

an opinion adverse to their being produced at all. The objection to producing them was twofold:—(1) it would encourage inquiries of an inquisitorial nature, and (2) their production would be misleading, because they showed lump sums and not merely what the pursuer paid upon the profits of his trade. The period for which the books must be produced should be greatly curtailed and the motion with regard to the income-tax receipts refused altogether.

At advising—

LORD PRESIDENT—I think that the defenders are entitled to these recoveries.

They require a certain latitude in point of time in order to ascertain the average income of the pursuer; and I do not see very well how, without going back for a certain period—sufficiently long to overcome incidental variations—they are to be able to know what the worth of the pursuer's business, taking one year with another, really is. I confess I think three years is not an excessive demand on this point.

The pursuer, as Lord Rutherford Clark observed in the case referred to, puts his business in issue, and having said that he has suffered loss to his business, it is directly relevant to the question to ascertain what the profits were, taking one year with another, in his business. The jury will see what loss has been sustained by comparing one state of matters with another.

As regards the income-tax receipts, I confess I think that the defenders are entitled to them, and for the same reason. The income-tax receipts are available of course merely in so far as they show the profits on the business, but production of these documents cannot I think be said to be an invasion of the private affairs of the pursuer, who comes seeking damages for loss to his business.

It only remains that I should say that I do not think the case of *Craig* is a decision adverse to this view. That case doubtless differed from the present. The application in that case was to recover income-tax receipts for four years, and, so far as I can gather, the judgment of the Court was merely pronounced on that request in the aggregate. Certainly there is nothing in the opinions of the Judges which shows that their Lordships considered either the books or the income-tax receipts to be irrelevant to the matter which was to be tried, or unfit documents to be recovered.

I am therefore for granting the application.

LORD ADAM—I agree. There seems to have been some difference in practice in this matter. In my experience I always granted similar applications.

LORD M'LAREN—I also concur. I agree in thinking that the case of *Craig* is not an adverse authority to the decision we are giving. As I read that case, the Court merely refused the motion as put before

them, leaving it open to the applicant to come with a specification limited to a shorter period of time.

My experience, like that of Lord Adam, has been that recoveries of this kind have been frequently made and used in trials of actions for damages. I think there can be no doubt that where a pursuer claims compensation upon the footing of loss of profits it must be open to the defender, against whose estate the claim is made, to offer evidence in cross to that which the pursuer will no doubt put before the jury regarding the extent of his profits. That consideration, I think, covers not only the business books—I mean such books as are sufficient for ascertaining the amount of his profits—but also covers the case of income-tax receipts, because it seems to me that even if the receipts for income-tax showed a less amount of profit than the books it would be his profit during the year that must be considered.

If there be discrepancy the jury might draw from the discrepancy that this business was of a more or less precarious character, and that the profits actually shown in a year could not always be maintained.

LORD KINNEAR—I concur with your Lordships, and I only desire to add that in allowing the recovery of the income-tax receipts we are of course not deciding how far and under what circumstances they could be direct evidence of the amount of profits earned by the person who has paid income-tax on those terms.

The pursuer himself will be put into the witness-box and examined as to his profits, and it will be in reference to his examination that the receipts will be available.

The Court directed the Lord Ordinary to grant the diligence.

Counsel for Applicants—Graham Murray, Q.C. — Salvesen. Agent — John Rhind, S.S.C.

Counsel for Pursuer—Comrie Thomson—A. S. D. Thomson. Agent—M. J. Brown, S.S.C.

Friday, December 23.

FIRST DIVISION.

[Lord Low, Ordinary.

MACBRAYNE (OWNER OF "THE ISLAY") v. PATIENCE.

Ship—Collision—Reparation—Liability of Pilot—Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. c. 149), sec. 138.

The 138th section of the Clyde Navigation Consolidation Act of 1858 provides that a pilot "shall be answerable for any wilful or culpable neglect or mismanagement."

Held that the liability of a pilot under this section was the same as at common law.

The pilot in charge of the s.s. "Strathspey" took her from the port of Glasgow down the river Clyde, when an unusually strong ebb-tide was running. Owing to the strength of the current in her favour, and the slow rate of speed to which she was restricted by the river bye-laws, the pace of the "Strathspey" through the water was insufficient to give her steerage-way, with the result that she sheered over to the wrong side of the river and collided with the "Islay." Held that the accident was due to the fault of the pilot in taking his ship down the river when the ebb-tide was so strong, that he might have foreseen the danger to which he would be exposed, and therefore that he had acted with culpable neglect, which rendered him liable in damages to the owners of the "Islay."

On the evening of January 25th 1890 the s.s. "Strathspey" left the port of Glasgow and proceeded down the river Clyde. When near Govan Wharf she met and collided with the s.s. "Islay," which was coming up the river. For the damage so caused David MacBrayne, the owner of the "Islay," first brought an action against the owners of the "Strathspey," in which the Court assolizied the defenders, on the ground that the collision had been occasioned by the fault of a licensed pilot acting in charge of the "Strathspey" within a district where pilotage was compulsory by law (reported *ante*, July 3, 1891, vol. xxviii. 787, and 18 R. 1048.) MacBrayne now brought an action of damages against James Patience, the pilot who had been in charge of the "Strathspey" at the time of the accident.

The pursuer averred that "the said collision was due entirely to the fault of the defender. Looking to the state of the weather, and the very heavy current which was running down the river, it was grossly imprudent for the defender to have taken the 'Strathspey' out of the Queen's Dock, and proceeded with her on her voyage on the night in question."

The defender denied this averment, and averred "that the collision was occasioned entirely by the fault of those navigating the 'Islay.'" He also founded on the 138th section of the Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. c. 149), as protecting him from liability. That section provides that any pilot employed as therein provided "shall be answerable for any wilful or culpable neglect or mismanagement."

Proof was allowed. The evidence led in the previous action was adopted (except in so far as bearing on the question of damages), and further evidence was led. The result was to show that when the "Strathspey" left the dock, an ebb-tide of unusual strength was running, and that owing to the strength of the current, and the slow rate of speed to which she was restricted by the river bye-laws, the "Strathspey" lacked steerage-way, and not being under the control of her helm, sheered over to the south or wrong side of the river, and

there collided with the "Islay," which was going up stream.

There was a considerable amount of skilled evidence to the effect that it was very imprudent to take the "Strathspey" down the river when the ebb-tide was running so strong.

On 11th June 1892 the Lord Ordinary (Low) repelled the defences and ordained the defender to make payment to the pursuer of £444.

Opinion.—The parties to this case agreed to hold the proof (except in so far as bearing upon the question of damages) in the recent actions between the owners of the 'Strathspey' and the owners of the 'Islay,' as evidence in this case, along with any further evidence which they might lead.

"In the actions between the owners of the vessels, the First Division, taking the same view of the evidence which I as Lord Ordinary had done, held that the collision was caused by the 'Strathspey' becoming unmanageable, and sheering over to the south side of the river, and that those in charge of the 'Strathspey' were in fault in having left the harbour under the existing conditions of wind and tide. The First Division further held that the pilot—the defender in the present action—was in charge of the ship, that it was for him to decide whether he could safely go down the river upon the occasion in question, and that the fault which led to the accident, namely, leaving the harbour at a time when it was dangerous to do so, was the fault of the pilot, and of him alone.

"In these circumstances, although the judgment in the former action does not amount to *res judicata* in a question with the defender, I think that what I have really to consider is the effect of the additional evidence which has been led by the defender. . . .

[*After examining the additional evidence his Lordship continued*].—"I am therefore of opinion, upon the whole evidence in the case, that it is proved (1) that it was dangerous to take the 'Strathspey' out of the harbour and proceed down the river at the time when she started on her voyage; (2) that the defender was in fault in taking the vessel out of the harbour at that time; and (3) that the result of taking the vessel out of the harbour was that she became unmanageable in the strong current, sheered over to the south side of the river, and collided with the 'Islay.'

"If I am right in the view which I take of the facts, I do not think that it was seriously disputed that the defender is liable in damages." . . .

The defender reclaimed, and argued—The collision occurred on the north side of the river, and was due to the fault of those on board the "Islay," and not to the defender's fault. At all events, a pilot was only liable under the Clyde Navigation Act for "wilful or culpable neglect;" and assuming it to be proved that the accident was due to the defender's fault in taking the vessel down the river when such a strong tide was running, he could not be charged with

more than error of judgment, and certainly not with "culpable neglect"—Bell's Comm. (7th ed.) i. 482.

Argued for the pursuer—The collision was proved to have occurred on the south side of the river, and to have been caused by the "Strathspey" sheering over to that side. It was due to the defender's taking the vessel out of dock when the ebb-tide was running so strong that he must have known, had he considered the matter, that it was impossible for the "Strathspey," at the slow rate of speed allowed by the bye-laws, to have proper steerage-way. In acting as he did, he acted imprudently and without due care, or, in other words, negligently, and he was liable for the consequences of his negligence. His liability under the statute was just the same as at common law. If he failed to exercise the care and forethought which his duties demanded of him, he was chargeable with culpable negligence, for the consequences of which he was liable—*Lawson v. Dumlin*, January 15, 1850, 9 C.B. 54; "*The Khedive*," 1880, 5 App. Cas. 876; "*The Marpesia*," 1872, L.R., 4 P.C. 212; "*City of Peking*," 1888, L.R., 14 App. Cas. 30; *Marsden's Collisions at Sea*, 66.

At advising—

LORD KINNEAR—[*After examining the evidence*—I must hold it to be proved therefore that the "Islay" was on the south side of the channel. It follows that the "Strathspey" must have been out of her proper course when the collision occurred, and that she was out of her course either in consequence of some blunder or mismanagement on the part of those in charge, or because she was not completely under control, so that no management of the ship, however skilful, would have been effectual to avert the accident. I think that the latter was the true cause of the collision. We had occasion to consider this question in the former action, and a new examination of the evidence has only confirmed the conclusion at which we then arrived. I think it unnecessary to repeat in detail the reasons we gave for it, but I think it proved that when the "Strathspey" left the dock an unusually strong current was running down the river, and that the ship could not, without danger or without breach of the regulations of the Clyde Trustees, steam down the river at that point at a sufficient rate of speed in excess of the rate of the current to bring her completely under the control of the pilot.

If this were the cause of the accident, we are required to consider a question of very serious consequence to the defender, and also of general importance. We have not been asked to reconsider the opinion which we expressed on the former occasion, that if it were imprudent to leave the dock in the condition of the river at the time, it was the fault of, and that the blame for the collision lay with, the pilot in charge, and not with the master. But it is said that under the Clyde Navigation Act a pilot is only answerable for wilful or culpable neglect or mismanagement, and that

the fault alleged is not sufficiently great to fall within that description. It does not appear to me that the statute removes in any way the common law obligation of the pilot to exercise due diligence, or his liability for negligence. On the contrary, it recognises the two separate grounds of liability to which anyone charged with a duty of negligence is subject by the common law—*dole*, or wilful mismanagement, and *culpa*, or negligence, because *culpa* in our own law, and in the Roman law, from which we derive both the term and the doctrine, is simply neglect of due care or caution in circumstances which impose a duty to be careful. Therefore if the epithet "culpable" adds nothing to the term with which it is connected, it appears to me to serve merely to emphasise the condition which the law would at any rate require, that the negligence which creates liability shall have occurred in the discharge of some function which imposes a duty of diligence. I am therefore of opinion that the question as to the liability of the pilot under the Act must be decided on exactly the same principle as if the action had been brought at common law against a master in command of his own ship.

The question therefore must be, whether the defender in leaving the dock in the condition in which the river was at the moment when he ventured into it, acted with the care and prudence of an ordinarily prudent and skilful seaman? I think the evidence is that he failed to exercise due care and caution in venturing into the river at the time when he left the dock. There is a great deal of evidence from men of skill and experience—I do not think it necessary to read it—that this was a very imprudent thing to do. But the conclusive proof of his imprudence is to be found in the result. It is quite true that the fact of the accident having occurred is not conclusive evidence that it ought to have been foreseen, but the question which the defender had to consider does not appear to me to have presented any very difficult or complex problem to an experienced and competent pilot. The result shows that the "Strathspey" could not be navigated safely down the Clyde in the actual condition of the river, because she could not be allowed to steam fast enough to bring her under the command of her helm, and the question is, whether the defender ought to have anticipated that result. He was bound to know, and must certainly have known, if he had considered the question with due care, what the highest rate of speed at which he could steam in that part of the river was, and whether the stream was running so fast as to render the vessel altogether or nearly helpless at that speed. I am constrained to hold that he failed to give due consideration to that question.

But if the accident were not due to the ship not being under proper control, the only other cause to which to ascribe it would be unskilful navigation on the part of those in charge. Now, I think there is no evidence to justify any imputation against the skill or experience of the de-

fender, who appears to have been an experienced and perfectly competent pilot. But I think the evidence does show that he failed to exercise due prudence and circumspection on this occasion. Therefore I am constrained to hold that he must be answerable for the consequences of his negligence.

No objection was taken by counsel on either side to the Lord Ordinary's view with reference to the pecuniary results of his judgment. I am therefore of opinion that we must adhere to the Lord Ordinary's interlocutor.

LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer—Salvesen—Younger. Agents—Whigham & Cowan, S.S.C.

Counsel for the Defender—Shaw—A. S. D. Thomson. Agent—William Douglas, S.S.C.

Friday, December 16.

OUTER HOUSE.

[Lord Stormonth Darling.]

M'LUCAS (POOR) v. CAMPBELL,

et e contra.

Master and Servant—Wages—Deductions—Truck Act 1831 (1 and 2 Will. IV. c. 37), secs. 3, 4, 5, 6, and 23.

An employer stopped part of a workman's wages in payment of coals supplied by him to the workman. The employer also, as factor for the landlord of the house occupied by the workman, collected the workman's rent by deducting it from his wages. The amount so deducted he handed over to the landlord, less a commission of five per cent. which he retained. The employer had no written authority from the workman to make these deductions.

Held by Lord Stormonth Darling (1) that the workman was entitled under the Truck Act to recover the whole amount of the deductions made in payment of the coals, though these had been supplied to him at market price; but (2) that he was not entitled to recover the amount of the deductions made for rent, in respect that the employer in paying the sums so deducted to his landlord, had acted for the workman.

Archibald M'Lucas, labourer, sued Dr Donald Campbell, lessee of Ballachulish Slate Quarries, for payment of £30, 8s. 6d., as the amount of deductions which he alleged had been made from his wages between the years 1882 and 1890, while he was in the employment of the defender. He averred that these deductions had been made without any authority from him in writing or otherwise.

The defender in answer admitted that deductions had been made from the pursuer's wages for the price of coals supplied to him, and the rent of two houses successively occupied by him between 1882 and 1890, and that these deductions had been made without the pursuer's authority in writing, but averred that the pursuer had ordered the coals freely and voluntarily from the defender's agents, without there being any agreement direct or indirect binding him to get his coals from the defender, and had consented, though not in writing, to the price being deducted from his wages; that the houses successively occupied by the pursuer while in the defender's service were occupied by him as tenant of E. Erskine Scott, trustee on the Ballachulish estate, to whom said houses belonged; that the defender had from time to time, with the pursuer's authority, though not in writing, deducted the amount of his rent from his wages, and paid it over to Mr Scott; and that the pursuer had received full value for the deductions made from his wages in respect both of house rent and coal.

The pursuer pleaded—“(1) Wages to the amount libelled being due and resting owing by the defender to the pursuer, he is entitled to decree as concluded for, in terms of the Statute 1 and 2 Will. IV. c. 37. (2) The said deductions from wages having been made without written authority from the pursuer, he is entitled to decree in terms of the said statute.”

The defender pleaded—“(1) The pursuer's averments are not relevant or sufficient in law to support the conclusions of the action; and (5) compensation.”

The defender Campbell also raised a counter action against the pursuer M'Lucas for payment of the value of the coals supplied to him, and the payments of rent made for him.

A joint-minute of admissions was lodged by the parties, from which it appeared that the coals supplied to M'Lucas had been supplied from stores imported by Campbell; that they had been supplied at the same price as to members of the public, and that their price (amounting in all to £18, 16s.) had been from time to time deducted from M'Lucas' wages; that the two houses successively occupied by M'Lucas while in Campbell's service were the property of E. Erskine Scott; that M'Lucas was his tenant; that Campbell acted as factor in regard to these houses, receiving a commission of 5 per cent. on the rents collected by him; that he had deducted the amount of M'Lucas' rent from his wages, and had paid the sums so deducted (amounting to £20, 12s. 6d.) to Mr Scott, less his commission.

Section 3 of the Act 1 and 2 William IV., c. 37, enacts “that the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in