

insisted in, and very slight acquiescence will bar a party from claiming for mere inconvenience. He may get the value of the trees, but not for amenity, as he is bound to claim at first, and not allow it to go on for years. Acquiescence may be sufficient to bar this claim for damages, though not sufficient to continue the nuisance.

The jury at first came into Court with a verdict for the pursuers on the first issue, with L.5 damages; but being informed by the Court that this implied a verdict on the other issues, and that it would be better to find upon them, they again inclosed.

Verdict—"For the pursuers, on all the issues. Damages L. 5."

Moncreiff, D. F. and Buchanan, for the Pursuers.

Jeffrey, Cockburn, and More, for the Defenders.

(Agents, *John Young, C. J. F. Orr.*)

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PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

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INNES AND OTHERS, TUTEIN AND OTHERS,
AND KOLN v. GLASS AND COMPANY.

1827.
Feb. 26.

THESE were three actions against the owners of the Corsair, on the ground, that that vessel

In an action
against the owners
of a vessel for

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damages done to
another, finding
that those on
board of both the
vessels were to
blame.

had run down the Haabet or Hope. The first was at the instance of the owners of the Hope; the second at the instance of insurers, who had paid the value of goods lost on board that vessel; the third at the instance of the master of the vessel, for the value of property lost.

DEFENCE.—The loss was occasioned by the fault, negligence, &c. of those on board the Hope; or was accidental, and in that case there is no claim for damages on either side.

ISSUES.

Before proceeding to trial an order was made of consent that a verdict should be taken on the point, “Whether the loss of the said vessel, called the Haabet or Hope, was caused by the fault, want of skill, or negligence of the master or mariners of the said vessel called the Corsair?” and that the question of the value of the goods, &c. should be referred to the decision of an arbiter.

Cockburn, for the pursuers, stated this to be a case depending on nautical skill; and that he would prove this to have been by the fault of the Corsair, as she had the wind, while the Hope was as near the wind as she could be.

When a deposition was produced, *Forsyth* objected,—The witness was mate of the *Hope*, and on watch at the time, and is answerable for the loss. The other party were aware of this, and produced a discharge to the witness, but it was not produced till after his deposition was emitted. The verdict might be used by him; and his giving up his claim against us, and making a voluntary oath along with the master against us, is a strong act of agency.

Moncreiff.—Is any answer necessary? The verdict could not be used by him. He made the affidavit, which is usual in case of the loss of a vessel.

LORD CHIEF COMMISSIONER.—How is this verdict evidence in any case with the witness? There is no doubt the question goes to his credit, as any thing that affects his character as a seaman on his watch would do. But the question here is his competency; and I cannot conceive how this goes to make him incompetent. Unless the verdict is evidence for or against him in the question of his liability, the objection is not good. Merely being liable in an action is too remote an interest to affect his admissibility. Even if he were liable to the

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owners, it would be impossible to exclude him for the underwriters. It is the opinion of the Court that all the facts go to the credit of the witness, and that the jury must consider this seriously.

LORD CRINGLETIE.—The argument stated would go to this, that the only witnesses competent to speak to the facts would be excluded.

When a certificate entered in the log-book was referred to,

LORD CHIEF COMMISSIONER.—The log-book and protest are only good to refresh the memory of a witness, and to this effect it is good in this case. With regard to the certificate which the witness saw wrote, if he read it at the time, he might read it again to refresh his memory; but if he only saw the person write it, then it could not refresh his memory.

Moncreiff.—We think an entry in a log-book by an impartial witness is evidence.

Robertson.—The witness who saw the writing was a Dane, and could not understand it.

LORD CHIEF COMMISSIONER.—The log-book is only good as an admission by the party, but cannot be evidence, as it is not on oath.

A log-book, or certificate entered in it, only admitted to refresh the memory of a witness, but not as evidence.

What is stated in it of the Hope not being to blame, I thought hearsay.

It was proposed that the opinion of the nautical gentlemen should be taken after the evidence of fact on both sides was closed.

LORD CHIEF COMMISSIONER.—If that is done, then the counsel for the defenders will be heard upon the evidence of opinion, confining himself strictly to that part of the evidence.

Robertson, for the defenders.—The pursuers have not made out their case, and have only called three out of eleven of the crew of the Hope. If the description given by them is true, as to the rate of sailing and time of changing the course, the vessels could not have come into contact, but must have passed far a stern of each other. Besides, they describe our vessel as going right *to* the wind. By a survey of our vessel it is proved that she was struck by the stem of the other vessel.

The survey was shown to a witness, and he was asked whether the contents of it were true.

LORD CHIEF COMMISSIONER.—The regular way is to question the witness as to the facts,

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Evidence of opinion not taken till the evidence of fact closed.

Counsel for the defenders then to observe on that evidence.

Incompetent to ask a witness whether a survey contains a true statement.

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The master of a vessel a competent witness for the owners, on an issue whether damage was done by the fault, &c. of the master and mariners.

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and he may use the survey to refresh his memory.

The master of the Corsair was called, but afterwards withdrawn, the same objection being stated to him as had been stated on the other side to the mate of the Hope. Indeed, it was maintained that the objection was stronger.

LORD CHIEF COMMISSIONER.—The principle is laid down by Lord Kenyon in the case of Bent and Baker; we admit him on the same ground as the other, unless there is any peculiar rule in the law of Scotland.

LORD MACKENZIE.—There is no difference here.

Moncrieff, D. F.—Though the pursuers are foreigners, they will receive the same justice as the most eminent British merchant. Their case comes in disadvantageous circumstances, from the difficulty of collecting evidence; but our evidence of the facts must outweigh all evidence of opinion founded on the appearance of the defender's vessel after a long voyage. The Corsair was proved in fault.

LORD CHIEF COMMISSIONER.—Before stat-

ing the case to the jury, I wish to suggest to counsel a view of this case which has occurred to the Court. In the condescendence there are only two suppositions made, viz. that the pursuers were wrong, or that the defenders were wrong. But there is a third view which is settled in admiralty law, that there may have been faults on both sides.


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There are four positions in which a loss may happen. It may be caused by invincible force, or by the fault of the pursuers when they cannot recover; by the fault of the defenders when they do recover; or by the fault of both; in which situation the defender does not go free, but the pursuer only recovers one-half, and should this be the case here, I must direct the jury to find for the pursuer, and to give half the damages, which is competent under the issue.

Moncreiff and Cockburn.—We ask a verdict for the whole, but admit, that, were the damages to be ascertained here, the jury might give half the amount, and they may proceed hypothetically.

Forsyth and Robertson.—We came here as on a total loss, and protest against the application of the principle, and must except to the direction if it is given.

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LORD CHIEF COMMISSIONER.—If you think this for the interest of the defenders you are right. How it is for their interest is a different question. If this is surprise, of course it cannot be gone into.

(*To the Jury.*)—If this were a subject which I could treat familiarly, I might go into the minutiae of the case, and explain it to you, but this is what I feel incompetent to do. Not being familiar with the details, I could not hope to make them clear to you. But from the manner it has been treated at the Bar, and the attention you have paid to it, I trust a general view will be more advantageous.

This is a case in which the owners of a Danish vessel come asking compensation for the injury done by sinking the vessel, and say the defenders ought to pay the whole. On the other hand, the proprietors of the Corsair say the fault was in the Dane, and that no damages should be given. But there is a third situation when there are faults on both sides, and then, instead of the pursuer recovering the whole, or of inquiring who is most to blame, the damage is divided, and the pursuer recovers one-half.

In the present case, I rather wish you to consider the two first views, and to make up your minds upon them ; but it is competent for you

to find on the third view, and I shall, in concurrence with my brother, state to you how this is to be done.


The observations made on the witnesses called, and on the Corsair going off her course, were proper; but the case must be tried on the evidence, and not on observation; and in this case we have had the double evil of the evidence being to a great extent depositions, and the witnesses being foreigners.

It is clear that the vessels were sailing, the one on a wind, the other free, and that, had they gone straight on, they would have passed without injury. It is said the Corsair changed her course, and came nearer the Hope, for the purpose of speaking. There is evidence for and against this change of course, and you will weigh the evidence well on this point, as it is a material fact in coming to a right conclusion in the case.

The question is, how this fatal accident happened? It is said the Corsair passed the Hope, and returned and struck her, and on this subject you had much scientific evidence. But on the other side, it is said there are facts showing that the Hope was in fault, and the material fact here is the injury done to the Corsair. On this there was much minute evi-

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dence ; but the pursuers object that there is no evidence that the injury to the Corsair was caused by this collision, and perhaps it should have been traced to this, but her state is proved soon after she reached the end of her voyage.

There was scientific evidence to show that the accident could not have happened in the manner described by the Danish witnesses, and you must consider the credit of the witnesses, and their opportunities of observation, and what they state as to the position of the helm, which is a material fact.

On the question, whether the Corsair veered from her course up to a particular time, and whether this was proper, the nautical opinions do not apply, except in so far as they state that she ought to have kept away. You will therefore consider whether the Corsair, leaving her course, was the cause of the injury, or whether it was not partly occasioned by those on board the Hope not having, with sufficient alertness, put the helm in the proper position ; and if you are of opinion that the fault was on both sides, you ought to find a verdict for the pursuer, and add a note that both were to blame.

Verdict—For the pursuer ; but find also

that there was some blame to be attached to the Hope.

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DAVIDSON, &c.

Moncreiff, D. F., Cockburn, and Macallan, for the Pursuer.
Forsyth and Robertson, for the Defenders.
(Agents, *Ainslie and M'Allan, w. s. Daniel Fisher, s. s. c.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

CAMPBELL v. DAVIDSON, &c.

1827.
March 14.

REDUCTION of a trust-deed and latter will, on the ground of a false date, of blindness, of insanity, or want of disposing mind, of the granter not being made acquainted with its contents, and of its being obtained through gross fraud and circumvention.

Finding for the defenders on a question whether a deed was not the deed of the party.

ISSUE.

Whether the deed was not the deed of the late John Mackinnon Campbell?

Bell, for the pursuer, stated, That the grant-er of the deed was in a state of delirium, from constant and excessive use of spirits: That the agent had acted rashly in being a party to it, and had made out the deed without either written or verbal instructions.