

tion of any expence incurred as to the second and third issues, *e. g.* if any witnesses were called to prove them. This is frequently done in the Court of Session. The defender is clearly not entitled to his expences.

KIRK  
" GUTHRIE.

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

DAVIDSON *v.* LESLIE.

1817.  
Dec. 17.

THIS was an action in the Admiralty Court to recover the price of 600 barrels of herrings, under the following circumstances :

The pursuer sold to the defender 500 barrels of herrings, to be shipped at Pultney, the harbour of Wick, in Caithness. He had 600 barrels more lying in his stores at Lybster and Dunbeath, in Caithness, which, in the course of two days, he also sold to the defender. The bargain for the 600 barrels was written on the same paper with that for the former quantity, and they were to be delivered free on board ; but nothing was said of the place of shipment. Five hundred and fifty-seven barrels were put on board, when a storm came on, and the vessel was wrecked off Dunbeath.

An action for the price of a cargo of herrings lost on the coast of Caithness, though not all on board at the time the vessel was wrecked.

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## ISSUES.

“ Whether the defender, Alexander Leslie,  
“ upon the 1st September 1814, or about that  
“ time, purchased from the pursuer 600 bar-  
“ rels of herrings, at the rate of 37s. per bar-  
“ rel, then lying in the pursuer’s stores of  
“ Lybster and Dunbeath, to be shipped free  
“ on board at the said places, for Peterhead,  
“ for behoof of the defender? And whether  
“ the whole, or if not the whole, what number  
“ of the said 600 barrels of herrings were so  
“ shipped, in terms of said bargain, on board  
“ the brigantine Amity when she was lost, to-  
“ gether with her cargo, on 24th October  
“ 1814?

“ Or whether, by the terms of the bargain,  
“ the said herrings were to be delivered at  
“ Pultney harbour, and to remain at the risk  
“ of the pursuer until delivered there?”

When the case was called on for trial, it was stated by the pursuer, that the defender was not only bankrupt but dead; accounts of his being drowned having just reached town.

The Court having suggested that the trustee appearing as defender was sufficient,

*Forsyth* and *Jeffrey*, for the pursuer, con-

The death of the defender is not a sufficient reason for putting off a trial, if appearance is made for the trustee on his sequestrated estate.

tended, That they were entitled to have the case delayed till the representatives were called ; that there might be a reversion to the bankrupt ; that if he was alive, and put in prison, his friends might come forward, or, being dead, his representatives may incur a passive title.

LORD CHIEF COMMISSIONER.—By the act of sederunt, notice ought to be given of a motion for putting off a trial, though that, perhaps, might be got over in the present case, from the recency of the intelligence of the death ; but there must be an affidavit by the agent that he believes him dead. By Act of Sederunt, the trustee appearing is sufficient. Consent would have gone a great way in this case, but the trustee is ready to go on. Unless some great injustice can be pointed out, it appears that the case can be as well tried now as at any subsequent period.

LORD GILLIES.—What possible interest has the party to object to this? What can he get by a decree against the trustee and bankrupt together, which he will not get by one against the trustee? What evidence is there of the death? In this Court, it is not sufficient to state it; there must be an affidavit that the agent believes it true. If this is not done, I

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am clear we ought to proceed, as I can conceive no possible interest they have to delay. It is vain to think the representatives will incur a passive title, and the advantage sought by putting him in prison is an unfair one.

*Jeffrey* wished to give in a minute stating the fact that the defender was dead; but LORD GILLIES observed, This cannot appear on record, unless an affidavit is put in.

The defender contended, that the bargain for the herrings being on the same paper, and having reference to a bargain for herrings to be shipped at Pultney, they must be brought to that port before they were at his risk. He farther contended, that it was the general practice to ship herrings at that port, not at Lybster and Dunbeath; and that they were not free on board till the whole were on board.

The witnesses, however, on both sides, swore that more herrings were shipped on the coast than at Pultney, and that they considered free on board to mean free of expence.

LORD CHIEF COMMISSIONER.—The proof for the pursuer is extremely simple; and the defender's statement as to the place of loading, and the meaning of free on board, being con-

tradicted by his own witnesses, it is only necessary to attend to the terms of the issue.

On the first, you may find that he made the purchase, and that 557 were delivered free on board, and negative the second issue.

Verdict for the pursuer on both issues.

*Forsyth and Jeffrey*, for the Pursuer.

*Cockburn*, for the Defender.

(Agents, *Alex. Forsyth* and *Arch. Duncan*.)

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PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

JOHNSTON and PROUDFOOT v. PENNYCOOK  
and OWLER.

1818.  
February 16.



THIS was an action of damages against one of the defenders for not implementing a sale of cattle ; and against the other defender for subsequently purchasing them, knowing of the previous sale ; and for affronting, calumniating, and abusing the pursuers in a public market.

Damages for  
breach of con-  
tract.

DEFENCE.—The first bargain was not com-