PRESENT,

THREE LORDS COMMISSIONERS.

CAIRNS *v.* KIPPEN & BLACK.

1820.
March 17.

INSURANCE.—To recover L.1800 from the owners or underwriters, as the value of a cargo of oats, shipped at Limerick, on board the Lonsdale, insured to the extent of L.1650.

Insurance.—Found that a vessel was seaworthy; that she struck a rock, or the ground; and was lost by the negligence of the master in sailing after she struck.

DEFENCE.—The pursuer cannot maintain his action, as he has not averred the cause of the loss. For the owners—The vessel was seaworthy. For the underwriters—She was not lost by peril of the sea, or other risk for which they are responsible.*

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* In this case, before the Issues were prepared, a motion was made for a commission, which was opposed.

LORD CHIEF COMMISSIONER.—We are now in the situation in which the Court of Session were before the late Act passed; and, acting upon the analogy of their proceedings, I must grant the commission, if the affidavit is sufficient.

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ISSUES.

"1*st*, Whether the brigantine Lonsdale, "on board of which 1500 barrels of oats were "shipped, between the 17th and 24th of "January 1818, or about that time, for be-"hoof of the pursuer Cairns, and insured by "the defenders, Kippen and Others, at and "from Limerick to Greenock, by policy of "insurance dated 16th January 1818, (cargo "valued at L.1650,) was sea-worthy at the "time the risk insured against attached, and "at the time of sailing from Limerick?

"2*d*, Whether the said vessel was sea-"worthy when she sailed from Tarbert Roads "in the Shannon, on the 7th of February "1818?

"3*d*, Whether, when the said cargo was "shipped as aforesaid, the said ship was tight, "staunch, and strong, and in good and suffi-"cient repair, and properly equipped and "manned for the voyage insured?

"4*th*, Whether, on some day previous to "the 7th February 1818, the said ship, in "sailing from Limerick to Tarbert Roads, in "the river Shannon, on the voyage afore-"said, struck upon a rock, at or near the "Whelps in the said river; and Whether

" the striking of the said ship, as aforesaid,
" was in consequence of the negligence and
" misconduct of the master or pilot?

" *5th*, Whether the master of the said ship,
" well knowing her state and condition, did
" notwithstanding sail from Tarbert Roads
" aforesaid, on the 7th of February 1818;
" and Whether the total loss of the ship, on
" the 8th February 1818, was owing to the
" negligence and misconduct of the master in
" sailing from Tarbert Roads as aforesaid?" *

In January 1818, a quantity of oats was shipped in bulk, on board the Lonsdale, and was insured by the defenders, Yuile and Others, to the extent of L.1650. The vessel sailed from Limerick on the 24th, and on the 27th or 28th struck the ground in the Shannon; but the wind having carried her on, she proceeded to Tarbert Roads. In a few hours after sailing from the roads, in a breeze, the vessel went down.

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* On the margin of the Issues was the following:—
" N. B. This case is to be tried without the intervention
" of the pursuer, by counsel; and the underwriters, Kippen
" and Others, are to act as pursuers. The owners of the ship,
" Black and Others, are to act as defenders at the trial of the
" Issues.

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The log-book of a vessel, and protest taken by the master and mate, after the loss, may be produced as documents, and to prove the statements of the master and mate; but are not evidence of the facts stated in them.

In opening the case, Mr Moncreiff was about to read the protest taken by the master after the loss, and also referred to the log-book.

LORD CHIEF COMMISSIONER.—I suppose you mean to read the protest as part of your statement—not as evidence.

Moncreiff.—We put it in as a document.

LORD CHIEF COMMISSIONER.—If this is done by consent, the Court will not interfere; but it is desirable to have this point settled as soon as possible; especially as the practice here and at Guildhall appears to be different. If you put in the protest merely as a document, that is one thing, and not objectionable; but if you put it in as proving the facts stated in it, that is a different thing, and I think objectionable.

As to the log-book, two important questions arise; the one on the terms of the Issues, and the other on the document itself. When the Issues were preparing, I thought the term sea-worthy ought not to have been in the second, as I considered it to be a technical term not applicable to the situation of the vessel as then stated; but Mr Jeffrey mentioned, that by the decision in the case of La Gloire, 3. Dow, 24. the vessel must be

sea-worthy at the time she takes her second departure, though that is not to be found in the report of the case.

As to the document itself, the same question arises upon it as upon the protest. Is it to be rested on as proving the facts, or merely to prove the statement of the master and mate? This is one of the points which I am anxious to have settled, not only on the ground of the variance of the rules with regard to the protest, but also, as I think, in the case of Carleton and Strong, Vol. I. p. 32, I was led into a mistake, and admitted the log-book in too loose a way. I therefore do not wish that case to be held as a precedent.

Jeffrey.—It does not appear to us that there is here any question of law. It is not competent to alter the Issues, and we are entitled to have a foundation laid for the question, which was *argued* in the case of La Gloire, though it does not appear in the report. We mean to rest on this chiefly as shewing the conduct of the master, but also as a statement or admission by the defenders. It would have been received in the Court of Session.

LORD CHIEF COMMISSIONER.—If you merely mean to use the protest as the admission of the authorised agent of the party, I

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may be bound to admit it. But in this case there is a confusion from the situation of the parties, the question being between the insurers and the owners of the vessel. If the decision is, that the vessel was not sea-worthy, the case is at an end; but if it is that she was sea-worthy, there may still be a question behind. The Issue being solemnly approved of, we undoubtedly cannot now alter it; but in the course of the trial, facts may be proved that may be of importance to this other question.

The master of a vessel is agent for the owners; and statements made by him may be given in evidence by the underwriters.

A witness was called to prove what the master had said of the state of the vessel at the time of sailing.

Cockburn.—This is incompetent, as the master is not one of us.

Jeffrey.—The master is a party, and the competency of the proof cannot be doubted.

LORD CHIEF COMMISSIONER.—If this were a question betwixt the insurer and insured only, there is scarcely any part of the evidence which has been given which I should have thought proper; but this is a question also between the owners and insurers; and there is no point in law clearer, than that the master is agent for the owners. It is on this principle I admit the evidence, without en-

tering into the question, whether the master is a defender or not.

A witness was called, and asked, when a ship strikes in going out of a harbour, or soon after, what is the duty of the master?

The facts of the case under trial ought to be stated to a witness called to give his opinion as a person of skill.

LORD CHIEF COMMISSIONER.—If you had given evidence of the nature of the stroke, or if you describe it, you may ask the opinion of the witness on these facts; but you cannot put the general question in the manner you propose.

His Lordship then read his notes of the evidence of a preceding witness, when Mr Jeffrey submitted to the Court, that he was entitled to put the general question, or at least to read the log-book to the witness.

LORD CHIEF COMMISSIONER.—You are entitled to lay before the witness, all the evidence that has been given, and to ask his opinion on it as a person of skill.

Moncreiff, for the pursuers, opened the case, and stated the facts, and maintained that the defenders must shew that the loss was by peril of the sea. To do this, they must first shew that the vessel was sea-worthy, as they, and not the pursuers, ought

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to know this fact; if she is not sea-worthy, there is no contract, as the insurer has no chance of gain. The action is against both the owners and underwriters; but the question here is between the owners and underwriters; and in a question with the owners, every thing must "be in that state and con-"dition in which it ought to be." Park, 332 and 345; Christie *v.* Suretan, 8. T. R. 192; Douglas *v.* Scougall, 1816. 4. Dow, 269. The insurance is *at* and from; and there might be a question whether the vessel was sea-worthy at Belfast; but at all events she must be sea-worthy at the time of sailing. Park, 344 *(a)*.

A vessel is presumed sea-worthy; but if, in a short time after sailing, she becomes unmanageable, the opposite presumption holds. Park, 333 *(a)*; Parker *v.* Potts, 3. Dow, 24.; Watson *v.* Clark, 1. Dow, 336; and the defenders do not state any sufficient cause for the loss. We shall prove the 1*st*, 2*d*, 3*d*, and 5*th* Issues; the proof of the 4*th* lies on them.

Gordon, for the defenders.—In this case, though there are several Issues, the real question is, whether this vessel was sea-worthy at a particular time. As the oats were insured and never arrived, it is admitted that

either the owners or insurers are liable; we also admit, that we were bound to furnish a sea-worthy vessel, and aver that we did so. If a vessel founders apparently without any sufficient cause, the presumption is, that she was not sea-worthy; but here the accident she met with, combined with the foul weather, make these presumptions fly off, and the other party must prove that she was not sea-worthy at the time of sailing. They seem to hint that she must be sea-worthy at the time of sailing from Tarbert Roads; but I can find no authority or dictum in support of such an opinion. The master is in a difficult situation, and must do the best he can for all concerned.

The account in the log-book, as well as the protest, is made up by the master, and is therefore not evidence. Park never even mentions the log-book, and Marshall mentions it only as throwing light on the question of neutrality, and that the protest is not evidence so long as the master is alive. The objection was taken in the case of Carleton and Strong, Vol. I. p. 32.

Jeffrey.—The present proceeding is merely to ascertain two points upon which the Court of Session may found its decision.

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The points are, Whether this vessel was sea-worthy, and whether she was lost by the improper conduct of the master in sailing from Tarbert Roads.

It is admitted, that the weather alone was not sufficient to account for the loss; and therefore the presumption that the vessel was not sea-worthy would hold. But it is said she struck in coming down the river. Even if she did touch, it must have been so slight as not to injure a sea-worthy vessel.

On the second point, there is still less doubt. It is said witnesses who saw the vessel are to be preferred to those who merely give their opinion; but in this case the evidence must be that of opinion; and the witnesses swear that it was the master's duty to have returned, and to have had the vessel examined.

LORD CHIEF COMMISSIONER.—After so long and painful an attention to the evidence, I regret that it will be necessary for me to go into some detail; for though there are properly only two questions, there is some intricacy in the case, from the situation in which the parties stand to each other.

If the case had taken the usual course, this

would have been a claim by the assured against the underwriters, and the conduct of the master would have been a separate ground of inquiry; but here we have both questions, as this is a question between the owners and the underwriters.

The first subject of inquiry is, whether the vessel was sea-worthy; the second, the conduct of the master in sailing from Tarbert Roads.

The answer to the first Issue must be in reference to the law on the subject, and some explanation is necessary.

The term sea-worthy has long been understood as a technical term relative to the contract of insurance, which is a contract of indemnity, and has certain implied conditions. One of these is, that the vessel must be sea-worthy, and capable of performing the voyage; and the liability of the party does not depend on his knowledge that she was not sea-worthy.

When a party comes into Court claiming for a loss, the answer is, the vessel was not sea-worthy. This may be proved either by positive evidence, or by presumption; but if it is proved, there is an end to the right to recover.

In the first Issue the question is put, whe

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ther she was sea-worthy at the time the risk attached, and at the time of sailing? You may free your minds from the consideration of the first of these points, though you may, if you choose, answer both.

On the question stated from the Bar as to presumed unsea-worthiness, the law on the subject is laid down in Parker *v.* Potts, 3. Dow, 23. The words are, If without adequate cause, &c. (reads). The case referred to in the report was also from this country; Watson *v.* Clark, 1. Dow, 336. The principle is, that when inability to perform a voyage occurs soon after sailing, the presumption is, that the cause of this inability existed before the vessel sailed; but does this apply to the present case? If the loss happened without any supervening accident, you cannot find that she was sea-worthy at the time of sailing. But is this consistent with the facts proved by the same pursuer, in support of the 5th Issue? In that part of the case, evidence has been given, in order to shew the improper conduct of the master; and if you are satisfied on this branch, that the vessel was lost in consequence of the accident, then the presumption holds that she was sea-worthy be-

fore sailing. The question is, whether she had a latent defect, or was lost by a supervening accident. If you think she was lost without any accident, you will find her not sea-worthy; but if you think the accident sufficient to cause the loss, your verdict will be the other way.

2d Issue.—On this I early stated my opinion, and I am still satisfied that we cannot alter the terms of this Issue; but if you return an answer to it without explanation, it would, in my view of the law, leave a fact uncertain for the other Court. I hope the time will come, when the whole question will be tried in this Court upon the general issue; and in this way the evil arising from the omission of a particular fact will be avoided. It appears to me inconsistent to make the sea-worthiness attach at any time, except at the time of sailing; because, if the loss is held to be occasioned by a latent defect, the presumption that the vessel was not sea-worthy, draws back to the date of the policy, which, therefore, never was binding, and the risk never attached.

In framing this Issue, we have been guilty of a misuse of the term sea-worthy. Here it can only be dealt with in its popular, not its

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legal sense. If it is meant, whether the vessel was capable of performing her voyage, the question is included in the last Issue. If it is meant to apply to latent defect, it is included in the first.

3d Issue.—On this, I merely refer you to the evidence you have heard.

4th Issue.—As to the first question here, one or two witnesses spoke of a rock; most of them mentioned the ground. The precise point where she struck not being fixed, you may say she struck on her passage from Limerick to Tarbert Roads. You have no evidence of the negligence or improper conduct of the master or pilot; and you have evidence of the great rise and fall of the tides.

5th Issue.—It is understood that the verdict upon this will settle the rights of the parties. The first part is pure fact, the last is partly law.

There is a curious anomaly in the law of insurance, that the insurer is liable for the barratry of the master; but though this is the law, it is well understood that the owners, not the insurers, are responsible for the conduct of the master, if it is short of barratry. This is laid down by Mr Justice Lawrence, and has since been confirmed by Mr

Justice Chambre, though I have not been able to lay my hand on the cases. CAIRNS v. KIPPEN, &c.

The master being appointed by the owners, they must know his character, and how far he is to be trusted with property; at the same time the conduct of the master on this occasion was out of sight of the owners; and you must consider well how far his conduct was such as to bind the owners; at least, it is with this feeling that you ought to consider this part of the case.

It is a singular fact, that the accident is not mentioned in the log-book; and from this Mr Jeffrey wishes to infer that it did not occur: but all the witnesses who were on board, and one who was not on board, swear to it. Up to the time of the accident, no grain appeared in the pumps; but even if there had been a little, that is what occurs in the best vessels. After the accident there was a "deal" of grain; and you are to judge whether this was known to the master, and whether it was misconduct in him to sail with her in this state.

The two parts of this case bear on each other, and so singularly, that if we hold that she was not sea-worthy at the time of sailing, then the loss does not fall under this Issue;

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but if we hold that the coming up of the grain was occasioned by the accident, and that it was blameable in the master to sail, we must, on the other hand, hold that she was sea-worthy at the time of sailing from Limerick.

You have had much evidence as to the state of the vessel, and you have had the evidence of very competent witnesses on board, that it was not improper to sail. On the other hand, you have the evidence of opinion; and, with one exception, all these witnesses agree that it was a case for inspection. You have evidence of more frequent pumping after than before the accident, and also of an attempt at concealment and misrepresentation, which is always to be taken into view. The question is, whether the master judged wrong, and so wrong as to render the owners liable.

Verdict.—The Jury found that the vessel was sea-worthy at the time the grain was shipped, and at the time of sailing from Limerick—that she was not sea-worthy at the time of sailing from Tarbert Roads, in consequence of striking the ground on her way from Limerick to Tarbert Roads—that she was tight, staunch, and strong, &c.—

that she struck a rock or the ground on her passage, but that it did not appear to be by the negligence of the master or pilot—that, notwithstanding the striking, she sailed—and that the total loss was owing to the negligence of the master.

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Clerk, Jeffrey, and *Moncreiff,* for the Pursuer.
Jo. Gordon and *Cockburn* for the Defenders.

(Agents, *Gibson, Christie,* and *Wardlaw,* W. S. and *Alexander Youngson,* W. S.)

PRESENT,
LORDS CHIEF COMMISSIONER AND GILLIES.

ANDERSON *v.* PYPER & Co. &c.

1820. March 18.

Damages claimed against the proprietors, guard, and driver of a stage-coach, for injury done by an overturn of the coach.

AN action of damages against the proprietors, guard, and driver of a stage-coach, at the instance of a passenger hurt by an overturn.

DEFENCE.—The overturn was occasioned by a defective axle, for which the defenders are not liable.