

CASES

TRIED IN

THE JURY COURT.

INVERNESS.

PRESENT,
LORD PITMILLY.

GRUBB & MATHESON v. MACKENZIE.

1818.
September 10.

AN action of damages for destroying stake-nets.

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Damages for
destroying
stake-nets.

DEFENCE.—Stake-nets are illegal engines. Those taken down were calculated to ruin the fishing of the defender, and rendered the navigation of the river dangerous.

ISSUES.

“ 1st, Whether, in the night between the

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“ 9th and 10th days of April, in the year
 “ 1816, or about that time, nets and ropes
 “ belonging to the pursuers, and which were
 “ placed by them, or by their order, on stakes
 “ belonging to them, for the purpose of catch-
 “ ing salmon and other fish, at Criech and
 “ Spinningdale, on the north coast of the Frith
 “ of Dornoch, and at Ardchronie, on the south
 “ side of said Frith, were destroyed and cut to
 “ pieces by the defender, or by persons acting
 “ under the orders of the defender, or secretly
 “ instigated by him, to the great loss and da-
 “ mage of the pursuers, by the injury done to
 “ their fishing apparatus, caused by the afore-
 “ said acts?”

The second and third issues were, Whether the nets at Ardchronie were again beat down, cut, spoiled, or destroyed, by the defender, on or about the 2d May 1816, and 6th July 1816? and the fourth, Whether those at Spinningdale were again cut and destroyed by him, on or about the 10th July 1816?

The damages were laid at L.5000.

Witnesses
 partly examin-
 ed, re-inclosed,
 and called
 again.

Mr Cockburn wished to confine the examination of the witnesses to the first issue; to have them re-inclosed, and called back to

prove the others; to which Mr Moncreiff objected.

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LORD PITMILLY.—It is not the part of the Court to interfere in a matter of this sort. Parties ought to arrange matters so as to save the time of the Court and Jury.

Mr Cockburn will conduct his case in the way he thinks best; and if any objection is taken when a witness is called, the Court will then give its decision. In other cases, something very near what is now proposed has been done; and if it is for the purpose of bringing out the truth, the counsel for the defender, I am sure, will not object to it.

The witnesses were examined, in the manner proposed, and an officer was inclosed with them; and the objection was not taken when they were called back.

On the second issue, the answers to the condescendence, and some of the other proceedings in the Court of Session, were given in evidence, to prove that the defender admitted having cut down the Ardchronie net. One of the Jury requested to know whether they were to receive this as evidence.

Proceedings in the Court of Session, evidence of an admission in the cause.

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LORD PITMILLY.—The proceedings referred to are admissible here, and they are sufficient evidence of the defender's admissions.

Not competent to prove amount of wages to fishermen, under an issue for damage to fishing apparatus.

After proving the value of the nets destroyed, Mr Cockburn wished to prove the sum paid as wages to the fishers; to which Mr Moncreiff objected.

Cockburn.—The issue is for the damage done to the “fishing apparatus.” The work of the men is part of the apparatus which we lost by the destruction of the nets. We do not attempt to prove the value of the fish, as that is excluded by the Court; but this is a direct, not a consequential loss. It is wages, not profit.

Moncreiff.—The Court ordered part of the issue to be delete, which excludes the proof now offered. The Court held the mode of fishing illegal, and would not allow any other loss to form part of the issue, than the damage done to the stakes, ropes, and nets.

LORD PITMILLY.—The pursuer claims two distinct species of damage:—1st, The

direct damage occasioned by the injury done to the apparatus : *2d*, The loss he has sustained, by being deprived of the use of that apparatus in catching salmon.

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The Court, after argument and deliberation, struck out the part of the issue applicable to the loss under the second claim ; and it appears to me, that by doing so, they intended to exclude all evidence as to any thing except the direct damage. If they had intended to allow proof of the amount of the wages, they might easily have sent an issue on the subject ; but they have not done so ; and I therefore think the question as to the wages of the fishers inadmissible.

Moncreiff, for the defender, contended, that the pursuer was not entitled to any damages, as he was merely interrupted in an illegal encroachment on the rights of others.

Stake-nets are illegal, and the defender was entitled to remove them, as an obstruction to the navigation of the river. His doing so was not a criminal act ; and this is not a prosecution at the instance of the public prosecutor. If the mode of fishing had been legal, the defender must have been liable for

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all the damage, both direct and consequential; but being illegal, he is not liable in either.

Maitland, in opening the case, and *Cockburn*, in reply, stated—The pursuer claims reparation for the damage done—for the loss of the fishing—and a solatium.—All that has been said of the illegality of the mode of fishing, is irrelevant. The only question is, whether the nets were destroyed, and what is the value of them? The second issue is admitted; and from the circumstances proved, there can be no doubt of the others. The defender alone had the interest to destroy the nets, and some of them must have been destroyed by persons in boats, and he alone had boats in the frith.

LORD PITMILLY.—It is now my duty to submit my observations on the evidence, and the case in general; and in doing so, I shall endeavour to state, 1st, The precise points on which you ought to deliberate, and those from which you ought to withdraw your attention as irrelevant. 2d, The evidence on one side and the other, leaving you to draw the inference.

Much has been said of the illegality of stake-net fishing, and that no damages could be given on account of the interruption of an illegal act.

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We have nothing to do with this. The Court of Session, knowing all this, and the law on the subject, have sent these issues, to ascertain the amount of the damages; and it would be very extraordinary, if we made a return, stating that that Court was mistaken, and that, as the mode of fishing was illegal, no damage could follow from the act of the defender. I also perfectly agree with Mr Cockburn, that the titles of the parties are not here under discussion. It would not be fit to send such a question, and in this case it is not sent. The Court of Session either have decided this, or will decide it, if there be any question on the subject.

The questions then are, Whether the nets were cut? and What is the extent of the damage? And to ascertain these, it will be necessary to take the issues in their order, and refer generally to the evidence.

1st Issue.—The questions here are, Whether the nets were cut? To what extent? and Whether it was done by the defender? That they were cut, is proved by three witnesses;

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but the material question remains, Whether it was done by the defender, or by his orders? The evidence of this is circumstantial, and must be weighed scrupulously. It is not sufficient to infer or suppose it was done by him: you must be satisfied that it was done by him, and by no other; and I have no hesitation in saying, that I do not consider this issue to be made out; but this is a question of fact, and I have no wish to usurp your province.

2d Issue.—This is in a very different situation from the first, and you must consider whether there is any reasonable ground to doubt, that on this occasion the act was done by orders from the defender; you must also consider, that it was very differently done from the others; and that in this case the orders were to cut the stakes, not the nets. An attempt was made to justify this act, on the ground that the nets obstructed the navigation of the river. I was rather surprised, that the defender should have stated this, and the injury to his fishing, as his motive for cutting the stakes. It certainly was a good reason for applying to the Sheriff or the Court of Session; but, on that account, the worst reason for following the course he did. I therefore

tell you, in point of law, that this does not justify his conduct, and ought not to be taken into consideration.

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3d Issue.—This was sworn to by only one witness, and was most properly given up by the pursuer.

4th Issue.—Three witnesses swear to this; and the circumstances (which Lord Pitmilley detailed) are a most proper subject for the consideration of a Jury.

By a decision already given, the damages are confined to the injury done to the nets; and damages ought not to be a punishment of the defender, but indemnity to the pursuer. The proof of the amount of the damages is very slight and unsatisfactory; and the pursuer was bound to have brought better evidence. The nets, however, are worth something, and damages must be given on the whole circumstances of the case.

Verdict for the pursuer on the 2d and 4th Issues—damages L.100. Find the 1st and 3d not proven.

Cockburn and Maitland for the Pursuer.

Moncreiff and Matheson for the Defender.

(Agents, *Joseph Gordon*, w. s. and *James Peäic*, w. s.)

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Expences to
pursuer, de-
ducting ex-
pence of de-
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on which de-
fender was suc-
cessful.

Cockburn moved for expences, as L.100 damages had been given.

Moncreiff opposed, and went into a detail of the case; and stated that a reference had been offered, and that he had gained more than the pursuer.

LORD PITMILLY.—In this case there were four issues; the 1st and 3d were not proved; the 2d and 4th were, and L.100 damages given. In such a case, the rule is, that we are to give expences subject to modification; that is, if the defender can shew that he has been put to expence in defending against these two issues on which he succeeded, this sum ought to be deducted from the pursuer's account.

LORD CHIEF COMMISSIONER.—The same principle applies here as in the case of *Kirk and Guthrie*, 15th December 1817.—See vol. I. p. 280.