James Manuel junior, the sum of L. 70 in three bills ; the first for L. 25, at six months date ; the second for L. 25, at twelve ; and the third for L. 20, payable eighteen months after date ; and he obliged himself, on these bills being retired, to grant to James Manuel senior a regular discharge of his proportion of the cautionary debt.

On retiring the third and last of these bills, the complainer required Mr Baillie to grant the stipulated discharge; and this having been refused, he applied to the defender, Mr Fraser, and, attended by him as a notary public, (April 11, 1809,) tendered under protest, to the agent of Mr Baillie, the contents of the bill, requiring a discharge of the debt due to the bank, agreeably to the previous obligation, and protested for damages, &c. if the requisition was not complied with.

2. Notwithstanding this procedure, Mr Baillie, (April 22, 1809,) through Mr William Jamieson, writer to the signet, his agent, raised letters of horning on the bill, and gave charges for payment of it to James Manuel senior and James Manuel junior. The latter waited on the defender with the respective charges, and instructed him to offer a bill of suspension. As the parties could not find caution, the bill of suspension prayed for “ suspension in the premises, upon consignation of the “ sums charged for, to remain *in manibus curiæ*, until “ the charger shall implement his part of the aforesaid “ contract.” The sum of L.20 was put into the hands of the respondent, to enable him to make the consignation; but this was rendered unnecessary by an interlocutor pronounced by Lord Balmuto; who, on advising the bill, (June 8, 1809,) with answers, replies, and productions, refused the bill, but sisted execution “ until the “ charger shall grant to the suspender, James Manuel “ senior, a valid discharge of the obligation he was under, “ as a co-cautioner with the charger, for the cash-account granted by Sir William Forbes and Company “ to his son John Manuel.”

In the face of this sist, Mr Baillie (Dec. 21, 1809) raised letters of caption against both father and son, which made it necessary for them to offer a second bill of suspension, which also prayed “ for suspension upon “ consignation.” This bill was appointed to be answered (Dec. 22, 1809) and execution sisted, and the sist intimated to the agent for Mr Baillie; but no further pro-

cedure took place, Mr Baillie having put the business into the hands of a different agent, by the advice of whom he granted, (May 28, 1811,) as a matter of course, the discharge in favour of James Manuel senior, and, at the same time, executed an assignation of the bond on which the cash credit proceeded, in favour of the petitioner, James Manuel junior, to the extent of L.70, that he might claim for relief against the estate of John Manuel his brother.

3. During the proceedings which have been mentioned, the defender was employed by the petitioner to suspend a separate charge of horning, which had been given to his father, at the instance of John Dunlop, to whom it has been stated, that his father had become cautioner in a credit given to his son John Manuel. In security of the advances made on that credit, the father had conveyed to Dunlop a house and garden at Portobello, which he had sold, but without accounting for the proceeds, he gave a charge (August 10, 1810) for L.223, as an alleged balance due to him. A bill of suspension was sisted, (Sept. 29, 1810,) but refused, on the ground that caution had not been found. A second bill, offered without caution, (Oct. 10, 1810,) was refused on that ground. But a third bill, presented on juratory caution, was passed, and the letters expedite; James Manuel senior having previously deponed, *that he possessed no property except the clothes which he then wore*; and the charge was abandoned.

4. In these proceedings, the pursuer, James Manuel junior, was the sole employer of the defender, who had no correspondence with the father, and never saw him, except on the occasion of his appearing to make oath. To James Manuel junior the defender rendered a state of his account, embracing both transactions, on 11th November 1809, and again on 22d December thereafter. The pursuer, when urged for payment, referred to the L.20 put into the hands of the defender, and which it had not been necessary to consign; and the defender, accord-

ingly, brought that sum to the credit of the account. A duplicate of the account was transmitted to the pursuer of this date, (April 11, 1811,) by which, after giving the credit for that sum, a balance of L.5, 4s. 5d. remained due to the defender; and, with reference to that balance, the pursuer, at an after period, alleged that he had transmitted the sum of L.5 by the hands of his brother, being the same sum which he more lately, and equally contrary to the fact, represented as "paid by his father, as per receipt, to him."

On 18th June 1811, after the discharge had been granted by Mr Baillie, a fourth and final account was rendered to the pursuer, by whom it has been produced in process; in which, after adding to the balance of the account as rendered on 11th April preceding, the expence of the discharge and assignment, and the sum of L.10, 7s. 8d. paid by the defender to Mr Baillie, in full of the bill for L. 20, (the difference betwixt that sum and the amount of the bill, with interest, having been allowed by Mr Baillie as the expences occasioned by the procedure which had been adopted on his part,) the sum due to the respondent amounted to L.19, 8s. 1d.

And it may be proper, in point of connection, to state, that the defender having more lately, and in autumn 1816, raised an action before this Court, for payment of the balance of that account, the pursuer required that it should be taxed by the auditor of Court; who fixed the sum due at L. 20, 7s. 8d. including correspondence, which has since been paid, with L.3, 10s. 8d. of expences, thus placing the justice of it beyond question.

5. In the course of autumn 1811, the defender mentioned the existence of this account to Mr Archibald Watson, whose wife conducts a tambouring business in Edinburgh, and who, on that account, had frequent occasion to travel betwixt Glasgow and Edinburgh; and requested that he would, on the first occasion when he went to Glasgow, or had occasion to be in the neigh-

bourhood of the pursuer's residence, call upon him and endeavour to obtain payment, or a bill for the amount. With this view, he put into his hands the discharge to James Manuel senior, the assignation of the bond in favour of the pursuer, the bill, and diligence which had been raised on it by Mr Baillie, and the other vouchers of the account, to be delivered up on receiving payment, or a bill as proposed. These instructions were given in presence of one of the defender's clerks. The defender gave no instructions whatever to apprehend the pursuer, or in any other manner to concuss payment.

6. Mr Watson had no opportunity, for sometime after, of calling on the petitioner; but on 5th November 1811, being accidentally in the neighbourhood of the pursuer's residence, in company with an acquaintance, he called upon him, and presented the account. The pursuer affected to state objections to various parts of it; but concluded by saying, that it was necessary for him to go to Edinburgh on separate business, and that if Mr Watson would wait for a short time, he would accompany him. This Mr Watson did.

7. When the pursuer and Mr Watson reached Edinburgh, in the evening of the same day, they endeavoured to find out the house of a friend of the pursuer, who he stated lived in one of the new streets on the south side of the town, and where he meant to pass the night, but they were unsuccessful in their inquiries. They then endeavoured to get lodgings for him in the Lawnmarket, but were equally unsuccessful; and Mr Watson latterly offered the pursuer a bed in his own house, which he readily accepted.

On the following morning, the pursuer called on the defender, not as a prisoner, but alone, and in all respects as a person at large; nor did he then insinuate that he either had been apprehended, or that he considered himself to have been so. Mr Watson had previously left the grounds of debt with the defender. The pursuer stated two objections to the account. He alleged that he had not been credited with a sum of L. 5, which he

stated that he had sent by his brother John Manuel, but which had not been delivered to the defender; and he affected not to understand in what manner he could be debited with the expence of the two bills of suspension which had been paid by Mr Baillie. All this having been explained to him, he at length stated, that if his brother, John Manuel, should say that the account was correct, he would pay it. On this understanding he left the house of the defender, to whom he sent in the afternoon an open note, saying that he had not found his brother at home, but would be in town on the Friday following and settle the business. He disregarded that promise, and did not again call; and it was only when threatened with the action for payment, which it was afterwards necessary to bring, that he applied to the same William Jamieson, writer to the signet, who had acted as agent for Mr Baillie in the proceedings against him, which had given rise to the expences in dispute, who trumped up the petition and complaint now under discussion.

8. The facts above stated the defender is prepared to support by evidence, and they are already in great part supported by the evidence in process, and the varied and inconsistent statements made by the pursuer. Thus the new statement, that he resided in the house of his father, and not in his own, is at variance with the judicial statements made by him in every stage of the procedure. The allegation, that he was detained a prisoner in Edinburgh for four days, and the separate allegation, that he was liberated on granting a letter of presentation, made by him judicially and so strongly, are admitted to be incorrect and groundless; and the latter is further proved by the depositions in process to have been so. The averment made in the petition and complaint, and in the subsequent pleadings, that the pursuer was creditor, and not debtor to the defender, is refuted by the debt having been since paid with expences, under an action brought to recover payment. The assertion, that he was first informed by the defender, when in

Edinburgh, that he had been apprehended for the amount of his account, has been disproved by his more recent admission, that Mr Watson, when he called upon him in the country, laid the account before him.

On the whole, it is submitted, that the pursuer's own statements, and the general aspect of the present case, affords a sufficient ground for dismissing the complaint, and subjecting him in full expences; but if the averments of parties shall go to proof, the defender can entertain no doubt of the issue, and has only to regret the little prospect which he can entertain of ultimate indemnification from the opponent by whom he has been so improperly and calumniously brought into the field.

In respect whereof, &c.

WILLIAM BOSWELL.

ANSWERS for JAMES MANUEL Junior.

Art. 1.—It is totally denied that the pursuer was indebted to the defender in the sum of L. 19, 0s. 1d. mentioned in this article of the condescence. The pursuer had no concern with the business against Dunlop, mentioned in this account. This was, as he understands, business done for his father, James Manuel senior, and for his brother, John Manuel, merchant in Edinburgh. The pursuer never employed the defender till the 1st May 1809, when he paid him 15s. for his trouble, and lodged in his hands L. 20, to pay *Baillie's bill*. The defender recovered all the expences incurred in the suspension against Baillie. It was not till some time afterwards that the defender rendered an account anent that business; and when he did render it, it appeared that all the expences incurred in the suspension had been paid by Baillie; and credit is accordingly given for them. But there was also the expence of a discharge and assignation of the debt, by Baillie, in favour of the pursuer, for which the defender charged in his account L. 3, 19s. 7d. and part of which Baillie had also paid. There remained only L. 2, 5s. 3d. of that expence due to the defen-

der, which the pursuer was all along willing to pay, upon a separate account thereof being rendered to him, and which he has accordingly since paid, and produced the defender's receipt therefor. The pursuer never had any other business with the defender.

Art. 2.—The whole of this article is denied. On the 1st of May 1809, when the pursuer, *for the first time*, employed the defender, he put the L. 20 already mentioned into his hands. The defender could not legally impute that money to any account due to him by the pursuer's father or brother. It was given to him *for the express purpose of paying the pursuer's bill to Baillie*; and at this time no expences had been, or indeed could have been, incurred on the pursuer's account.

Art. 3.—This article of the defender's condescendence consists of an absurd and laboured argument to justify conduct which truly admits of no excuse. The defender has admitted, and cannot deny, that Baillie paid the expences incurred by the pursuer in the suspension; and, consequently, this expence could not be charged against the pursuer. The defender does not deny that he got the money from the pursuer, for the purpose above-mentioned, and he was clearly bound to have applied it to this purpose; and if any expence had been incurred which was not recovered from Baillie, it was time enough to have demanded payment of this from the pursuer, after Baillie had refused to pay it. But no such expence was incurred, the whole of the defender's accounts having been confessedly paid by Baillie, with the exception of a part of the expence of the discharge and assignation, to the amount of L. 2, 5s. 3d., as before-mentioned, which the pursuer has since paid.

Art. 4.—The whole of this article is a gross misrepresentation of the fact. The defender, it will be observed, does not deny *that he gave the caption to Watson, the messenger*; and it is impossible that Watson could have got this diligence, except for some improper purpose. He was both employed and acted as a messenger, in the

strictest sense of the word ; for he apprehended the pursuer, and brought him in custody to Edinburgh.

Art. 5.—The statement given in this article is both false and incredible. Watson, the messenger, came to Westcraigs inn on the forenoon of the day on which the pursuer was apprehended. He did not appear to have any other business in that quarter, except to apprehend the pursuer ; and none other has yet been specified. Watson was very overbearing, and said his orders were so peremptory, that if he did not bring the pursuer to Edinburgh as a prisoner, he must bring payment of the debt, or be himself answerable for it. The pursuer is in the practice of carrying goods from the Shotts Ironworks to Edinburgh. His two carts were then standing on the road, loaded with goods for Edinburgh ; and he insisted very much with Mr Watson for the indulgence of being allowed to go with these carts to Edinburgh. This, however, was refused, and the pursuer was obliged to go with Watson as a prisoner. The carts had, of course, to be unloaded, to the great loss and disappointment of the pursuer and his employers. When the pursuer came to Edinburgh, had he not been under restraint, and in fact detained as a prisoner by Watson, he could have gone either to the house in which he usually lodged, or to an uncle's house, who resided then in the neighbourhood of Edinburgh. But this was not permitted to him ; he was kept a prisoner in Watson's house ; and even though Watson had found lodgings for him in the Lawnmarket, which he made an unsuccessful attempt to do, still the pursuer was to have been kept there as a prisoner. On any other supposition there could have been no reason for Watson attempting to find lodgings for the pursuer, as he could have found them for himself.

When Watson, on the morning of the following day, carried the pursuer to the defender's house, he did not leave him there ; for the defender sent both the pursuer and Watson to find John Manuel, the pursuer's brother,

in order to bring him to the defender's house, and to get his, John Manuel's accounts settled. But he, John Manuel, could not be found. The pursuer was then brought back by Watson to the defender's house, when the defender told Watson to take a letter from the pursuer, obliging himself to appear in Edinburgh against a certain day. Watson, after taking a line from the pursuer to this effect, set him at liberty.—The story about the L. 5 is this. The pursuer told the defender that his father had sent L. 5 to John Manuel, to assist in paying the account due *by them*, that is, by John Manuel and his father, to the defender, which sum, it would appear, had been kept up by John Manuel; but the pursuer told the defender he had nothing to do either with that account or with the payment.

Art. 6.—The pursuer certainly granted the letter before-mentioned on the day after he was brought to Edinburgh, which he thinks was a Wednesday. The letter stated, that he was to appear in the defender's office again, in two days after, at a certain hour; at least this is the pursuer's impression as to the terms of the letter. The pursuer waited in Edinburgh for two days, and went to the defender's office at the appointed hour, taking his brother, John Manuel, with him; but neither the defender himself nor Mr Watson were there, and the pursuer therefore came off and went home.

Art. 7.—The practice here mentioned is not only quite unknown, but it is absolutely ridiculous. Was it indeed ever heard of, that when an agent pays a debt for his client, with money put into his hands by the client *for that very purpose*, that he should be entitled to use the *retired diligence* against his own client, in the name of the original creditor, for the purpose of recovering payment of some other alleged claim? The defender made no advances in the suspension for the pursuer, as he recovered his expences from Baillie, as before stated; but though he had made advances for him, he was not entitled to take so illegal a method of compelling payment.

Art. 8.—The defender can state no defence in law, nor any objection to the relevancy of the complaint. Indeed, the remit to the Lord Ordinary, by the Court, is a virtual finding that the complaint is competent, as to which, indeed, there can be no room for doubt.

The pursuer cannot help observing, that as the defender does not deny that he got the L. 20 for the purpose already mentioned, and further, as he does not deny *that he put the caption into the hands of Watson*, but, on the contrary, admits both these facts, enough is admitted to authorize your Lordships, without any further procedure, to find damages due; and he humbly trusts your Lordships will pronounce an interlocutor to this effect. In truth, the pursuer has been so much injured in his credit and circumstances by the oppressive nature of the defender's proceedings, that he is unable to bear the expence of a protracted litigation. And he is not without hope that the mutual condescendences have been ordered to be answered, with the view of enabling your Lordships at once to decide the cause, and to award such sum, in name of damages, as shall seem to be adequate to the injury sustained. At all events, it is hoped, that an interlocutor finding damages due will be pronounced, so that any future investigation may be limited merely to the *quantum* of damages, without obliging the parties again to travel over the same ground they have already gone.

In respect whereof, &c.

J. S. MORE.

ISSUES.

IN obedience to a remit from Lord Reston, Ordinary, dated 23d May 1817, I report that the following Issues are calculated to try the question between the parties :

Whether, on or about the 5th day of November 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 process, raised at the instance of James Baillie of Falahill, against the pursuer ?

Whether the pursuer was detained in custody 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 binding himself to appear before the said defender, upon the 5th of November 1811, or about that time, to the injury and damage of said pursuer ?

(Signed) WILLIAM CLERK,
First Clerk of the Jury Court.