PRESENT,
THE LORD CHIEF COMMISSIONER.

1823.
Feb. 24.

THOMSON *v.* BISSET.

Findings—that a vessel was so damaged as to be unable to proceed on her voyage—that she was in pilot's fair-way—but that no pilot could be had.

THIS was an action on a policy of insurance, the nature of which will appear from the issues.

ISSUES.

"It being admitted, that the policy of in-
"surance in process, dated the 11th of Octo-
"ber 1819, was entered into betwixt the pur-
"suers and defenders, whereby the hull and
"materials, &c. of the vessel called the Aid,
"were insured by the defenders, at and from
"Riga to Londonderry, to the extent of
"L.100 each.

"It being also admitted, that the said vessel
"sailed upon the voyage insured, and anchor-
"ed in the north harbour of Scalpa, on or
"about the 15th day of October 1819,

"Whether, on the morning of the 16th of
"October, or about that time, the said vessel
"was lost, or so damaged as to prevent her
"from proceeding on the voyage aforesaid?

"Whether, at the time of her being so lost "or damaged, the said vessel was in pilot's "fair-way, and was in a situation where a pilot "might have been had, and where a pilot ought "to have been on board; and whether the "said vessel had a pilot on board at the time "of her being lost or damaged as aforesaid?"

In opening the case for the pursuer, Mr Jeffrey stated, That he understood that the Jury were to find specially the facts, in order that the Court of Session might decide the law, and he wished instructions whether it was necessary to refer to legal authorities.

LORD CHIEF COMMISSIONER.—Looking at the issues, there may, no doubt, questions of law arise on both. In cases of this sort, it is extremely difficult to foresee the questions that may arise, and it is the strong inclination of my mind, if it were satisfactory to the public and to the judicatories of the country, to reduce cases of this sort to general questions, under which all the facts could be proved so as to raise the question of law. I am ready, in this case, to do it in either way the Bar think best.

At all times, a special verdict, in its proper form, constitutes a most proper ground for de-

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ciding a question of law—it contains not the facts proved, but the result of the evidence. But the other mode, by a general verdict, is the mode pointed out on ordinary occasions, and has been found to answer the purpose, as a Bill of Exceptions puts the facts as effectually on record as in the other method. If this is the procedure adopted, I shall direct the Jury —a Bill of Exceptions can be tendered to my direction, and the facts can be so taken now as to answer every purpose. A motion may then be made for a new trial, and an exception taken to the decision of the Court, whether it agrees with me, or differs from me in opinion.

In a case of a different nature (deathbed) tried at Dumfries, I made the same reference to the Bar as at present—it was left to me to take the course I thought best; and having a clear opinion upon the law, I preferred having the question discussed on a Bill of Exceptions. In that case, however, the facts had been gone through, and here we are prejudging, and I think it premature to decide at present, as one state of facts may exclude the question of law.

Moncreiff, for the defender.—The only object we have, is to fix the fact clear of the law, and a special verdict is perfectly fair to all parties.

LORD CHIEF COMMISSIONER.—You might get special findings on the question of abandonment and as to the pilot, but neither a special verdict, nor special findings, have preaudience, which a Bill of Exceptions has.

At the conclusion of his speech, Mr Jeffrey admitted that the situation where the vessel was lost would be a fair-way if there were any pilots to be had, but the inhabitants of the island cannot be pilots, as they could not navigate the vessel.

LORD CHIEF COMMISSIONER.—The question here will be, Whether pilot, in the issue, means a Trinity House, Branch Pilot, or whether it means one of the persons you have described. I am not prejudging the question till I hear the fact. The question is still open in England. In the case referred to by Marshall, the Court avoided the decision of whether a regular qualification was necessary, there being no pilot on board.

Abbot's Law of Shipping, p. 174.

Marshall, Ins. 165.

An objection was taken to the protest by the master as not evidence.

LORD CHIEF COMMISSIONER.—It is not evidence of the facts stated in it, but merely proves that a protest was taken.

The protest by the master of a vessel is not evidence of the facts contained in it.

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When certain admissions by the defender, and accounts of the expence of repairing the vessel were put in,

LORD CHIÈF COMMISSIONER.—This is an action to recover the sum underwritten on the voyage in question. How do these accounts apply to the case of a total loss?

The process was then given in to show that the want of a pilot is the only defence.

LORD CHIEF COMMISSIONER.—I suppose it is agreed that the first issue is to be tried?

A party to the action rejected as a witness, though it was alleged that he was made a party by mistake.

The second witness called was Kid, the master of the vessel.

Jamieson objects, He is a pursuer in the action, and is answerable for the expences, and is interested in the question at issue.

Jeffrey, for the pursuer.—The procurator made him a party without authority, and we are ready to release him. Being a party is not of itself a sufficient objection. But the objection depends on the fact, which the defenders must prove if they persist in it. Insurance requires a special mandate, and the master did not even know of this policy, and could not claim upon it.

Moncreiff, for the defender.—I was surprised to hear that we had to prove any thing. This is an attempt to make one of themselves a witness. We are entitled to a verdict against him.

LORD CHIEF COMMISSIONER.—This is one of the most anxious questions ever put to me here. The objections to testimony range themselves under competency and credit, and Courts of Law are anxious, if possible, to let the objection go to the credit rather than the competency of the witness, and in the present case, I could not admit this witness without stating, that there never was a witness where the objection to his credibility was stronger—indeed, I do not recollect any one where the objection was so strong, as his letter from Scalpa is not an abandonment, but is written as owner. If application had been made in sufficient time, the other Court might have relieved us from this difficulty, and might, as the Lord Chancellor frequently does, have directed that this person, though not otherwise admissible, should be examined on account of a *penuria testium*, or some other peculiarity in his situation.

The points that embarrass us here are, That he still stands as a pursuer—there is no de-

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cree by the Judge-Admiral, finding that he is not a party; nor was any application made to have the case sent back to him, and I do not know if we could have returned it on such a ground without the consent of the party. We have sent cases to have errors in the summons corrected, but that has been done by consent. One of this nature was a question as to a house in Aberdeen, which we did not send till there was a consent; and if we could not do it to have the nature of the injury corrected, how could we do it to have a party removed from the record? As no consent was asked, and, of course, none granted, and as he still stands a party on the record, is it competent for me, in the middle of a trial, to remove him? By the practice of the Jury Court, I could not have done so at any stage of the proceeding, and still less can I do it after the Jury are sworn, and when I have not time to consider the collusion that may possibly exist in such a case.

There may have been an error in making him a party, but I must hold him a pursuer, and holding this, I am asked to admit him as a witness in his own cause.

It is the clearest law that a party cannot be a witness. Even where there is *penuria testium*, that is not a sufficient ground for examining a

party. We have, with one exception, held, that a person in such a situation is an incompetent witness, and that exception confirms the rule. In the case of Murray and Tod, we admitted the witness to give evidence on a branch of the cause in which other parties were alone interested.

Vol. I. p. 227.

As to his interest, there are circumstances in his situation that render it too delicate to let the objection go merely to his credit, and not to his competency. The remit was made in June 1820, at which time a condescendence had been given in, and the averments made, which were of consequence in preparing the issue, and ever since that time this person has remained a party.

If this case had gone to proof on commission, could he have been examined in such circumstances? If this is answered in the affirmative, it certainly would make a strong impression; but if, in that case, he must first have been discharged from the action, the inference is the other way.

On the whole, I reject this witness as he is a pursuer, and I have no power to discharge him. And also from the whole circumstances of the station he held in the cause being calculated to make too strong an impression on his

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mind to allow the objection to go merely to his credit. I am ready, however, to receive a Bill of Exceptions.

A witness, before giving his evidence, allowed to look at a written report made by him on the subject.

A witness was called who had been employed to inspect the vessel, and report upon the state in which she was. It was proposed to show him the report.

Moncreiff.—They are not entitled to our private information.

Jeffrey.—He was employed by the whole underwriters, and not by the defenders alone.

LORD CHIEF COMMISSIONER.—As this is not meant to be given as evidence, I see no objection to the witness looking at his own writing for the purpose of refreshing his memory.

In opening the case for the defender, Mr Moncreiff said, There was not a total loss, as the vessel was repaired in a few weeks at an expence of only L. 200: That there was no evidence to show the voyage was lost; neither was there any evidence as to the cargo. And that the owners were bound, by the custom of trade, to have on board a person acquainted with the navigation in such a situation, who are to be held pilots.

LORD CHIEF COMMISSIONER.—You state correctly that there must be a total loss to warrant abandonment. You apply that to the ship. I have stated that I consider the insurance to be on the ship for the voyage; and that if there is a loss of the voyage, then it is a total loss. I wish you to address yourself to that view of the case before you close.

With respect to the custom to have on board such a person as you mention, Would not evidence of this be evidence of the law? I am anxious that the law should be cleared up on this point, and it is fixed, that by the insurance law a vessel must be fully equipped, and if she is not sea-worthy, the underwriters are discharged from liability for the loss. One of the things necessary in certain situations is, that a pilot should be on board. In the present case, your argument must be, that it would have been wise and prudent conduct on the part of the master, in the situation in which this vessel was placed, to have had such a person as you describe on board, and that the want of this rendered the vessel unsea-worthy.

Before you proceed with your evidence, I wish again to call your attention to the form in which this case may be disposed of. I now know the pursuer's evidence, and have heard what

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you mean to prove. The aim seems to be to have a special verdict, and this might be done, but I think it would be better to allow the discussion to arise on a motion for a new trial. All the facts will be got from my notes.

If the verdict is against evidence, then the motion will be on that ground. If my direction is against law, this is equally a ground for a new trial.

From the opening of the defender, it would be extremely difficult to get such a special verdict as would be satisfactory. The manner which I have stated as the best in which to dispose of this case, is that practised in England in all cases of total loss.

Moncreiff.—We fear the Jury may be influenced by their own views of the law.

LORD CHIEF COMMISSIONER.—I must direct the Jury whether this is a place requiring a pilot; and whether this was a total loss.

In the course of calling the evidence for the defender, Mr Jeffrey admitted, That if there had been a branch-pilot at the station, the master would have been bound to have him on board, and objected to the defenders calling

insurance-brokers to prove the practice in cases similar to the present.

LORD CHIEF COMMISSIONER.—As the insurance-brokers act by decided cases, it would be asking an opinion on a question of law. Proof of usage of trade has in some cases been admitted, but not in cases of this nature. The question here is, whether the vessel was so damaged as to prevent her from proceeding on her voyage? A court of law must give its decision on the question, and if you were to ask the question at the witness, I should probably have to give a different opinion.

The witness was then placed in the box, and the objection sustained without further argument.

Moncreiff.—We have witnesses to prove the practice of deducting one-third from the repairs for new work.

LORD CHIEF COMMISSIONER.—The question here is as to a total loss, and the evidence offered is not material to the fact here in issue. The deduction of this would go to the settlement of an average loss, but is not applicable to the present case.

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Jeffrey, in opening and in reply, said, This is an action by the owners of a vessel against the underwriters, and the defenders resist the demand, on the ground that this was a partial, not a total loss; and that the vessel was not sea-worthy, not having a pilot on board in circumstances requiring a pilot. This was a total loss, as the vessel was so much damaged, as to render the voyage not worth pursuing.

The delay and uncertainty of whether she could be repaired, would have justified the abandonment.

The master's letters contain nothing unfair, and are produced to create a prejudice.

We do not dispute that she was in pilot's fair-way; and, therefore, the only question is, whether a qualified pilot, or person capable of navigating the vessel, could be got at the place. The master saw the rock on which the vessel struck, and the loss was occasioned, not by his negligence, but by the anchor accidentally dragging.

Moncreiff.—There are just two points, and it will be easy to apply the evidence to them.

The loss happened in circumstances where it was the duty of the master to have a person on board to act as a pilot, the want of which frees the insurers entirely from the loss. I

shall not trouble you with the distinction as to branch-pilots; you are to judge of this on the principle of common sense; this was in pilot's fair-way, and it was the duty of the master to take assistance in passing through it.

On the first issue, it is not maintained that every degree of delay entitles a party to abandon, and I shall maintain that no delay entitles the owners of a ship to abandon. The vessel in this case was repaired for L. 209, which was not one-fourth of her value, and so they were not entitled to abandon. This is not a perfectly fair case, as, in a private postscript to a letter, the master advises the owners to take 65 or 75 per cent., which, with the price, would have given them more than the value of the vessel. We tendered more than would be due upon an average loss.

LORD CHIEF COMMISSIONER.—I should have been happy if I could have dictated a special verdict for you to have found; and with that view I have, in the course of the trial, put in writing the result of the evidence; but I cannot say I have done so to my own satisfaction, and the result of turning the subject in my mind has been, that, even if I could have done so, it would not have been the proper course to follow.

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If the Judge, in trying a case, has formed a clear opinion on the law as arising out of the facts proved, he ought to state it, and the Jury then apply the facts to the law. If there is no opportunity of having the law discussed before, or if the Judge has doubts, then the Jury are to find the facts specially. But the scrutiny this case has undergone, has satisfied me that every justice will be done by stating the evidence and the law as applicable to the facts. If I had only to do with you, I am satisfied that you would take my opinion on the law; but as this will be carried to another tribunal, I shall state the reasons and authorities on which that opinion rests.

It is for you to consider the veracity of the witnesses and the truth of the facts; and if you are wrong in fact, an application may be made to set aside the verdict as contrary to evidence; if I am wrong in law, a Bill of Exceptions may be tendered, or an application made for a new trial, and the Exception taken to the decision of the Court.

It would require much time to frame a special verdict, and I must still occupy a considerable portion of your time, for though it is not my custom to recite all the evidence, still I think it right, in the present case, that the par-

ties may have an opportunity of correcting any errors in my notes.

The second issue contains four questions. I wish I could have selected the evidence applicable to each, but I must go through it as it was given. His Lordship then stated the venditions, the policy, the parol testimony, and the letters, particularly one from the master, of 25th October, which stated that the greatest part of the cargo was saved, but that only a small part was not damaged: That the testimony appeared to him fair on both sides, and stated what appeared to him the general run of the testimony as to the damage: That, on the other points, it appeared that the vessel was in pilot fair-way, but that no pilot was to be had;—that there were people who pointed out the dangers, and that there was evidence both ways, as to the duty of having one of these people on board. His Lordship then said,

On the first issue, you must find according to what you believe to be proved; and though, for other reasons, I must go more at large into the law, to you I would say, in general, that this was a total loss. The right to abandon depends upon its being a total loss. At all events, the pursuer would be entitled to a finding on the state of the vessel; and I am

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distinctly of opinion that the loss was such as amounted to a total loss,—that the vessel was so damaged as to prevent her from proceeding on her voyage,—that it was the loss of the subject insured, and so would have warranted an abandonment on the 16th of October.

I consider the law of insurance to be the same in England and Scotland; and, therefore, cite English cases. In Cazalet and others *v.* St Barbe, the principle on which the present case turns is laid down, though the facts differ. In that case, Mr Justice Buller lays it down, that the insurance is on the ship for the voyage; if, therefore, the ship or the voyage is lost, I hold it a case for abandonment. In this case the insurance was on the ship for the voyage,—the object was to carry the cargo safe to its destination; but the vessel was stranded, and stopped for many weeks. It may be said in defence, that the damage only occasioned delay, as, by sending for materials to Greenock, the vessel might have completed her voyage; but I hold that the voyage was lost, as the cargo was lost, and that, if the voyage was defeated by the loss of the cargo, the defence stated is insufficient. This, too, was in the beginning of winter,—the repairs must take a considerable time, and could the cargo

1. T. R. 187.

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be in perfection at its end? None of the proof of the delay and the repair is to be compared with the fact of the injury to the cargo.

In the present case, the insurance does not include the freight and cargo; but, in my opinion, this does not take it out of the principle laid down in a case mentioned by Marshall and Park, in which I consider the import of Lord Mansfield's judgment to be, that the injury having rendered the voyage of no avail, that renders the loss total; and, therefore, in the present case, I think the Jury will do right in finding that the vessel was so damaged, &c. The case I have last mentioned is said to have been shaken by the subsequent case in the 2d vol. of Maul and Selwyn, (which I have not been able to get,) and a case in 2 Camp. 623; but these are cases of retardation, and here the cargo was so much injured as to prevent her proceeding on her voyage. The object was defeated by the great proportion of the cargo being lost. The cargo being of a perishable nature makes this case depend on the principle of the former case. If you find according to this direction, you will find that the vessel was not totally lost, but was so damaged as to prevent her from proceeding on her voyage; and I tell you that a voyage is defeated, when the cargo

Marshall, Ins. p. 585. Park, Ins. 260.

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is so damaged as to make the voyage not worth pursuing.

The second issue divides into four questions, but the first and last are conceded by the pursuer. A great part of the question here arises from the different meaning of the term pilot, in its technical and popular sense. One of the fishers on Scalpa may be a pilot in the popular sense of that term; but we must here take it in the sense in which the want of a pilot renders a vessel unsea-worthy. A vessel being sea-worthy, implies not merely that she is stout, staunch, and strong, but that she is properly manned, and that she has a pilot on board when a pilot ought to be on board. If she is not sea-worthy from a defect in any of these particulars, the contract is at an end, and the law holds that the owners shall not recover; if there is no pilot on board when a pilot ought to be on board, the underwriters are free, though the loss may be occasioned by lightning from Heaven; his being on board could make no difference, but the law holds that his not being there frees the underwriters. In the present case, the question arises, What is a pilot? Is he a person who takes up the office himself? Is he a fisherman? Is he a person with a token, or without one?

It is not contended that it was necessary for the master to take a pilot the whole way from Orkney, it is only said, he ought to have had one in the particular position near Scalpa. If the plea had been that the vessel was not seaworthy, as she had not a pilot the whole way, that would have been averred and proved.

At Scalpa there are no regular or branch pilots, there are only persons who practise as such; there is no evidence as to their skill, and there is contrary evidence as to the duty of having one on board; there is no established signal, and it is in evidence that, when a signal is made, these persons do not consider themselves bound to go on board. The master did not take an irregular pilot on board, but in this issue, pilot must be taken in its technical meaning, and not as applied to a person that may or may not come at his pleasure, as in this way it would not be in the power of a party to make his vessel seaworthy, which he may do where there are Trinity-House or branch-pilots.

The Chief Justice states, That the master of a ship must put his ship under charge of a regular pilot, and in Law and Holingsworth, the Court of King's Bench do not decide that a vessel without such a person would be seaworthy. In the whole circumstances of the case,

Abbott's Law of Shipping, 174, edit. 1812.

7 T. R. 160.

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therefore, I think I am in a situation to state, that, though the vessel was in pilot's fair-way, and though no pilot was on board, it was in a situation in which no pilot could be had.

It appears to me that the only way to extricate the law is, to hold that pilot, in this issue, must mean such a pilot as law recognizes, and not a person who takes the duty on himself; and, therefore, you will be right in finding, that this was not a situation where a pilot could be had, and therefore not a situation where one ought to have been on board. There may be some points of novelty in this case, which are fit to be questioned, and may be carried to the Court above, either by Bill of Exceptions now, or on a motion for a new trial.

I am sorry to have detained you so long, but this is a case of first impression. The only difficulty in it is, whether the vessel was so damaged as to be unable to proceed on the voyage? and upon this, I trust, I have stated my views with sufficient clearness to enable the party to seek his redress if I am wrong.

Verdict.—Finding on the first issue—"That, "on the morning of the 16th October 1819, or "about that time, the said vessel Aid was not lost, "but was so damaged as to prevent her from

"proceeding on the voyage aforesaid: Find, "on the *second* issue, that, at the time of her "being so damaged, the said vessel was in pi- "lot's fair-way, but was not in a situation "where a pilot might have been had, and, there- "fore, was not in a situation where a pilot "ought to have been on board, and the said "vessel had not a pilot on board at the time of "her being so damaged as aforesaid."

This verdict was afterwards abandoned, and a verdict entered for the pursuer, subject to the opinion of the Court of Admiralty, on a case agreed upon by counsel, and drawn up from the Lord Chief Commissioner's notes.

Jeffrey and , for the Pursuers.
Moncreiff and *Jamieson*, for the Defenders.
(Agents, *Ramsay* and *Imrie*, and *Wm. Miller*.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

ARMSTRONG *v.* VAIR and ALSTON.

1823. Feb. 28.

Damages for defamation.

THIS was an action of damages for sending a challenge to fight a duel—for posting the pursuer as a coward, &c.—and for a libel con-