proof was closed. The pursuer's agents used as much diligence in procuring evidence as they possibly could. But they did not hear of the foregoing facts in time to be available in the proof, and there was nothing in the evidence suggesting them, or suggesting inquiries to be made at the parties named. The evidence, as it was daily taken, was published in the newspapers, and it was believed that this induced the persons who can give evidence as to these facts to speak upon the subject, and thus they were learnt by the agents for the pursuer.

MACDONALD for the pursuer and respondent.

BALFOUR for the defender and appellant.

At advising—

LORD PRESIDENT—The admission of additional evidence, more especially in actions of divorce, is a matter of great delicacy, and the competency of the new averments must be strictly judged. In this case I have no doubt of the admissibility of the matter contained in articles 1 and 2 of the condescendence before us. The allegations in the record, as originally made up, were general. They averred a course of continued adultery with Grant extending over nearly a year. These averments were supported not by proceeding to prove any single act of adultery, but the case was constructed on the basis of inferring adultery from a long train of facts and circumstances, and the pursuer excused himself from taking this course by saying that he did not know when the particular acts of adultery were committed. In articles 1 and 2 of the condescendence of *res noviter* the pursuer sets out specific acts of adultery. I greatly doubt whether it would have been competent to prove these allegations under the record as it formerly stood. To render such proof competent either at the trial or now it was necessary to add a condescendence.

The question still remains, is the pursuer entitled to have the record opened up in order that he may add matter which ignorance prevented him from founding on in his former record, and which is now well and relevantly averred? I am prepared to admit the first two articles, and to proceed to make up the record of new by allowing the defender to answer them, and thereafter to close the record, and allow additional evidence.

As to the third article of the new condescendence, I entertain a different opinion. That is an allegation of facts which falls within the sixth article of the original record. The facts here set forth might have all been proved under the original record, and just amount to additional facts and circumstances from which to infer adultery. I do not think that we can admit the averments in that article to proof. I am therefore for admitting the first two articles and rejecting the third.

LORD DEAS—There is more delicacy in admitting a condescendence of *res noviter* in a case of divorce for adultery than in any other. This action is still undecided, and it is a point in favour of the pursuer that the only judgment that has been pronounced is in his favour. Still I should not be inclined to admit them unless the fresh statements are both *specific* and *important*. Now, nothing could be more specific or more important than the statements in articles 1 and 2 before us; so important are they, indeed, that if established they would substantiate his case independently of the evidence already led. We must of course be specially on our guard against the admission of false evidence. If we see anything palpably like an attempt to defeat justice by the introduction of false evidence we are bound to refuse to admit it. I see nothing of that sort here, and I agree with your Lordship that we should admit these two first articles; but, on the other hand, that we should reject the third for want of those conditions which I have just insisted upon.

LORD ARDMILLAN—The pursuer is in a position which, according to recognised usage, entitles him to get added to the record anything which is properly *res noviter*. Looking to the two first articles of this condescendence, and to the original record, I think that these are averments which he should be allowed to add. Of course the question whether they are really *res noviter venientes ad notitiam* is one which remains to be inquired into on the evidence, just as much as the truth of the averments themselves.

LORD KINLOCH concurred.

The Court accordingly "allowed the record to be opened up, and the first and second articles of the said condescendence of *res noviter* to be added to the record; refused to allow the third article to be added to the record," &c.

Agents for Mr Walker—Henry & Shiress, S.S.C.
Agents for Mrs Walker—J. B. Douglas & Smith, W.S.

## *Tuesday, November* 1.

### M'INTOSH, PETITIONER.

*Messenger-at-Arms — Execution of Service.* The Messenger's execution of service of this petition bore that he had "passed and in Her Majesty's name and authority," &c. Whereas the fact was, that his warrant was only an order or interlocutor of this Court.

The Court commented on the irregularity, but they allowed the execution to stand, on the ground that the real warrant was properly set forth, and that it was more or less true that the Messenger did "pass in Her Majesty's name and authority," as he was a Messenger-at-Arms, and acted under the authority of this Court, to which Her Majesty's was delegated.

## *Tuesday, November* 1.

### SMITH *v.* CRAIK & CO.

*Jury Trial—Damages—Expenses.* Where a jury give substantial damages, though only a portion of the random sum claimed, the rule is that expenses are carried; and, unless there is any glaring misconduct of the case, the Court will not go into the proof to see whether every part of the evidence was necessary for the success of the pursuer.

This case came before the Court upon a motion of the pursuer, to apply the verdict which had been given in his favour. On his afterwards moving for expenses, the defenders objected to his getting full costs of suit, on the grounds (1) that he had only got a verdict for a portion of the sum claimed; and (2) that he had led much irrelevant and unnecessary evidence, particularly as to the character of a certain road.

In disposing of the question of expenses—

The LORD PRESIDENT said, the idea that a pursuer is not to get full expenses because he claimed a random sum of £2000, and only succeeded in obtaining a verdict for £700, is one which cannot be for a moment entertained. So long as the damages are substantial, it is a rule in this Court that they carry expenses. It is quite impossible to listen to the other points attempted to be made by the defenders. To go into the proof, and say whether this little bit of evidence, or that little bit was too much, and unnecessary for the success of the pursuer's case, is a course which this Court cannot take. I must add, that I consider that the pursuer proved his case in a very substantial manner, and after the explanations we have had from my brother Lord Ardmillan, who presided at the trial, I do not think that there is any reason for animadverting upon the manner in which he led his evidence.

Agents for Pursuer—Leburn, Henderson & Wilson, W.S.

## *Tuesday, November* 1.

### MACKENZIE *v.* PITBLADO.

*Damages—Undue and Unwarrantable Delay.* Circumstances in which the Court found that undue and unwarrantable delay in the prosecution of a voyage had occurred on the part of a master and owner of a vessel, so as to subject him in damages for loss of market, &c. The Court being of opinion that certain conduct on his part, on and shortly after the completion of the loading, threw on him the obligation of increased activity in seizing the first opportunity for sailing, which he had failed to do, chiefly because the tackling and equipment of his vessel had not been got on board at the proper time.

This was an appeal from the Sheriff-court of Perth, in an action at the instance of James Mackenzie, potato merchant in Cupar Fife, against David Pitblado, sole registered owner and master of the ship "Agnes Campbell," of Perth. By charter party entered into at Dundee, on the 16th December 1868, between Pitblado on the one hand, and Mackenzie on the other, the defender engaged to sail with all convenient speed for Balmerino, there to take on board a cargo of potatoes belonging to the pursuer, and proceed therewith to London, and deliver the same to the consignee on being paid freight at a certain specified rate. The action was for the "sum of £400, or such other sum as may be modified in the course of the process to follow hereon, as damages sustained by the pursuer in consequence of the undue and unwarrantable delay of the ship or vessel called the 'Agnes Campbell,' of Perth, or in consequence of the undue and unwarrantable delay of the defender, the master of the said vessel, in proceeding in terms of the charter party on her journey from Balmerino to London, which ship or vessel, though completely loaded by the pursuer on the 31st of December last, and ready to proceed on her said voyage immediately thereafter, did not, in consequence of the said undue and unwarrantable delay, reach London till the 8th day of February last, whereby the pursuer has suffered serious damage through loss of market, and by and through the injury done to the cargo by its being so long kept at sea, or on board the said vessel."

The following facts and circumstances were brought out in evidence:—

That the vessel having been chartered in Dundee on the 16th December 1868, crossed, after the lapse of a few days, to Balmerino Bay. At Balmerino she took on board a cargo of potatoes amounting to about 107 tons. She took about eight days to load, and the last few tons were pressed forward from the various farms on the last day of December, so as to complete the loading that afternoon, and enable the vessel to sail by the early morning tide of the 1st January 1869. Her loading was accordingly finished by the afternoon of 31st December. The potatoes were all put on board at the sight of the pursuer's superintendent. They were proved to have been in good condition and unfrosted. It appeared, however, that there was severe frost upon the night of December 31st, and that the last few loads had not been sufficiently covered and protected after being put on board. The vessel being ready to sail by the morning tide of 1st January, did not do so, the captain alleging that the pilot refused to take him off in consequence of the calm. The pilot, however, was not adduced as a witness. On the night of the 31st December the captain and some of the crew were on shore drinking, and on their return to the vessel the captain and his son, the mate, quarrelled and came to blows, in consequence of which the mate deserted the vessel. By the afternoon tide of January 1st the vessel got under weigh, but only proceeded as far as Wormet Bay, about one and a-half miles down the river, where she came to anchor, it being discovered that a warp had been left behind. On the 2d she again weighed anchor, but ran aground before leaving Wormet Bay. The captain then went over to Dundee to obtain a seaman to replace his son, who had deserted at Balmerino. On the 4th the captain took the vessel down to Dundee Roads, when he again went ashore to get his compasses, oars, and a supply of bread, all which he had neglected to take on board before leaving Dundee for Balmerino. From the 4th to the 7th he lay in Dundee Roads. On the 7th he proceeded as far as the Ferry Roads, but there alleged that he was brought up by bad weather, and was detained by contrary winds from the 7th to the 20th January. This was proved to be more or less the case. On the 20th he was able to get out of the Tay, and reached Harwich on the 3d February, where he was obliged to put in along with a great many other vessels. It was not till the 9th February that he reached London. On arriving there it was found that much of the cargo was damaged. On this subject, however, a joint minute of parties was put in process, to obviate proof, to the effect that, in the event of the defender being found liable in damages, such damages should be assessed at £250, being £70 for loss of market, and £180 for deterioration of cargo, reserving all the defender's rights and pleas.

It was farther proved, that during the time which elapsed between the 1st and the 20th of January, there had been a good deal of drinking among the captain and crew, though not sufficient to render them incapable of their duty. That on the 8th January the pursuer entered a protest against the captain of the 'Agnes Campbell' for not sailing, and communicated the same to him; and finally, that at any rate, between the 1st and 7th of January several vessels left Dundee for ports in the north of England, and arrived with perfect safety, and after remarkably good passages.