

O'REILLY
v.
INNES, &c.

PRESENT,
LORD CHIEF COMMISSIONER.

1821.
Feb. 13.

O'REILLY v. INNES, &c.

Damages for
apprehension
on a *meditatio
fugæ* warrant.

DAMAGES for apprehending the pursuer, as
in meditatione fugæ.

DEFENCE.—The warrant was properly obtained and enforced; and the statements are false and calumnious.

ISSUES.

“ 1st, Whether, on or about the 26th day
“ of August 1816, the defender did, in the pre-
“ sence of Richard Wooley, Esq. one of the
“ Justices of the Peace for the county of Mid-
“ Lothian, falsely depone, that the pursuer
“ was justly indebted to him, the defender,
“ the sum of L.30 sterling or thereby, being
“ the amount of an account for sundries, end-
“ ing on the 23d of August said year, for the
“ purpose of obtaining a warrant for summa-
“ rily apprehending the said pursuer, to the
“ injury and damage of the said pursuer?

“ 2d, Whether, on the occasion aforesaid,
 “ the defender did emit a deposition, that he
 “ the defender was credibly informed, and be-
 “ lieved in his conscience, that the pursuer
 “ was about to leave Scotland, in order to
 “ avoid payment of his debts, without having
 “ any probable ground for his belief, for the
 “ purpose of obtaining a warrant for incarce-
 “ rating the pursuer as in *meditatione fugæ*?
 “ and whether the defender did obtain such
 “ warrant, and did apprehend and detain the
 “ pursuer, in virtue of the same, in custody, to
 “ the injury and damage of the said pursuer?

“ 3d, Whether, on the occasion aforesaid,
 “ when the pursuer was apprehended in vir-
 “ tue of the warrant aforesaid, the pursuer,
 “ or Mr Phillips, mail-contractor, in his be-
 “ half, did offer sufficient security for his ap-
 “ pearance in any action to be raised against
 “ him for payment of L.30, the sum alleged
 “ to be due to the defender? and whether
 “ the defenders, or their agent acting by their
 “ authority, did illegally refuse to accept of
 “ said security, to the injury and damage of
 “ the said pursuer?

“ 4th, Whether, on the occasion aforesaid,
 “ the said Mr Phillips did offer a draft on
 “ his cash account with the British Linen

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“ Company, to the defenders’ agent, for the
“ alleged debt, together with the sum of L.5,
“ alleged to have been the expences of the
“ warrant aforesaid, making in all the sum of
“ L.35; which offer was illegally refused by
“ the defenders, or their agent acting in their
“ name and authority, to the injury and da-
“ mage of said pursuer ?

“ 5th, Whether, on the occasion aforesaid,
“ and for the purpose aforesaid, the pursuer
“ did offer to consign the aforesaid sum of
“ L.35 in the hands of Mr William Trotter,
“ upholsterer, in order to be paid over to the
“ defenders, in case it should afterwards be
“ found due? and whether the defenders, or
“ their agent acting by their authority, did
“ improperly refuse to accept of said consig-
“ nation, and liberate the pursuer, to the loss
“ and damage of said pursuer ?

“ Damages laid at L.3000.”

A witness re-
jected, there
being no chris-
tian name in
the list served
on the opposite
party.

The first witness called was — Wooley,
Esq. who was said to be the Magistrate who
granted the warrant.

Forsyth and *Cockburn* object, there is no
christian name or designation of the witness
in the list served upon us.

Jeffrey.—They cannot state that they

were misled, or did not know who was meant, which is the only reason for a list being given.

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LORD CHIEF COMMISSIONER.—This is one of the distressing questions arising from this rule as to lists of witnesses; and I do hope the bar will unite to correct the abuses introduced by it. *In hoc statu*, however, I feel myself bound to refuse the witness. If he had been described as Justice of Peace for the county of Mid-Lothian, or if his place of residence had been mentioned, I would have received him, as I do not consider the want of the christian name to be the same with the case of a wrong name. The admission that the signature is genuine, goes a great way to prove the warrant; and if the statement is proved as to the execution, it will shew that it must have been got at an early hour. I do not like going against a rule of this sort; and I hope, so long as it exists, agents will be attentive to have the descriptions accurate.

A similar objection was taken to the second witness.

Jeffrey.—In the list, we design him residing in Edinburgh; and the following day, as soon as we knew it, we stated his trade.

Circumstances in which a witness was received, altho' his designation was not given eight days before the trial.

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LORD CHIEF COMMISSIONER.—What has been done on the present occasion, appears to me sufficient; and I may still allow the other witness, under the power given by the 24th section of the Act of Sederunt.

Circumstances in which a written document was admitted, altho' not produced eight days before the trial.

A witness for the defender was called, to prove a bill to be of the handwriting of the pursuer.

Jeffrey objects.—This was not produced eight days before the trial; and we did not expect it, as we refused to admit it to be genuine.—Act of Sed. 9th July 1817, § 5.—Russel, Form of Pro. App. p. 97.

Cockburn.—They must have known the document, as Mr Clerk mentioned it in opening the case. It is produced in the other action; and in the circumstances, the neglect was pardonable.

LORD CHIEF COMMISSIONER.—Mr Cockburn has stated an argument why I should receive this document, but has not stated any cause for not producing it before the trial. It appears that the pursuer had sufficient notice of it; and so far the object of the rule is attained; but I am called on to decide on a technical rule, which makes it very

difficult to disentangle the case, as the decision may affect the justice of both cases. The present is an application for damages, for an apprehension when no debt was due ; and this document is offered to shew that the pursuer knew the debt was due. If it is admitted in the other case, the defender may have a verdict, though in this case there may be a verdict against him.

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It was perfectly regular for the counsel to state the nature of the document, before giving it in evidence ; and it was equally regular for the counsel on the other side, to stop the witness from speaking to it.

It is said the pursuer is in a worse situation than if it had been produced. The case appears to me new, and not provided for ; but it also appears to me, that the justice of both cases cannot be got at, without admitting this evidence ; and, therefore, I am led to reject the technical objection in favour of the justice of both cases. If I withhold this from the Jury, it would not be treating them in the manner I ought.

A letter was then tendered, which was said not to be produced in proper time. Mr Cockburn stated, that production on the same

A document rejected, having only been produced on the eighth day before the trial.

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day of the week before, had been held sufficient.

LORD CHIEF COMMISSIONER.—The days must be counted according to law; and here I cannot exercise discretion. It would be setting aside the Act of Sederunt, were I to admit this.

When a witness was called,

Jeffrey objected.—They mean to prove by this witness, that he believed that the pursuer was about to leave the country, and that he was owing large sums of money. This is no defence, unless the defender knew it at the time.

Cockburn.—We mean to attempt to prove that he knew it, and are also entitled to argue to the Jury, that the reports were so general that he must have known it.

LORD CHIEF COMMISSIONER.—The defender must bring this home to himself; and I will give you credit, that you mean to call witnesses for that purpose; and that, if you fail, it will be want of proof, not of intention; but if you fail in this, the evidence now offered must be struck out. There are two ways in which it may be brought home; either by direct proof, or by shewing

the report so general, that he cannot be supposed ignorant of it. But it will not be sufficient to shew that the pursuer was in very distressed circumstances, and that he had borrowed large sums of money; for unless the defender knew this, he could not act upon it.


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Clerk opened the case for the pursuer, and stated—No debt was due, as the gun was not delivered. The debt sworn to by the defender is four times the amount of that stated in the note sent to the pursuer. The question was referred to the pursuer's agent. The diligence was used at the time the affront would be greatest. There was no ground to believe the pursuer was leaving the country.

Cockburn, for the defender.—Whether a debt was due, depends on the question of accounting; and if the debt was due, the defender's oath was not false. Assuming that a debt was due, the questions are, whether we had grounds for believing that he was about to leave the country; and whether he offered sufficient caution. Whether a creditor is bound to take caution, or even consignation, is a difficult question of law.

Jeffrey.—In this case, as the person of the pursuer was invaded, damages are presumed

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due, unless they can justify their act. They have not proved that the debt was due, or that, at the time of the arrest, they had any ground to believe that the pursuer was going away, for the purpose of defrauding them.

The LORD CHIEF COMMISSIONER stated, —That the first question for the consideration of the Jury, was, whether a debt of L.30 was established to be due? On this point, he had to state, that the first threat of a *fugæ* warrant, was in a note from Innes, in which the debt is' stated at only L.8. 15s.; and as the gun was retained, which constituted the principal part of the sum in the account, he was not in a situation to tell them that it amounted to a legal demand for L.30; but that they must consider on the evidence, whether the demand for L.8. 15s. was raised to L.30 the following morning.

That the second question was, whether credible information had been given, sufficient to raise a reasonable ground of belief in the defender's mind, that the pursuer had it in contemplation to leave Scotland, and return to Ireland, for the purpose of avoiding the payment of his debts?

On this it must be observed, that if they believed the evidence, it established that

O'Reilly wished to have his gun to shoot grouse in Perthshire,—that the road to Perth was not on the way to Ireland,—and that his object in going, was inconsistent with his escaping from his creditors. That there did not seem sufficient evidence to establish, that his proposing to go to Perthshire was a mere pretence, which was the only other explanation that could be given of the evidence.

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Verdict for the pursuer.

Immediately after the verdict in the preceding case, the following Issues came to be tried between the same parties, and upon the same evidence.

ISSUES.

“ 1st, Whether the defenders undertook to
 “ furnish a stock and locks to two gun bar-
 “ rels delivered to them for that purpose by
 “ the pursuer, and to deliver to him the gun
 “ in question, finished, previous to the 26th
 “ day of August 1816, so as to enable him,
 “ the pursuer, to set out to the shooting on
 “ that day? and whether the defenders im-

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“ properly failed to implement the said agree-
“ ment ?

“ 2d, Whether the defenders agreed to
“ finish and furnish said stock and locks for
“ the sum of L.18. 18s. ?

“ 3d, Whether the barrels of the said gun
“ required to be new breeched ? or whether
“ the pursuer gave an order for the same to
“ be new breeched ?”

Jeffrey, for the pursuer.—The pursuer is entitled to a verdict on the 1st Issue. On the 2d no verdict is necessary, and on the 3d you may find either way.

Cockburn, for the defenders.—They have not proved any of the Issues.

LORD CHIEF COMMISSIONER.—From the manner in which this case is brought forward, it is difficult to pick out the evidence applicable to it. The first part of the 1st Issue is sufficiently proved; but on the second part, the evidence is more obscure. You are to say from the circumstances, whether the pursuer has proved affirmatively.

The 2d Issue must be found for the defender.

On the 3d, there is no evidence of the order.

Verdict—" For the pursuer on the 1st Issue, and for the defenders on the 2d and 3d.

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*Clerk, Jeffrey, and J. Campbell, for the Pursuer.
Forsyth and Cockburn for the Defenders.*

(Agents, *W. Dallas, w. s. and D. Fisher.*)

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PRESENT,

LORD CHIEF COMMISSIONER.

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ROBERTSON v. BAXTER.

1821.
Feb. 14.

REDUCTION of a deed by the pursuer, ratifying one which his father had executed on death-bed.

Finding for a defender on an Issue, whether the pursuer was, by fraud and circumvention, induced to sign a deed to his *enorm lesion.*

DEFENCE.—The deed by the father was a proper deed, and the pursuer voluntarily executed the one under reduction.

ISSUES.

“ Whether the pursuer was induced, by
“ fraud and circumvention on the part of the
“ defender, or those acting for her, to sign