MACKAY v. MACLEODS.

copy. This was objected to as neither the original, nor the copy authorized by the bankrupt act.

LORD CHIEF COMMISSIONER.—In fact, by the statute there are two originals, but this is neither of them, and the admissions not having been taken in the usual way, this copy must be rejected. As this is the foundation of the pursuer's case, if I had the power to nonsuit, this would be a proper case to exercise it. But not having this power, I must direct a verdict for the defender.

Verdict—" For the defender."

Robertson, for the Pursuer.
Hope, Sol.-Gen., and *D. M'Neill*, for Macpherson and Maclachlan.
Monteith for Macnicol.
(Agents, *Thomas Ker*, W.S. *David Brown*, W.S. *James Hamilton*, W.S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1827. July 12.

MACKAY *v.* N. AND M. MACLEOD.

Damages against the master and

AN action to recover from the master and the

owner of a vessel the value of a cargo of oats shipped on board that vessel.

MACKAY
v.
MACLEODS.

owners of a vessel for the value of corn lost on board the vessel.

DEFENCE.—The vessel was seaworthy; only a part of the cargo was lost, and the loss was caused by the violence of a storm, not by any fault of the defenders.

ISSUE.

" It being admitted that, on the 10th day " of December 1824, the vessel called the " Diana was the property of the defender, " Norman Macleod, and that, at the said time, " the defender, Murdoch Macleod, was master " of the said vessel:

" It being also admitted that, on the said " day, there was shipped at Clare, in Ireland, " on board the said vessel, 1583 barrels of oats, " the property of the pursuer; and that the " defender, Norman Macleod, by a bill of lad- " ing, dated the 10th day of December 1824, " subscribed by Murdoch Macleod, master of " the said vessel, undertook and agreed to de- " liver the said oats in good condition at Glas- " gow, the danger of the seas, fire, rivers and " navigation of whatsoever nature and kind " excepted:

" It being also admitted, that decree in ab-

MACKAY v. MACLEODS.

" sence was pronounced against the said Mur-
" doch Macleod :

" Whether the defender, Norman Macleod,
" failed to perform the said undertaking and
" agreement, to the loss and injury of the pur-
" suer ?"

Cairns v. Keppin, 2 Mur. Rep. 245.

Jeffrey, for the pursuer, said, That a person undertaking to deliver a cargo was liable for the loss, unless he used all diligence to preserve it. In this case the question is, whether the loss was caused by stress of weather, or whether the defenders failed in a most material part of their duty. After sailing, but before leaving the Shannon, one anchor was lost and another broken, and in these circumstances the duty of the master was to return to Limerick, and get his vessel made seaworthy; but he sailed, and she was lost; and it is maintained that they were not bound to go back to repair, and that, even if they had had the anchor, it would not have saved them.

Evidence taken in Ireland on commission read in Court without proof that the witnesses could not attend.

To the examinations of certain witnesses taken in Ireland being read, it was objected that there was no evidence of the causes of their absence.

LORD CHIEF COMMISSIONER.—The pre-

sumption in this case is, that the witnesses are not here, because they are not within the jurisdiction of the Court. The true distinction is, that, in case of a sick witness within the jurisdiction of the Court, the *onus* of proving the cause of absence lies on the party producing the deposition; but when the witness is beyond the jurisdiction of the Court, the *onus* is on the other party.

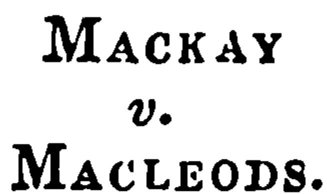
When the deposition of one of the witnesses was produced,

Cockburn, for the defender, objects,—Before his examination he was taken before a magistrate and precognosced upon oath. He acted as agent in the cause, and got L. 30 for his services, which is proved by a paper, the writing of which he denies; but I am ready to prove it his.

Moncreiff, D. F.—It is the practice in Ireland, in case of a loss, to take affidavits in this manner. If the paper mentioned is the one which was put into the witness's hand at the time of his examination, he denies that it is his writing.

LORD CHIEF COMMISSIONER.—As to the first objection, that there was an uncancelled deposition by the witness at the time of his examination, there is no difference whether

MACKAY
v.
MACLEODS.



the examination is taken here or abroad, provided instructions to that effect were in the commission; and perhaps it may be proper in future to insert such instruction. But it would be carrying matters very far to say, that this testimony, in the circumstances in which it was taken, is to be rejected. The rule for destroying the deposition is one for the protection of the witness; and if the examination had been in Scotland, the affidavit would have been cancelled; but in England, instead of being cancelled, the witness would have been cross-examined from it; and with such a rule there, and no instructions in the commission, it would be carrying matters to an extreme to reject the evidence. This and the other objection, as to his denial of the writing, go to his credit, and will be sufficiently before the jury.

LORD CRINGLETIE.—Precognitions here are frequently taken on oath, especially in the north. When the witness is called, the precognition is understood to be destroyed, but is not in fact destroyed, only it cannot be set up against his oath in Court; and the same must be understood in this case.

Incompetent to prove the loss of

In the deposition, a fact was stated as to the

master having acted in opposition to the opinion of the pilot, and thus having caused the loss of the vessel. This was objected to as a charge of barratry. On the other side, it was stated, that the jury must know all that happened to the vessel, it being at the same time admitted, that, if the jury were satisfied that the anchor was good, and that the loss proceeded from a different cause, then it was surprise.

Mackay v. Macleods.

a vessel from a cause different from that stated in the condescendence.

Lord Chief Commissioner.—The real question is, Whether the vessel was sufficiently found with anchors? and if the matter now proposed to be given in evidence is not sufficiently explained in the condescendences and answers, it cannot be gone into here.

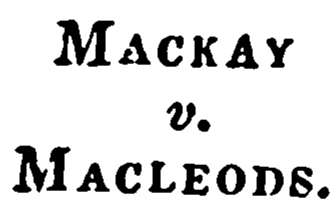
The point was then given up, and the answer by the witness was not read.

To the deposition of another witness, it was objected that he admitted that he had got L.30 for his evidence.

Moncreiff, D. F.—You may prove the fact, but not the admission.

Lord Chief Commissioner.—It is only proposed to prove an admission, and not any act done, for the purpose of countervailing what

MACKAY v. MACLEODS.



the witness swore; and when the defender comes to his case, he will have an opportunity of making what use he can of this.

Cockburn, in opening for the defender, said, The first question is the points the jury have to try, and we submit to the Court that they ought to direct the jury not to find against the defender, unless there is misconduct or negligence by the master. In the difficult situations in which a master is placed, he is entitled to use his discretion. When there is difference of opinion amongst naval persons, as to what ought to have been done, it may not be easy to say which is right; but it is a sufficient defence, that one experienced seaman would have acted as this master did; and we shall produce several who think he acted properly. The question is, whether he fairly exercised his discretion?

To succeed, the pursuer must prove that the master acted improperly, and that the loss was caused by that impropriety. This is not a question with insurers, or whether the vessel was unseaworthy; but the pursuer must connect the loss with the improper act of the master. The vessel was seaworthy when she sailed, and the loss was not caused by the want of the an-

chor; besides, there was more danger in going back to Limerick than proceeding to Glasgow. The pursuer has not produced any living witness before you who was present at the time of the loss.

In an action against the master and owners of a vessel for the value of goods lost incompetent to prove that the sum insured on the vessel had been paid on a reference. Evidence admitted at the trial to affect the credit due to a witness examined on commission.

A witness was called to prove that the insurance on the vessel had been paid under a reference. This was objected to, and the Lord Chief Commissioner observed, that the evidence was inadmissible, as this was *res inter alios*.

It was then proposed to call evidence to contradict the witness examined on commission, who denied having written or subscribed a paper shown to him.

Jeffrey.—This was stated as an objection to the witness at the time of his examination in Ireland, and they ought then to have been ready to prove it; but it is incompetent now at a distance of time, and when the witness is not present to explain. The time for reprobatory proof is past, and, not having been protested for, it is incompetent.

Cockburn.—If this is not competent, parties are in a curious situation with respect to evidence on commission; for the authority to the commissioner is to examine a certain individual, and under that commission he could not take

MACKAY
v.
MACLEODS.

the proof; and now at the trial it is said to be incompetent. We made the objection, and the paper being returned by the commissioner it is indecent to make the objection now.

LORD CHIEF COMMISSIONER.—This paper is attached to and returned with the commission for examining the witness. The object is to show that the witness did write that which he denies having written; and the question is, whether the necessary examination of a witness on commission shall have an additional disadvantage, which would not have been the case had the witness been present, and the whole proof taken at one time? We cannot so restrain the examination of witnesses, or prevent their true situation and character from appearing. We are in such a predicament, that, for the purposes of justice, we must admit the evidence. If there is any question of surprise that will be for after-consideration; but it is a most serious consideration, if we are not only to have the examination on paper, but not to have the means of trying the credit of the witness.

LORD CRINGLETIE.—This is not merely an offer to prove that the witness admitted that he had written the paper, but that this is his writ-

MACKAY
v.
MACLEODS.

ing, though the witness denies it. If the witness had been put in the box and denied it, could you not have called this evidence to prove the fact? Formerly evidence of this nature was got by protesting for reprobators, but this is impossible in trial by jury, where we must have the whole evidence at once. But this evidence, it is said, was taken on commission. The commissioner, however, could not have taken the evidence now offered; it must therefore be admitted now.

Moncreiff, D. F. in reply,—The argument of the defender is most extraordinary. It is, that, after a vessel sails, she is entirely under the discretionary management of the master, and that in no case can he be wrong, 1*st*, The obligation is to carry the cargo, and this implies that the vessel is seaworthy; and if the owner cannot show this, he is liable, as the loss is not by peril of the sea. 2*d*, We are to show negligence on the part of the master; and if we have proved this, we must succeed.

But the first question is, whether she was seaworthy? and the defender admits that she was so at sailing; but she was not seaworthy at the time of leaving the Shannon; and seaworthiness applies to charter-parties, as well as to policies

Wilkie *v.* Geddes, 3 Dow. 57.

MACKAY
v.
MACLEODS.

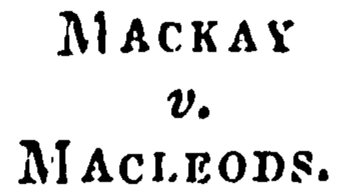
of insurance. Cases of necessity may occur where masters run the risk, but if a vessel is in a place of safety, the master must make her seaworthy. This was found in Parker's case; and in a later case in this very bay the verdict went against the owners.

Parker, *v.* Potts, 3 Dow. 23.
Cairns *v.* Kippin, 2 Mur. Rep. 245.

As to negligence, it certainly was the duty of the master to send to Limerick. With respect to the evidence brought to contradict our witness it is incorrect; and even taking the evidence at the worst for us, it is but one witness against another, and our witness is confirmed by circumstances, while their's is not.

LORD CHIEF COMMISSIONER.—You have now been attending for many hours to a case in which, from bodily infirmity, I doubt if I shall be able to give you the assistance I might have done, had it been brought within narrower limits.

In this case there has been much said of the disadvantage of proof taken on commission, and it is great, though in this case it is less injurious from the body of other evidence. With regard to the witness on whose testimony it was attempted to throw discredit, the affidavit he made was at a time when he was not aware that it was contrary to the law of Scotland, and

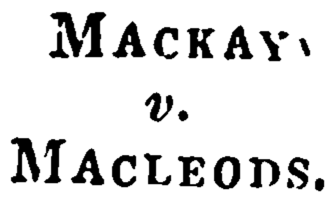


does not appear much to affect his credit; and as to the paper which he denied having signed on looking at it, though I am not fond of this sort of evidence as to hand-writing, the similarity of the writing to the genuine signature is not such as to make me think he has been guilty of perjury. In this case there is only one witness brought against him, and that witness is not confirmed by circumstances; and even in England, where one witness is sufficient to prove a fact, it requires two witnesses to convict a person of perjury.

The question here is, not as to the loss of the vessel or the value of the cargo lost, but whether you are to give L. 938, 0s. 6d. to the pursuer, or find a verdict for the defender? Whether the defender has, by the act of the master, been brought within the terms of the undertaking; for if he has, there must be a verdict against him.

The relative situation of an owner and master of a vessel is, that the owner vests in the master the utmost authority that can be given, and is liable for the acts of the master, as if they were his own. The situation of the owner relative to the freighter of a vessel, is the same as that of a carrier by land; and he undertakes to do all that is necessary for conveying the

MACKAY v. MACLEODS.



goods. The implement which he provides for the carriage must be sufficient; his vessel must be seaworthy; for that is a sufficiency which applies to charter-parties as well as policies. There is no doubt, that, had the vessel sailed originally in the state in which she was afterwards when she left Tarbert Roads, she would have been unseaworthy, and the contract would have been void; but she was seaworthy at sailing; and therefore the question turns on what the master was bound to do in the circumstances which afterwards occurred. The vessel becomes insufficient, and though this may have been by the act of God, still there are duties incumbent on the master. He is bound to do every thing which may enable the vessel to go on in safety. You are to draw the conclusion from the facts proved, whether he did use the means in his power? You have heard it proved that anchors are not manufactured at Limerick; but that at the time they might have been got there. Now, is there any evidence of the master having made inquiries on the subject? If he had inquired, and been informed that he could not get them at Limerick, then he did his duty. It is said, that, if he had gone to Limerick, it would have been a deviation from the voyage; and I am not prepared to say there was such a

necessity as would have justified his going there; but he remained six days in the Shannon; and there is no evidence of his taking any step to repair the injury; and the question is, whether the innocent affreighter or the owner is to suffer?

The questions are, whether the anchors were insufficient in Tarbert Roads? Whether the master did any thing to repair them? and whether the vessel was lost from the insufficiency of the means of holding her fast?

Verdict—For the pursuer, L. 953, 0s. 6d.

Moncreiff, D. F., Jeffrey, and *Ivory,* for the pursuer.
Cockburn, Cuninghame, and *Jameson,* for the defender.
(Agents, *Campbell* and *Macdowall,* and *William Smith.*)

1827. Dec. 20.

A new trial refused, the case having been sent to the jury on conflicting evidence.

The Court granted a rule to show cause why the verdict should not be set aside.

Jeffrey showed for cause, that the master was negligent in not going to Limerick; that the loss was caused by the drifting of the vessel.

Cockburn.—This is in opposition to two cases decided at Lloyds on a reference. There is no question of seaworthiness but negligence, and this is not to be tried by what we know now, but by the situation of the master at the time. The anchor, though broken, was ser-

MACKAY *v.* MACLEODS.

viceable, and there would have been more danger in returning than in sailing, as the voyage was short.

LORD CHIEF COMMISSIONER.—When the rule was granted in this case, statements were made, bearing on the manner in which I put it to the jury, which I was anxious to have cleared up. It was also said that settlements had been made at Lloyds; but as that was with different parties, evidence could not have been admitted. I do not consider this as a case of seaworthiness, as that is a technical term applicable to insurance; and if a vessel wants an anchor, though she perishes by lightning, the ship not being seaworthy, the contract is void *ab initio*. But here the questions were, what was the nature of the accident, and whether the vessel was lost by the accident and the negligence of the master? There was conflicting evidence as to the extent of the injury, and the duty of the master, which was sent to the jury; and they were of opinion, that the diligence was not exercised, which the freighters were entitled to expect, and that they ought not to suffer. The jury were of opinion, that the master ought to have exerted himself to repair the damage. We therefore sustain the verdict, as it is according to the weight of the evidence.

MACKAY
v.
MACLEODS.

LORD CRINGLETIE.—There is no doubt here, as it was a case of conflicting evidence. The negligence was the only point laid down to the jury, and that is assumed in statutes as a ground of subjecting the owners.

The new trial was therefore refused.

1828.
Feb. 1.

The Court cannot add interest to the sum found by the verdict.

Ivory moves, That interest from a certain date should be added to the sum found by the jury, or that the case should be remitted to the Court of Session for that purpose.

LORD CHIEF COMMISSIONER.—This ought to have been claimed from the jury, as our adding it now would be the Court finding a verdict. If this claim had been brought under the view of the Court and jury in the issue, it might have been included in the verdict; but we cannot now give it, as a verdict was taken for a specific sum. This Court has not original jurisdiction; and our duty is now to enter up judgment on the verdict, and for expences, in terms of the statute; and we have no legal or equitable power by which to do what is now asked.

The next question is, whether we can return this to the Court of Session, that they may deal with it according to their legal and equitable powers? I shall be happy to find that we have

GRAHAM v. WESTENRA.

59 Geo. III, c. 35, § 20.

such a power; but the 20th section of the act confirms, instead of removing my difficulty.

LORD CRINGLETIE.—You have limited yourself to a specific sum, and I am satisfied we cannot alter the sum in the verdict.

1828. Feb. 8.

On a subsequent day, judgment was given against the application.

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1827. July 16.

GRAHAM v. WESTENRA.

Damages against a superior for having conveyed away in liferent the superiority of the pursuer's lands.

AN action of damages for having conveyed away in liferent the superiority of the pursuer's lands, which had previously been conveyed to the pursuer's grandfather in fee.

DEFENCE.—The second conveyance was made *bona fide*, and partly by the fault of the pursuer. The defender will pay the sum received for it, upon the pursuer paying with interest the bill which his grandfather granted for the price.

ISSUE.

"It being admitted that the late Douglas