

questions might arise. But I agree also that there is no authority here given by the official assignee for presenting this petition. That authority might not require to be in express terms, but it would require to be in such terms as to comprehend this power, and I think this power of attorney does not, and was not intended to comprehend it.

LORD ARDMILLAN—I think the party presenting this petition has authority to sue an action, but he has plainly no authority under this power of attorney to take his present step.

Agent—J. M. Macqueen, S.S.C.

Tuesday, January 14.

PETERSEN AND MANDATORY v. M'LEAN & HOPE AND HERTZ.

Reparation—Ship—Arrestment of Ship—Damage to Ship by Unskilful Management—Issues. Issues adjusted to try questions of wrongful invasion and removal of vessel, malicious arrestment of vessel, and unskilful management, causing damage to vessel.

The pursuer of this action, Niels Christian Petersen, is master and part-owner of the vessel "Nayaden." The defenders, M'Lean & Hope, are merchants in Leith, and the other defender is a merchant in Glasgow.

The "Nayaden" had been employed in bringing over a cargo of bones from Barcelona to Leith, deliverable to Hertz or his order. By 9th May 1867 the cargo was delivered at Leith to M'Lean & Hope, holders of the bill of lading. On 15th May, the vessel was taken to the roadstead of St Davids, in the Firth of Forth, to load a cargo of coals for Flensburg. The pursuer alleged that the vessel, on account of her tonnage, build, and other circumstances, could not safely be taken into or allowed to remain in a tidal harbour, where she was liable to be left aground for a length of time on the receding of each tide. "Accordingly, the pursuer intended to load in the said roadstead, and had made arrangements for going into the harbour and taking part of the cargo on board when the tide was in, and thereafter going out again to the roadstead, bringing the cargo from St Davids in lighters or small vessels, and putting it on board in the roadstead. About nine o'clock at night on 16th May 1867, while the said vessel was lying safely at anchor in said roadstead, a number of men, acting on the orders of the defenders, or for whom the defenders are responsible, came on board and illegally took possession of her, hove up the anchor, loosened the top-sails, and carried her into the harbour of Inverkeithing, to the danger of the lives of all on board, the vessel having no ballast. No arrestment was used or executed, or at least no arrestment was regularly and validly used or executed at this time. If any arrestment was used, it was illegal, oppressive, malicious, and without probable cause. The harbour of Inverkeithing is not a place to which such a vessel should have been taken, or in which she could remain in safety, and this was, or ought to have been, well known to the defenders, and to said parties. Further, the pursuer specially remonstrated against the said vessel being taken into the harbour of Inverkeithing, and pointed out to the said parties who came on board as aforesaid

that injury and damage would necessarily arise to the vessel from her being taken into said harbour, or into a tidal harbour; but, notwithstanding of said remonstrances, they persisted in their said illegal proceedings. In entering the said harbour, the said parties who had taken possession of the vessel, by unskilful and reckless management, ran her up against the quay, and against a coal spout on said quay, to her injury and damage. The collision caused the vessel to lurch to starboard, and she afterwards again struck against the quay, thereby suffering additional damage. When said vessel was brought into the harbour, a pretended arrestment was executed by one of said parties, who stated that he was John Thomson, messenger-at-arms, and was acting under the defenders' instructions. The said arrestment was used on a summons at the instance of the defenders M'Lean & Hope, with consent and concurrence of the other defender, Theodor Hertz, against the pursuer as master and part owner, and for himself and as representing the other owners of the vessel, for payment of £297, 6s. 4d., for alleged short delivery of the foresaid cargo of bones. The said claim against the pursuer was entirely without foundation, the pursuer having delivered the whole cargo of bones put into his vessel at Barcelona. In said action the defenders altogether disregarded the qualification contained in the said bills of lading, and also calculated the tonelada as equivalent to the English ton. Before using said arrestment, the defenders made no inquiry whatever as to the quantity contained in the Spanish tonelada. The said arrestment was illegal and oppressive, and was used maliciously and without probable cause, or at least recklessly and without due caution or inquiry. The said John Thomson, under colour of the said pretended warrant of arrestment, caused the said vessel to be laid alongside the quay-wall of said harbour, where, at every fall of the tide, she received additional damage by falling over and lying on the wall or quay, which slopes outwards. In consequence of this and other improper and reckless usage by said parties, as also from being moored in said harbour and allowed to take the ground, the vessel received great damage and injury in her hull and timbers, and the copper was torn off her in several places. She was also considerably strained, and at each tide made a deal of water. In consequence of said injuries caused by the proceedings of the defenders, the said vessel was so damaged that she was not in a condition to take in cargo or proceed to sea, and required to be placed in a dry dock and repaired."

The pursuer sought damages, and proposed four issues, which, as finally adjusted, stood as follows:—

- (1) "Whether, on or about 16th May 1867, and in or near the roadstead of St Davids, in the Firth of Forth, the defenders, or others acting by their orders, wrongfully, and without legal warrant, invaded and took possession of the said vessel, and brought her to the harbour of Inverkeithing, to the loss, injury, and damage of the pursuer?"
- (2) "Whether, on or about the said 16th day of May 1867, the said defenders maliciously, and without probable cause, arrested the said vessel on the dependence of said action, and caused her to be detained, first in the harbour of Inverkeithing, and thereafter in the harbour of Leith, from said date till 22d June 1867, to the loss, injury, and damage of the pursuer?"
- (3) "Whether, on or about said 16th May 1867, the

defenders, or others acting under their orders, did, by gross negligence or gross unskillfulness, cause the said vessel to strike against the quay at the said harbour of Inverkeithing, and against a coal-spout on said quay, whereby she sustained damage in her hull, rigging, and other parts, to the loss, injury, and damage of the pursuer?

- (4) "Whether the said harbour of Inverkeithing was an unsafe harbour in which to place the said vessel; and whether the defenders, or others acting by their orders, did, by gross negligence or gross unskillfulness, cause the said vessel to be placed in said harbour on or about said 16th May 1867, and detained therein from said date till on or about the 8th June 1867, whereby she suffered damage in her hull, rigging, and other parts, to the loss, injury, and damage of the pursuer?"

Schedule of damages laid at £2000 sterling.

The Lord Ordinary (BARCLAY) reported on issues, with this note:—

"The parties differ widely as to these issues. In the first place, the defenders maintain that the matters embraced in the first, third, and fourth issues should be the subject of one issue; the injuries done to the vessel, which are the subjects of the third and fourth issues, being merely part of the alleged damage resulting from the illegal seizure, which is the subject of the first issue. They also maintain that the second issue is not in any respect alternative to the first, there being no allegation on the record that any arrestment was used until after the vessel had been taken into the harbour of Inverkeithing.

"The Lord Ordinary is disposed to think that the injuries referred to in the third and fourth issues may properly be the subject of separate issues, as, if they were caused by improper or unskillful conduct, they may found a claim for damages, whether the vessel was wrongly taken possession of or not.

"From the peculiar phraseology of the sixteenth article of the condescendence, it is difficult to say that it contains any averment that the vessel was arrested before it was taken into the harbour. The Lord Ordinary is inclined, though not without hesitation, to think that it may be read as containing such an averment, as alternative to the leading averment that it was illegally taken possession of. He therefore thinks that the pursuer is entitled so to frame the second issue as to embrace the case of the arrestment having taken place in the roadstead, if that shall turn out to be the case.

"The defenders maintain, in reference to the averment in article sixteenth of the condescendence, that the only connection alleged to exist between them and the persons who took possession of the vessel, is, that they acted on the orders of the defenders, and that this ought to be inserted in the first issue, as the sole ground of responsibility alleged against them. This does not seem to be a matter of practical importance; but the Lord Ordinary thinks it would be more correct that the issue should bear that the vessel was taken possession of by persons acting on the orders of the defenders, and for whom they are responsible.

"The defenders further object to the second issue that there are not relevant averments to warrant an issue of the use of arrestments maliciously and without probable cause. The pursuer refers to the case of *Baillie v. Hume*, 16 D. 161, in which it seems to have been decided that it is sufficient to

make the averment in general terms, provided the pursuer's other statements are not such as to exclude the existence of malice and want of probable cause.

"Assuming that the pursuer is entitled to these issues generally as framed, the Lord Ordinary thinks they may be amended in point of expression."

GIFFORD and SCOTT for pursuer.

YOUNG and W. M. THOMSON for defenders.

After discussion, the issues, as amended, stood as above.

LORD PRESIDENT—The question is, whether these issues are to be allowed as fairly raised by the record. Now, the case is in some respects peculiar, and it is necessary to keep in view the situation of this vessel, and the master and crew, at the time when the proceedings complained of took place. The vessel was a foreign vessel, with a foreign master and crew, and had been taken to the roadstead of St Davids as being the most suitable place for loading her cargo. The reason assigned for this is the peculiar build of the vessel. The harbour of Inverkeithing, to which the vessel would naturally have proceeded otherwise, is alleged to be a harbour of an unsuitable and unsafe kind for such a vessel, and therefore she was lying in the roadstead of St Davids. In these circumstances, it is alleged that on 16th May, about nine o'clock at night, when the vessel was safely lying at anchor, some persons, acting under the authority of the defenders, illegally invaded her, took possession of her, and carried her into the harbour of Inverkeithing. Now, that action of itself—the illegal invasion of a vessel and carrying her off from her anchorage—is a legal wrong for which the parties committing it are unquestionably liable in damages, and that forms the subject of the first issue. I think the first issue fairly represents that part of the record, and is correctly enough expressed. But the pursuer further alleges that the harbour of Inverkeithing is not a place to which such a vessel should have been taken, or in which she could remain safely; that this was well known to the defenders; and that the pursuer remonstrated, and pointed that out to the defenders. Then, it is alleged that in entering the harbour the parties who had taken possession of the vessel, by their recklessness and unskillfulness, ran her up against the quay, and that, when the vessel was brought into the harbour, arrestments were executed on the dependence of a summons at the instance of the defenders against the pursuer. Then, it is said farther that this claim was unfounded, and that the action raised against the pursuer for the purpose of enforcing that claim was withdrawn, and that therefore the pursuers are in the same position as if they had been assoltized. Farther, they say that the messenger-at-arms, under the warrant of arrestment, caused the vessel to be laid alongside the quay wall, where in various ways she was damaged. Out of these allegations the pursuers propose to take the second, third, and fourth issues, and the question is, whether, within the allegations, there is sufficient matter to justify them. I have not much doubt that the record warrants the second issue. It is said, however, by the defenders that in this issue the place where the arrestments were used should be defined, whether it was after the vessel came into the harbour, or when she was still in St Davids roadstead, or in transition between the two places. I am of opinion that, in the special circumstances of this case, it would be unjust to re-

quire that specialty, and it is not necessary in point of relevancy. It would be unjust for this reason, that the pursuer, the master of a foreign vessel, unacquainted with the forms of diligence in use in this country, and possibly not speaking our language, may be in doubt as to the particular time when the arrestments were used. He may not be in a condition to condescend upon it, and accordingly he has wisely refrained from condescending on it. His record leaves it open to show that the arrestments were used either before or after the vessel entered the harbour. I think it is not necessary to insert the *locus* in the second issue. Now, the third issue proceeds on this, that the persons who were acting under the orders of the defenders caused the vessel to strike against the quay to her injury and damage. It is said that it is not shown whether this took place before or after the execution of the arrestment. That objection is founded on the assumption that it is a fact that the parties did make the vessel strike against the quay, and if that is the case, it is not of much consequence whether it was before or after the arrestments. If all that was done was without warrant at all, that may aggravate the damages; but, supposing the arrestments were executed before the injury took place, there might still be a quite good ground for damages, for the mere circumstance of arresting a vessel will not fairly justify parties in handing her over to ignorant persons who will cause damage. The fourth issue is said to be a part of the second issue. I do not think it is. The question is whether this harbour was an unsafe place for this vessel to be detained. Here, again, I think the wrong will be committed whether there was a good arrestment or not, and that the issue purposely leaves that open, because, even if the arrestments were good, and the damages to be claimed for malicious use of the arrestments may fail, he may still be entitled to prevail on the fourth issue if he show that the arrestment was followed by such gross unskillfulness as to cause damage. I am therefore for allowing these four issues.

The other judges concurred.

Agent for Pursuer—A. Duncan, S.S.C.

Agent for Defenders—John Ross, S.S.C.

Thursday, January 16.

BRIDGE OF ALLAN WATER COMPANY v.
ALEXANDER.

Advocation—Lands Clauses Consolidation Act—Competency. A company having agreed to purchase land for public works, and the compensation to be paid to the landowner having been ascertained in terms of the Private Act and the Lands Clauses Consolidation Act 1845, but the landowner refusing to accept the money on its being tendered, or make out a title, the company, under sections 75 and 76 of the Lands Clauses Act, consigned the money in bank, but did not expedite a notarial instrument. The company then presented a petition to the Sheriff for possession under section 89 of the Act. *Held*, under sections 138 and 139, that advocacy of the petition was incompetent.

Statute—Lands Clauses Consolidation Act 1845—Construction—Interdict. *Held*, that a company consigning money under sections 75 and 76 of the Lands Clauses Act, but failing to expedite

a notarial instrument, are not in a position to ask the Sheriff to put them in possession of the subjects, and may be interdicted from entering on them.

Sir James Edward Alexander is proprietor of Westerton, in the parish of Logie, and for a number of years he and his predecessor, Major Henderson, were in use to supply the village of Bridge of Allan with water by means of a reservoir on their property, from which the water was conveyed to the village by means of pipes. In 1866 the Bridge of Allan Water Company's Act (29 and 30 Vict., c. 241) was obtained by certain inhabitants of Bridge of Allan for enabling them to supply Bridge of Allan and places adjacent with water. By the 28th section of the Act, it was provided that the company should purchase the said water-works, including the reservoir, main-pipe, (distributing-pipes, and all appurtenances connected therewith, and the compensation payable to Sir James Alexander might be agreed on between him and the company, or, in case of difference, such compensation was to be fixed and determined by arbitration, provided that, in fixing the amount of compensation, the arbiter should take into consideration the value of the water, the plant, and the whole circumstances of the case. Section 29 enacted that, on payment of the compensation, Sir James was to grant a conveyance of the water-works to the company, and, on such conveyance being granted, the works were to form part of the undertaking of the company, and be vested in them for the purposes of the Act. Section 75 of the Lands Clauses Consolidation Act 1845 (8 Vict., c. 19), which Act is incorporated with the former Act, provides that, if the owner of any lands purchased or taken by the promoters of the undertaking, on tender of the purchase-money, or compensation either agreed on or awarded to be paid, refuse to accept the same, or fail to make out a title, or refuse to convey the lands, the promoters may deposit the purchase-money or compensation in bank, subject to control of the Court; and section 76 provides that, on such deposit being made, "the cashier, or other proper officer of such bank, shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same shall have been received, and in respect of what purchase the same shall have been paid in; and it shall be lawful for the promoters of the undertaking, if they think fit, to expedite an instrument under the hands of a notary-public, containing a description of the lands in respect whereof such deposit shall have been made, and declaring the circumstances under which, and the names of the parties to whose credit such deposit shall have been made, and such instrument shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of the parties for whose use and, in respect whereof such purchase-money or compensation shall have been deposited, shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands; and such instrument, being registered in the register of sasines in manner hereinafter directed in regard to conveyances of lands, shall have the same effect as a conveyance so registered."

No compensation having been agreed on between the parties, Mr Thomas Ranken, S.S.C., was ap-