
PRESENT,

THE THREE LORDS COMMISSIONERS.

1818.
March 2.

HARVEY and Others v. SMITH and Others.

Insurance.—A vessel found to be fully equipped, and that she was not lost by want of equipment, or being detained to complete it.

THIS was an action for recovering L.3000, insured upon the hull and stores of the Earl of Fife, Greenlandman. The assured claimed on a total loss.

DEFENCE.—1st, The vessel was not fully equipped when she left the port of Banff. 2d, There was not a total loss.

This case was reported by the Judge-Admiral to the Second Division of the Court of Session, who approved of the following issues, and also appointed the underwriters to stand in the character of pursuers in the Jury Court.

ISSUES.

“ 1. Whether the vessel, the Earl of Fife, the
 “ property of the pursuers, (now defenders,)
 “ was fully equipped for the voyage on which
 “ she was insured, when she sailed from the

“ harbour of Banff upon the 13th day of April
 “ 1816, or about that time ?

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“ 2. Whether the loss of the said vessel
 “ was caused by her not having been fully
 “ equipped for the voyage insured, when she
 “ sailed, as aforesaid ?

“ 3. Whether the loss of said vessel was
 “ caused by her having remained, or been de-
 “ tained in the bay of Banff, to receive on
 “ board provisions, stores, or other necessaries
 “ for her said voyage ?”

‡ The ship Earl of Fife was insured “ at and
 “ from Banff,” and “ with liberty, on her re-
 “ turn, to lighten in the bay, if necessary, to
 “ allow the vessel to enter the harbour.”

The vessel was mustered by the Custom-
 house officers, and had her stores, ballast, &c.
 on board, in the month of March ; but, owing
 to a want of sufficient depth of water, she
 could not get out of the harbour. At this
 time she had on board five or six puncheons
 extra allowance of beef and pork, with a view
 to her remaining longer in the Greenland
 seas than formerly, in case she was not suc-
 cessful. Part of the beef, ballast, &c. was
 taken out again, and she did not sail till the
 12th of April, when, the weather being fine,

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she was warped out of the harbour. There being less water in the harbour than in the entrance to it, part of her provisions, &c. were ranged upon the pier, and she took part of these on board as she was going out ; but some puncheons of the extra provisions, and a number of shaked casks, were left. After warping out about a quarter of a mile, (during which time she took in some ballast water,) it began to blow so hard, that it was found impossible to continue the operation of warping ; and, as the wind was contrary, and they had not got far enough out to clear the land on either tack, they put out first one anchor, and, as the storm increased, another ; but the ring of the first giving way, and finding that they would strike at low water, if they allowed the vessel sufficient cable to ride on the second, they cut their cable, and ran her on the beach.

A number of witnesses were examined as to the quantity of ballast necessary for the vessel, and some of them gave it as their decided opinion, that she ought to have had half her register tonnage ; and that, without this quantity, they would not consider her “fully equipped.” The defenders attempted to prove that (including her stores) she had this quantity on board. Their proof on this point was defec-

tive, but they proved that she was as deep in the water as on former voyages, and that she was in a condition to go to any part of the world. It was also proved, that she had on board sufficient provisions for the voyage, and that there was no order given, and that it was not known to be the intention that she should cast anchor in the bay, and wait for the articles left on the pier.

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The first witness called for the pursuers was examined as to the quantity of ballast necessary for a vessel of a certain tonnage, the mode of stowing it, and the consequence of a deficient quantity being on board; and in answer to a question from the Court, stated, that he thought, on hearing an accurate description of the ship in question, he could say what quantity of ballast was necessary. The counsel for the pursuer then suggested that the witness should be asked whether he was acquainted with the build of Sunderland vessels.

LORD CHIEF COMMISSIONER.—It would be better to lay before him an accurate description of the vessel, and then to ask his opinion.

But the counsel for the pursuers having stated that he had not asked him any thing as to the ship in question; and that this inquiry was

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not cross to any question which he had put to the witness, and did not arise out of the examination in chief, his Lordship said, he would strike out of his notes all that the Court had asked the witness.

Circumstances
in which a wit-
ness was called
back after he
was examined
and dismissed.

The second witness for the pursuers having stated, that a vessel of 330 tons requires about 160 tons of ballast, but that the quantity depends a good deal on the build of the vessel.

LORD CHIEF COMMISSIONER.—I have been present at a great many trials of this sort, and the common way is to lay before the witnesses an accurate description of the vessel, and then to ask their opinion.

I am averse to interfere with the conduct of a case, but if there be no accurate description of the ship agreed upon, I would recommend that the carpenter be called to describe the vessel in the presence of this and the former witness, and that they should then be asked their opinions, as persons of skill, as to the ballast of such a vessel.

Jeffrey, for the defenders, admitted that the pursuers might call the carpenter to describe the vessel to the witness now under examination, but maintained that it was incompetent to call back the former witness, who had been

fully examined and dismissed. Even where a witness has not been fully examined, this is sometimes refused ; but that is not at all similar to what is proposed on the present occasion. In Davie's case, there were contrary decisions on this point ; and the second examination was not allowed without a condescendence of what had taken place at the first examination ; of the facts to be proved by the witness ; and showing that they were essential to the case.

Moncreiff, for the pursuers, contended, That he was entitled to call back the witness, which had been done in a fishing case ; he also mentioned a case in which a gentleman present had been twice examined.

LORD CHIEF COMMISSIONER.—In one view, this is contrary to every principle with which I am familiar ; but perhaps we are not so much at variance in reality as in appearance. It is contrary to justice, and consequently incompetent, when a witness has been thoroughly examined and dismissed, to call him back to eke out the case, merely because the other witnesses have not in their evidence come up to what the pursuer expected.

Here the examination as to this point came from the Court rather than the bar, and on a question as to the build at a particular port, I

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suggested the propriety of proceeding in this manner. The witness is to be asked his opinion after hearing the vessel described. It appears to me that justice requires it, and I do not think it infringes on any rule of the law of Scotland.

The carpenter was then called, it being understood that the first witness was to be brought back to give his opinion.

LORD PITMILLY.—I hope it is understood by the bar that the Court are not laying down any general rule, but merely directing that it is competent in the particular circumstances of this case.

The carpenter of a vessel may be called to describe the build of the vessel to another witness, but it is not competent to ask him in presence of that witness if she required more or less ballast than usual.

On his examination in chief, the carpenter did not give a very clear description of the ship; and on his cross-examination, with the view, as was stated, of clearing it up, he was asked, whether, from her build, she required more or less ballast than usual. To which it was objected, *1st*, That the question was not cross to the examination in chief; *2d*, That it could not be asked in presence of the other witnesses.

LORD PITMILLY said,—As I am bound to deliver my opinion, I must say I think the question improper in presence of the other wit-

nesses. These witnesses are called to give their opinions, and the carpenter is called to describe the vessel to them. The question proposed is competent and necessary, but I do not think it ought to be put in presence of the other witnesses.

LORD CHIEF COMMISSIONER.—The witness is called to state the length, &c. of the ship. This question is intended to throw light on the cause, not to explain the build of the ship. This is, therefore, not the proper time to put it.

When the carpenter was removed, the first witness, on being again called, was asked whether he thought that, by a question or two to the carpenter, he could have ascertained with more precision the build of the ship. He said he could. It was then proposed to call back the carpenter, but it was objected, that parties ought to come with their cases prepared, and not to make a witness act as agent.

LORD CHIEF COMMISSIONER.—Certainly the pursuers have already had every indulgence which the law will allow them. When another case of this kind occurs, gentlemen ought to come prepared with an accurate description of

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A witness called to give an opinion as a man of science, not allowed to have a witness called back to give a fuller statement of the facts on which his opinion is to be given.

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the vessel ; which may easily be done, as by act of Parliament British ships must be registered, and the register contains a description of the vessel.

Cockburn, in opening the case for the pursuers, maintained,—Insurance requires the insured to act with the best faith, and to communicate the nature of the risk,—the vessel must be seaworthy ; and in this case she must be more, she must be “ fully equipped ” for the voyage in question before she leaves the harbour ; if she want her compass, or have left part of her shaked casks behind, the underwriters will be free, though she may be lost in sight of land where the compass could be of no use to her.

LORD CHIEF COMMISSIONER.—You would require to prove that she *waited* for these. Do you mean to say that the shaked casks were necessary for ballast ?

Cockburn.—No ; but they were intended to make part of her equipment. She also left part of her beef and beer. She had not her complement of boats or men on board, nor a sufficient quantity of water ballast. She cast anchor in the bay to supply these defects in her equipment.

Jeffrey, for the defenders, stated,—The case is contained in the first issue; and as I have no doubt it will be found in favour of the defenders, they have no interest in the other two. This is a painful case, as tending to throw discredit on the mercantile character of the country. These insurers living at Aberdeen, and knowing perfectly the facts, maintained for a year, that we were not entitled to abandon. The English underwriters have settled their part of the insurance, and said they would have done so on the day of the loss, had it not been for the misrepresentation of the Scots underwriters.

The vessel was fully equipped; even if the quantity of ballast mentioned was necessary, the pursuers have not proved any deficiency, as there were 60 tons of water ballast, and the provisions, &c. were more than sufficient to make up the rest of the weight. Being seaworthy and fully equipped are synonymous. She was fully equipped, and the water ballast taken in during the warping was to make her hang a little astern; and constant alterations are made in this during the voyage. She was over-victualled. It is probable that, if the weather had continued fine, the articles left behind would have been taken on board during the warping out, but none of them were necessary for the

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safety of the ship, nor would she have waited for them.

Moncreiff, for the pursuers, contended,—It appears from the policy of insurance that the vessel must be fully equipped before leaving the harbour ;—when he was interrupted by a statement that the policy was not proved.

LORD CHIEF COMMISSIONER.—I have nothing to do with the policy in this case, any more than with the conduct of Scots insurers. I have no objection to going out of the case for explanation, but I cannot consent to going out of it as to the evidence.

Moncreiff farther contended,—The insured must show not only that she was seaworthy when she left the harbour, but that she was fully equipped. This, as distinguished from being seaworthy, must mean that she had on board all the equipment intended for her. It is proved that she wanted part of this, and was not “in the state she ought to be,” (which is the definition of seaworthy given by Park,) for part of her provisions were left, and she took in ballast after she had sailed.

If you find that she was not fully equipped for the long voyage, the Court will infer that she waited in the bay for the provisions and casks.

LORD CHIEF COMMISSIONER.—The Court cannot draw this inference, if the other two issues be found against the pursuers. From the great pains and ingenuity which Mr Moncreiff has displayed in this case, it becomes necessary for me to go into considerable detail; and, in doing so, I shall point out the nature of the issues, and what I conceive to be the intention of the Court in sending them.

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It is necessary that we come to a clear and distinct decision whether the vessel was fully equipped; and, to apply the proof to this question, the two first issues must be taken together. The equipment may be either for the navigating or for the mercantile part of the voyage; and if there was any doubt of the meaning of equipment in the first issue, the second would show that it was the sufficiency of the navigating, not the trading, part of the equipment which is meant.

This equipment includes every thing that renders her safe. It is argued that, as there are only 11 feet of water where the vessel was lying, she must have been deficient in ballast; but the “harbour of Banff” does not mean the inner harbour; and though she put out part of her stores, &c. yet it is proved that she took them in again before leaving the outer harbour.

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The question on the two first issues is not whether she had sufficient anchors, cables, &c., but has been reduced to the two points, whether her victualling and ballast were sufficient for the voyage out and home; and, in this question, the provisions are to be viewed both as provisions and ballast.

In this case, part of the evidence is directly opposed; and, therefore, it is necessary to go particularly into it. Four of the witnesses for the pursuers, whose evidence is opposed to the others, never saw the vessel, but are called upon to give their opinion of the quantity of ballast necessary. This requires a very minute description of the vessel; and though I do not mean to throw any blame on the conducting of the case, it is to be regretted that gentlemen had not attended to the act requiring the registration of ships, (commonly called Lord Liverpool's act,) which requires that a minute description be inserted in the register. As this has not been produced, the evidence depends on the description by the carpenter, which was not so clear or full as might have been wished. This being the basis on which the evidence rests, it is for you to consider what weight should be given to it, in competition with the opinion of nautical men, who saw her in the

water. Scientific evidence cannot be set in opposition to direct evidence of a fact. If there is contrariety in the direct evidence, then it may have weight.

Six witnesses swear that this vessel would have sailed if the weather had permitted ; and though, as stated, the insurers must depend for witnesses on those in the employment of the insured, yet there is nothing to discredit Lawrie, the chief mate of the vessel, who had been in this vessel on two former voyages ; who, on the present occasion, was to risk his life in her ; and who swears that she was as deep in the water as formerly. The shore-master (a person not in the employment of the defenders) also swears that she was 11 feet one or two inches deep when she left the harbour.

I did not think the pursuers made out their case ; but I do not regret that the defenders led evidence, as it made the matter still more clear. It is always unpleasant to balance evidence ; but, in this case, there is nothing which goes to character ; it is merely the scientific evidence in opposition to the fact.

The evidence for the defenders shows that the vessel was fully equipped ; that she was managed with skill ; that every exertion was

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made to get her out; that the water ballast was taken in to improve her sailing; and that dropping the anchor was a matter of necessity, not of choice. If you agree with me in this, you will find in terms of the issues,

That she was “fully equipped,” and that she was not lost by “not having been fully equipped,” or “by having remained, or being detained in the bay,” &c.

Verdict, accordingly, for the defenders.

Moncreiff, Cockburn, and Skene, for the Pursuers.

Baird, Jeffrey, and J. A. Murray, for the Defenders.

(Agents, *D. Murray, w. s. and John Peat.*)

In thanking the Jury, the LORD CHIEF COMMISSIONER took occasion to congratulate them and the country on the satisfactory result of this second case on the subject of insurance, which had been decided with so much dispatch.