

In disposing of the question of expenses—

The LORD PRESIDENT said, the idea that a pursuer is not to get full expenses because he claimed a random sum of £2000, and only succeeded in obtaining a verdict for £700, is one which cannot be for a moment entertained. So long as the damages are substantial, it is a rule in this Court that they carry expenses. It is quite impossible to listen to the other points attempted to be made by the defenders. To go into the proof, and say whether this little bit of evidence, or that little bit was too much, and unnecessary for the success of the pursuer's case, is a course which this Court cannot take. I must add, that I consider that the pursuer proved his case in a very substantial manner, and after the explanations we have had from my brother Lord Ardmillan, who presided at the trial, I do not think that there is any reason for animadverting upon the manner in which he led his evidence.

Agents for Pursuer—Leburn, Henderson & Wilson, W.S.

Tuesday, November 1.

MACKENZIE v. PITBLADO.

Damages—Undue and Unwarrantable Delay. Circumstances in which the Court found that undue and unwarrantable delay in the prosecution of a voyage had occurred on the part of a master and owner of a vessel, so as to subject him in damages for loss of market, &c. The Court being of opinion that certain conduct on his part, on and shortly after the completion of the loading, threw on him the obligation of increased activity in seizing the first opportunity for sailing, which he had failed to do, chiefly because the tackling and equipment of his vessel had not been got on board at the proper time.

This was an appeal from the Sheriff-court of Perth, in an action at the instance of James Mackenzie, potato merchant in Cupar Fife, against David Pitblado, sole registered owner and master of the ship "Agnes Campbell," of Perth. By charter party entered into at Dundee, on the 16th December 1868, between Pitblado on the one hand, and Mackenzie on the other, the defender engaged to sail with all convenient speed for Balmerino, there to take on board a cargo of potatoes belonging to the pursuer, and proceed therewith to London, and deliver the same to the consignee on being paid freight at a certain specified rate. The action was for the "sum of £400, or such other sum as may be modified in the course of the process to follow hereon, as damages sustained by the pursuer in consequence of the undue and unwarrantable delay of the ship or vessel called the 'Agnes Campbell,' of Perth, or in consequence of the undue and unwarrantable delay of the defender, the master of the said vessel, in proceeding in terms of the charter party on her journey from Balmerino to London, which ship or vessel, though completely loaded by the pursuer on the 31st of December last, and ready to proceed on her said voyage immediately thereafter, did not, in consequence of the said undue and unwarrantable delay, reach London till the 8th day of February last, whereby the pursuer has suffered serious damage through loss of market, and by and through the injury done to the cargo by its being so long kept at sea, or on board the said vessel."

The following facts and circumstances were brought out in evidence:—

That the vessel having been chartered in Dundee on the 16th December 1868, crossed, after the lapse of a few days, to Balmerino Bay. At Balmerino she took on board a cargo of potatoes amounting to about 107 tons. She took about eight days to load, and the last few tons were pressed forward from the various farms on the last day of December, so as to complete the loading that afternoon, and enable the vessel to sail by the early morning tide of the 1st January 1869. Her loading was accordingly finished by the afternoon of 31st December. The potatoes were all put on board at the sight of the pursuer's superintendent. They were proved to have been in good condition and unfrosted. It appeared, however, that there was severe frost upon the night of December 31st, and that the last few loads had not been sufficiently covered and protected after being put on board. The vessel being ready to sail by the morning tide of 1st January, did not do so, the captain alleging that the pilot refused to take him off in consequence of the calm. The pilot, however, was not adduced as a witness. On the night of the 31st December the captain and some of the crew were on shore drinking, and on their return to the vessel the captain and his son, the mate, quarrelled and came to blows, in consequence of which the mate deserted the vessel. By the afternoon tide of January 1st the vessel got under weigh, but only proceeded as far as Wormet Bay, about one and a-half miles down the river, where she came to anchor, it being discovered that a warp had been left behind. On the 2d she again weighed anchor, but ran aground before leaving Wormet Bay. The captain then went over to Dundee to obtain a seaman to replace his son, who had deserted at Balmerino. On the 4th the captain took the vessel down to Dundee Roads, when he again went ashore to get his compasses, oars, and a supply of bread, all which he had neglected to take on board before leaving Dundee for Balmerino. From the 4th to the 7th he lay in Dundee Roads. On the 7th he proceeded as far as the Ferry Roads, but there alleged that he was brought up by bad weather, and was detained by contrary winds from the 7th to the 20th January. This was proved to be more or less the case. On the 20th he was able to get out of the Tay, and reached Harwich on the 3d February, where he was obliged to put in along with a great many other vessels. It was not till the 9th February that he reached London. On arriving there it was found that much of the cargo was damaged. On this subject, however, a joint minute of parties was put in process, to obviate proof, to the effect that, in the event of the defender being found liable in damages, such damages should be assessed at £250, being £70 for loss of market, and £180 for deterioration of cargo, reserving all the defender's rights and pleas.

It was farther proved, that during the time which elapsed between the 1st and the 20th of January, there had been a good deal of drinking among the captain and crew, though not sufficient to render them incapable of their duty. That on the 8th January the pursuer entered a protest against the captain of the 'Agnes Campbell' for not sailing, and communicated the same to him; and finally, that at any rate, between the 1st and 7th of January several vessels left Dundee for ports in the north of England, and arrived with perfect safety, and after remarkably good passages.

The Sheriff-Substitute (BARCLAY), after a careful and exhaustive analysis of the evidence, found that the facts proved did not fix upon the captain of the "Agnus Campbell" liability for damage in consequence of the length of the voyage, and consequent loss of market, and deterioration of cargo.

The Sheriff (TAIT) adhered.

The pursuer appealed to the First Division of the Court of Session.

WATSON and ASHER for the appellant.

GORDON, D.-F., and BALFOUR, for the respondent.

At advising—

LORD PRESIDENT—The charter-party is dated 16th December 1868, at Dundee. It stipulates "That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed, sail and proceed to Balmerino, or as near thereunto as she may safely get, and there load," &c.; "and being so loaded, shall therewith proceed to London," &c. I think that there can be no doubt, on reading this, that the intention of the parties was that the vessel should go to Balmerino in such a condition that she could at once perform the contemplated voyage. The tackle and stores should therefore have all been on board before she left Dundee. In point of fact the vessel did not go to Balmerino till the lapse of such a time as should have enabled the captain to lay in such stores, &c, as he thought necessary; but he did not do so, and the vessel left Dundee without compasses, without bread, and without part of the tackle. Now, if it had been otherwise, if she had left Dundee with her proper complement of stores on board, she would have been ready to sail with the first tide after her cargo was shipped at Balmerino. She did not sail with that tide, and the reason why she did not appears to me by no means clear. The captain says he could not sail without a pilot. He sent for one, but the pilot refused to come, as he considered it too calm, and was afraid the ship might run aground. The pilot himself, indeed, does not give this evidence, and it is a remarkable thing that he was not called as a witness, but we are given to understand that this was the state of the case. We farther see that there were some very awkward proceedings going on upon that first night amongst the crew. If the captain was not drunk, he was not far from it; his son, the mate, was in the same state; they fell to quarreling, and the mate deserted the vessel. I do not say that all this, taken together, is sufficient to convict the captain of undue and unwarrantable delay, but I cannot help saying that the case starts very unfavourably for the master, and this must weigh with us in dealing with what follows. His failure to start by the first tide on the morning of the 1st January imposed upon him a very stringent obligation to get out of the river upon the earliest opportunity. From this point, therefore, we must examine his conduct very strictly. His pilot comes upon the 1st January, and carries him by the afternoon tide as far as Wormet Bay, and then leaves him. Here he lay at anchor till the 4th January, when he proceeded down as far as Dundee Roads, on the opposite side of the river, when he again cast anchor. Now what was this change of side for. Evidently to lay in the requisite stores which were not yet on board. This at once accounts for much of the delay that occurred, and which would have occurred whatever the weather had been. This, taken in connection with what took place upon 1st January, shows that he was not desirous of putting to sea

then, that he was not in fact in a condition to put to sea, and up to the 6th or 7th of January he was culpably wasting time, partly from his unreadiness, and partly from other causes. From the 7th to the 20th of January I am willing to take it for granted that he was really wind-bound. But I ask, whether, at any rate on the 4th, 5th, or 6th, he was not guilty of unwarrantable delay in not setting sail, taking into consideration the fact that he should have been in readiness, and the conduct of these first ten days. The evidence about the weather may be a little conflicting, but on the whole it is in favour of the supposition that a vessel such as the "Agnus Campbell," could have sailed on any one of these days, and I consider that the previous conduct of the Captain had laid upon him the paramount obligation of sailing then if it was possible. It was attempted to be made out that the other vessels mentioned in the evidence as having put to sea at that time were only bound for Shields, and other north of England ports, but I do not see that that affects the question; it was a great object for the master of this ship to get so far on his way at any rate, and if they set sail, so should he. I have therefore arrived at the conclusion, that on not sailing upon the 4th, 5th, or 6th of January the master was guilty of gross negligence and undue delay, and am therefore for altering the Sheriff's interlocutor. In arriving at this conclusion I do not at all undervalue the evidence led in support of the character and seamanship of the master; on the contrary, I quite subscribe to what the Sheriff-Substitute says on that subject, and on the whole matter have received much assistance from the elaborate and careful interlocutors of the Sheriffs. It is a question of opinion on consideration of evidence, and it is only in the ultimate conclusion that I differ from them.

LORDS DEAS, ARDMILLAN and KINLOCH concurred.

The Court accordingly sustained the appeal and recalled the Sheriff's judgment, and gave decree for damages in terms of the joint minute of parties.

Agents for the Appellant—Hill, Reid, & Drummond, W.S.

Agent for the Respondent—Alex. Morison, S.S.C.

Tuesday, November 1.

SECOND DIVISION.

CROMBIE AND BISSET *v.* CRABBS.

Tenant—Lease—Valuation—Market Value. A tenant was bound under his lease "to pay the price of the grass seeds sown with the waygoing crop, and also to pay the outgoing tenant for turnips and dung at a valuation to be made by two valuers to be mutually chosen by the parties, or, in case of difference between the valuers, then by an oversman. The incoming tenant is to leave turnips and dung at the end of his lease to be paid for in like manner by the next succeeding tenant." *Held* that the outgoing tenant was entitled under this clause to receive from the incoming tenant the *market* value of the turnips left on the ground, as fixed by the valuers.

This was an appeal from the Sheriff-court of Kincardineshire in an action at the instance of the trustees of the late Henry Erskine, farmer, Pittarrow, against Mr Crombie of Thornton, proprietor,