PRESENT,

LORD MACKENZIE.

WIGHT *v.* LIDDELL.

1827. July 21.

Demurrage, expences, and damages found for breach of agreement.

THIS was an advocation from the Admiralty Court of an action against the defenders for the demurrage and other expenses caused by their breach of agreement, and for not having a cargo of wood ready for delivery.

DEFENCE.—The vessel was too late of arriving, and was detained by the frost, and not by want of a cargo.

ISSUES.

"It being admitted that the pursuer is assignee of the estate of Johnston and Wight, late Merchants in Leith:

"It being also admitted, that on the 15th day of January 1815, the defender, William Liddell, promised and agreed to sell and deliver to the said Johnston and Wight, from 14,000 to 16,000 feet of wood, at the price of L.1, 2s. 6d. per ton, deliverable at Pictou,

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"or a safe port in the neighbourhood, first "open water in 1815:

"Whether the said Johnston and Wight "sent a vessel called the Friendship to receive "delivery of the said wood; and whether the "said vessel arrived at Pictou in the month of "November 1815?

"Whether the defender failed to furnish "the timber at the port aforesaid in due and "proper time; and thereby delayed the sail-"ing of the said vessel, to the injury and da-"mage of the said pursuer?

Cockburn opened the case for the pursuer, and stated the agreement by the defenders to furnish a cargo of wood at Pictou, or a convenient port in the neighbourhood. That the case turned on two facts: 1. Whether there was wood? 2. Whether, if there was not wood, this was the cause of the detention of the vessel?

There was not wood, and this was the cause of the detention of the vessel, as she arrived in time to have sailed with a full cargo. Even if she had time only to take on bóard a ballast cargo of wood, she would have sailed with that, if obtained, and so the failure to furnish wood must still be the ground of damage,

for she had thrown her ballast overboard, and could not get other ballast, if she could not get wood.

The master of the vessel was asked on cross-examination, whether he wrote to the owners, and what he wrote? To this it was objected, that they ought to show the letter to the witness, if they had one: To which Lord Mackenzie assented.

Incompetent to ask the master of a vessel what he wrote to the owners, without showing him the letter.

Moncreiff, D. F. opened for the defender, and said, The original contract was to deliver in the usual way, early in spring; but the vessel did not arrive till November, which was a breach of contract by the pursuer. The question is, whether, on the special contract, we failed, to the loss and damage of the pursuer? There was not time to load the vessel in the usual way, and this was admitted by the pursuer.

Jeffrey.—I object to the statement of any admission in a different cause.

Moncreiff.—This action was referred to by the pursuer in his opening.

Incompetent to give in evidence admissions made by a party in a different cause.

LORD MACKENZIE.—I am of opinion that you cannot put in evidence a condescendence in a different cause, where there was a different interest at stake.

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When the depositions of witnesses taken in America was produced, it was objected, there must be evidence that the witnesses are not in this country. The agent was accordingly sworn and examined.

Depositions admitted in evidence, there being no reason to believe that the witnesses were in this country at the date of the trial.

LORD MACKENZIE.—These I understand to be the depositions of persons all resident in America, and that nothing has been heard of them since the examination. I understand the agent to swear that he never heard of these persons being in this country, and that he believes them to be Americans. It would be extending the regulation too far to hold, that it excluded evidence taken on commission in such circumstances. There seems reasonable ground to be satisfied that the witnesses are still in America, and cannot be brought into Court here.

Incompetent to prove statements made by a witness, unless it is part of the *res gestæ*, to contradict what he swore at the trial.

One of the depositions stated, that the witness had frequently met the master, who told him the reason of the detention of the vessel. To this it was objected, that it was reprobatory proof against what the master had stated on oath, and offered without any question put to him on the subject. It was answered, that the master was agent for the pursuer, and that his statements were the statements of the party,

and that the evidence was also good as contradicting the witness.

LORD MACKENZIE.—I am of opinion this is not competent, though, if it were part of the *res gestæ*, I should think it evidence.

Jeffrey in reply, said, This case relates to the fair construction of a contract between ordinary men, and to the consideration of contrary evidence. There is an extravagant charge of breach of bargain made against us, but the true question is, whether they delivered wood in a safe port? I do not believe that they had wood; but if they had, they were negligent in not delivering it.

LORD MACKENZIE.—On the first issue there is no dispute; but on the second, the parties differ, and there are various things included in it. 1st, Whether the defenders failed to furnish in due time the stipulated wood at the port stipulated? 2d, Whether this failure delayed the sailing of the vessel? 3d, Whether the delay was to the injury and damage of the pursuer? If you are satisfied on all those points for the pursuer, then you must find for him, and assess the damages; but if on any of them you are not satisfied, then you must find for the defender. If there was no failure to

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deliver, or no delay by the failure, or if the delay was not to the injury and damage of the pursuer, you must find for the defender. The original bargain seems clear from the letters, (which his Lordship read.) It appears that a vessel was not found or sent so soon as was expected; and it is said this was a breach of bargain, which frees the defender, as she ought to have been ready "first open water." But this is carrying matters too high. It was the wood, not the vessel, which was to be ready "first open water." The delay in sending the vessel cannot free the defender, if it was possible that the wood could be brought home. The defender was bound to have wood ready at Pictou or the neighbourhood, however late in the season the ship arrived, provided the having it could have been of use to the pursuer; and the conduct of the partners of Liddel when the ship arrived, showed that this was their understanding of the contract.

This brings it to the question in the issue as to the failure to deliver. It is said the wood ought to have been at Pictou. The agreement is at Pictou, "or a safe port in the neighbour-"hood." The place to which the vessel was ordered appears to have been in the neighbourhood; but if you are satisfied that it was not a

safe port, then there is a failure. To me there does not seem to be any evidence that it was not a port or a safe one. If there was any undue delay in giving the orders at Pictou, that must be added to the other delay as against the defender. Of the question, whether the defender, or those for whom he is responsible, delayed to deliver timber, three views may be taken.

1st, That by undue delay the ship was prevented from sailing in December with a full cargo. 2d, That by such delay she was prevented from sailing at that time in ballast. 3d, That she could not have sailed before the shutting of the ports by the frost, but was detained a certain time by undue delay to deliver wood in spring. In the first view, you must find for the pursuer, and then in assessing the damages, you will give the pursuer the demurrage, and the expences caused by the detention of the vessel. There is no evidence of other damage; none that the wood would have come to a more profitable market at one time than another. In the second view, if you think there was undue delay to deliver wood, and that by this delay the vessel was prevented from coming home in ballast before the ports were shut, then the delay caused the demurrage and expenses. But,

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Qu. Whether matter which would have formed a bar to the action, may be stated as a ground for a New Trial?

per contra, in case the vessel had come home in ballast, the freight must have been payable without a cargo or any profit from the voyage. Another vessel must have been sent next year for the rest of the timber. In this way, by the timely delivery of wood for ballast only, the pursuer, though he would have saved demurrage and expenses, must have had a heavy loss to set against that saving; and in estimating the damage from failure to make such delivery, you cannot put the pursuer in a better situation than he would have been in, had there been no failure. Should you be of opinion that the delay took place only in spring, then it was only for a few days at the rate of L.7, 7s. a-day, and the amount of that demurrage seems the damage.

An objection was taken to allowing the expenses, as they were untaxed; but Lord Mackenzie said, that, provided the jury found for the pursuer, he thought him entitled to have these expenses taken as between client and agent.

Verdict—For the pursuer on both issues, in respect that there was not timber sufficient for ballast delivered in a reasonable time after the ship arrived in November 1815, and assess the

damages at the sum of L. 2021, with interest thereon from 12th October 1821 until paid, and also at the further sum of L. 234 for breach of bargain.

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Jeffrey, *Cockburn*, and *Cuninghame*, for the pursuer.
Moncreiff, *D. F.*, *Skene*, and *Jameson*, for the defender.
(Agents, *Walter Cook*, W. S. and *J. Mowbray*, W. S.)

A rule was obtained to show cause why the verdict should not be set aside.

1827. Dec. 6.

A new trial granted, the reason assigned in the verdict not warranting so large a sum of damages.

Jeffrey showed for cause, That there was strong evidence in favour of the verdict; that the evidence on the other side was on commission; and that, the capacity and integrity of the jury not being questioned, the Court ought not to interfere. It is said we were bound to make out that there was not sufficient wood for ballast, as the amount of damages depended on it. It was stated to the jury, that if there was sufficient wood for half a cargo, then the pursuer was not entitled to full damages.

Moncreiff, *D. F.*—This is an action brought against the defenders for breach of bargain, and the letters show the breach to have been by the pursuer, as the bargain was on condition of the vessel being there at the first open water.

LORD CHIEF COMMISSIONER.—You put this

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as a case of breach of bargain by the pursuer, where no damages ought to have been allowed. Would not this have been a bar to the action, if stated at the proper time? I know how this would have been dealt with in England, but doubt how it ought to be dealt with here. You may, however, state it, if it bears on the question of new trial.

Moncreiff.—The vessel did not arrive till after the season, and must take the risk of the season. There is no contrary evidence as to there being timber in the ponds; but there was not time to deliver it; and as the pursuer is in fault, he is not entitled to strain the time to the utmost. The verdict is against evidence, and ought to be set aside, if against the weight of the evidence. It is not an answer to the issue, as it finds that there was not ballast, but does not find as to a full cargo, which was the only agreement into which I entered.

LORD CHIEF COMMISSIONER.—This point was not opened at moving for the rule; and if it is of any importance, we must hear it more discussed.

LORD MACKENZIE.—There is one point on

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which I wish for argument. The finding of the jury implies that the vessel did not arrive in time to get a full cargo, but that she was in time to have sailed with ballast before the ports shut, provided there had been wood ready; but that there was not wood to ballast her. There was evidence that her ballast was thrown overboard, and that other ballast than wood was not to be had. But how can this view be reconciled with the amount of damages? The expense of returning next year for the cargo should have been deducted, or an allowance made for the loss by coming home in ballast, whereas the damages are equal to the whole demurrage, and a sum for breach of bargain, which seems at least equal to all the expenses. Now this seems putting the pursuer in a much better situation than if a ballast cargo had been actually delivered.

LORD CHIEF COMMISSIONER.—There is here a large sum found, and the case is one which it is difficult to unravel. The verdict is of the nature of a special finding, but the jury do not fully explain their meaning. We are ready to hear more on the subject, but it would probably be better to settle the case out of Court.

1828. Feb. 6.

Jeffrey.—We did every thing with a view to

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a compromise, as recommended by the Court. It is said the terms of the verdict imply that there was not time to load a whole cargo; and therefore, that too large a sum has been given, as, if the pursuer had got only ballast, they must have sent another vessel the following year. But this construction of the verdict is not forced on the Court. An observation made by the presiding Judge, it is said, probably gave rise to the finding in the verdict; and it is held that the jury took the observation on the evidence of want of a ballast cargo, but did not take the direction that the damage should be lower.

LORD CHIEF COMMISSIONER.—This is a very difficult question, and I would suggest, that, if both parties were wroug, the damages ought to be abated.

LORD CRINGLETIE.—I have considered this case with all the attention in my power, and the verdict appears to me a very hard one for the defenders, and one in support of which I cannot give my vote. It is contrary both to law and evidence. In the log-book, which is sworn to, it is stated that there was no wood; but there is no evidence that the master went to see whether there was wood; and, on the other side, there is evidence that there was plenty of wood,

but that the ponds were frozen; and, as there was no protest taken, the presumption is, that the master was in fault; and there are circumstances showing that he did not intend to go away, and other vessels of smaller burden were in the same situation. There is also strong evidence to show, that, with such a vessel as this, she was too late of arriving to expect to be loaded. The jury, therefore, I hold to be wrong.

If there was no wood, the verdict should have been for the pursuer, with the damages claimed. But the verdict only finds that there was not a ballast cargo, and gives the whole loss, and L.200 for breach of bargain. Was the bargain for a ballast cargo? On the whole, the verdict, in my opinion, is not in conformity with the issue sent, and is contrary to evidence.

LORD MACKENZIE.—I have difficulty in holding that the verdict was not competent under the issue, neither can I hold, that, on the face of the verdict, it appears contrary to evidence, on the ground that there does not appear to have been any want of wood at all. There was evidence to show that the defenders had wood, but there was contrary evidence; and though the master did not go to examine the ponds, or take a protest, yet he swore to facts

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which made this a question for the jury. If I were to form my opinion as a juryman on this matter, I might differ from them; but I cannot go so far as to set aside the verdict on this ground.

On the other point, however, on which we had argument to-day, I think we ought to grant a new trial.

There are three views of this case; 1. That the vessel arrived in time for a full cargo; 2. That she arrived in time for a ballast cargo, and that the master would have returned with this; 3. That she was so late that there was not time to take any cargo. The verdict is for the pursuer, in respect there was not wood sufficient for ballast; and my understanding of this is, that the jury state what they consider the wrong done, and for which they found damages, viz. that there was not wood enough for ballast furnished in a reasonable time. On the whole complexion of the case, I think this the true meaning of the verdict. Looking at the arguments used at the time, and all that was before the jury, I had, and have the impression, that the words were put in the verdict to show, what, in the opinion of the jury, constituted the wrong subjecting the defenders. It was not the want of a full cargo, as there was not time to take

that on board and sail, but the want of wood for ballast, for which there was time, but which was not supplied; and therefore they find against the defenders. And being of opinion that this was the view taken by the jury, I must come to the conclusion, that the damages are erroneous. If they could have been modified, it would probably have been the best result.

LORD CHIEF COMMISSIONER.—The other judges having come to the same conclusion, though on different grounds, it is not necessary for me to say much. But when I compare the issue with the verdict, and the verdict with the evidence, I coincide with my brethren in the opinion, that complete justice has not been done. But in a case which has depended so long, and is of such a nature, it gives us the greatest uneasiness to come to this conclusion, and still I hope the parties will now settle it by agreement.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

ANGUS AND COWAN *v.* MAGISTRATES OF EDINBURGH.

1827. July 23.

Finding that magistrates had wrongfully

THIS was an action of declarator to have it