Saturday, March 20.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MONAGHAN *v.* BUCHANAN.

Reparation—Negligence—Steamer.

A passenger steamer was lying ready to start at a quay on the river Clyde with the tide at flood and her bow pointing down the river. The captain, according to a common practice, gave the orders simultaneously to loose the bow-rope and to draw off the gangway. The firstof these orders was immediately obeyed, and the vessel's head swung outwards from the quay before the gangway was removed. While it was still on a person tried to pass along it from the quay to the vessel. As the vessel's head continued to swing outwards from the quay, the gangway slipped from her and he was thrown into the water. He brought an action of damages against the owner of the steamer. *Held* (*diss.* Lord Craighill) that the captain of the vessel was in fault, as he had ordered the bow-rope to be thrown off before the gangway was withdrawn; that there had been no contributory negligence on the part of the pursuer; and therefore that he was entitled to damages.

This was an action by Andrew Monaghan, Glasgow, against Walter Buchanan, proprietor of the river steamer "Benmore." The pursuer intended to go to Greenock on business on the 1st July 1885. He went to the wharf at the Broomielaw at twelve o'clock on that day, at which hour the steamboat "Benmore" was advertised to sail, and was, when on the gangway between the steamer and the pier, precipitated into the water under the circumstances detailed below. He was severely injured, and in this action claimed £250 damages. He averred that the accident happened through the captain of the "Benmore" negligently ordering the bow-rope to be thrown off and the steamer to move off while the gangway was still resting on the boat and quay for the use of passengers, and that the boat was in motion before any attempt was made to haul the gangway ashore, and that he was not warned of the danger, and that it was defender's duty to see that the gangway was hauled off before the ship was moved or any of the ropes loosened. The defender denied fault, and maintained that the accident was due to the pursuer's own carelessness in attempting to get off the steamer after he got safely on board, and when the gangway was being hauled away. The defender alleged that the pursuer had got on board the steamer in safety, but that he stepped back again on to the gangway, and that the accident was caused solely through the reckless and negligent conduct of the pursuer "in so doing after the order had been given to haul away the gangway, and while the men on shore were in the act of doing so."

A proof was led. It appeared that the pursuer arrived hurriedly at the wharf just as the boat was starting at twelve o'clock. A little behind him was a woman with whom he was acquainted, and who intended also to go by it. She was the wife of a friend who was on the boat before they arrived. The tide was rising, and the method of turning the boat's head out from the quay, and so as to pass a boat at the berth before her, was to let go the bow-rope and let the rising tide work the vessel's head out. The stern-rope is in such circumstances not taken off so soon, but is used to help the ship in getting properly away. Some captains give the order to take off the gangway and to loose the bow-rope simultaneously; sometimes the gangway is hauled away before the ropes are let go, the hauling away of it being done by the pier-master and those under his orders; some captains order the gangway to be taken off before the rope is let go.

The woman who followed the pursuer was stopped and not allowed to go on the gangway, but he himself got on the gangway. The evidence was conflicting as to whether any attempt was made to stop him, but it appeared that when he did get on it the boat was moving slowly outwards with the bow-rope off. The men holding it at the stern end deponed that they could not take it off because the pursuer was on it, and the captain that he had given the order simultaneously to let go the rope and haul off the gangway. It takes slightly longer to haul off the gangway than to let go the rope. The evidence for the pursuer was to the effect that he had not reached the steamer when the gangway came off the paddle-box of the boat and he fell into the water, followed by the gangway, which the men at the shore end were unable to hold; the defender's case being that the pursuer got on to the paddle-box and immediately looking round and seeing that the woman was not getting on board, stepped on the gangway again which the men were hauling ashore, and hence the accident. Independent witnesses who had been on the steamer or on the wharf were called in support of both views. The harbour-master was called for the defender. His evidence is quoted by Lord Craighill.

The Sheriff-Substitute (LEES) pronounced this interlocutor:—"Finds that on 1st July 1885, as the steamer 'Benmore' was about to start from the Broomielaw wharf, on her voyage to Greenock, the pursuer, hurrying along the gangway between the wharf and the paddle-box of said vessel succeeded in getting on board said steamer: Finds that he thereafter, and although the gangway was being hauled off from the vessel on to the wharf, went on to the gangway in order to try and get a Mrs Miller, who had been with him, allowed to come on board the steamer: Finds that the steamer having meantime, owing to the action of the tide, swayed outwards from the wharf, the gangway, with the pursuer on it, fell into the water, and he was injured thereby: Finds that the pursuer has failed to prove that the injuries he thus received were due to the fault of the defender: Finds that, in any event, he by his own negligence contributed to said injuries: Finds, in law, that the pursuer's injuries, not being due to the fault of the defender, or of anyone for whom the defender is responsible, or, at any rate, materially contributed to by the pursuer's own fault, he is not entitled to recover compensation from the defender for said injuries: Therefore assoilzies the defender from the conclusions of the action, and decerns."

The pursuer appealed to the Second Division of the Court of Session, and argued—The defenders here were in fault in two respects:—(1) They left the gangway between the quay and the vessel as the vessel was moving off. They had

thrown off the bow-rope so that the flood-tide forced the head of the vessel away from the quay while the gangway was still on. The gangway being on was an invitation to the public to go on board. They were therefore liable in damages if any accident occurred. (2) They were in fault, because if the gangway was left between the pier and the vessel while she was moving off from the pier, they ought to have had persons stationed at the shore end to warn passengers of their danger, but they did not do so. The evidence showed that the pursuer had never got on board the vessel at all.

Argued for the respondents—The gangway was not really between the shore and the vessel as an invitation to passengers; if the pursuer and others had not rushed upon it, the gangway would have been withdrawn. An endeavour was made to stop him, but he rushed on, and so contributed to the accident. The usual course on the Clyde was to give the order to throw off the bow-rope and withdraw the gangway simultaneously, and the order would have been obeyed if the pursuer had not rushed on to it. If the course of withdrawing the gangway before the bow-rope was thrown-off was followed, the danger incurred by persons leaping from the quay on board would be much greater than that incurred under the present practice. The pursuer had got safely on board, but had turned round on the gangway again to hasten some-one, and thus the accident had happened.

At advising—

Lord Young—This is an appeal against a judgment of the Sheriff-Substitute of Lanarkshire in an action of damages brought by a man who met with very serious injuries while endeavouring either to step on board or to step off the steamer "Benmore," a steamer which plies on the Clyde, and the action is brought against the owner of the steamboat. The ground of the action is that while the "Benmore" was lying at the wharf at the Broomielaw in Glasgow, a gangway was placed between the wharf and the paddle-box of the steamer so as to enable intending passengers to go on board, and so long as the gangway remained between the wharf and the steamboat intending passengers were entitled to think it was safe for them to venture upon it; that when the appellant was thus going on board the vessel by means of this gangway the vessel moved away, and he fell into the river and the gangway on the top of him, so that he received very severe injuries. He further says that this accident occurred through the fault of the defender, or of those for whom he is responsible, in culpably, recklessly, and negligently causing the bow-rope of the steamer to be thrown off, and that the flood-tide moved the steamer off while the gangway was still resting on the vessel from the quay for the use of passengers. The defenders say in answer to this, that the order to draw off the gangway and to throw the bow-rope were given as in the usual course, and that the two orders were given simultaneously; that the bow-rope was immediately thrown off in pursuance of this order, and that the gangway would also have been withdrawn, but that that was prevented by a rush of three men on to it. The defenders further say in answer that the pursuer had actually crossed the gangway and got safely aboard the steamer, but that the accident happened in consequence of his desiring to call a companion to come aboard, that in doing so he stepped back on the gangway from the paddle-box, when to his own knowledge the steamer was in motion away from the wharf.

Now, the Sheriff-Substitute has taken the view of the defenders and has assoilzied them—that is, he has held it to be a reasonably safe practice for the captain of a steamer such as this to order the bow-rope to be thrown off before the gangway is withdrawn from the vessel. The Sheriff-Substitute thinks that the defender and the captain of the steamboat did their duty by having people at the end of the gangway resting on the shore, ready to haul it off the vessel. Accordingly, as he says, he thinks the pursuer has himself to blame for the accident that occurred, and therefore he cannot claim redress. Now, I am the furthest in the world from saying that there is not evidence in the case tending in the direction of the Sheriff's opinion, and I should not like to say that his views are unreasonable. But there is a conflict of evidence, and on that point and without saying one word against the testimony of anyone who may be adverse to my view of the case, I think the balance of the evidence is so strongly in favour of the pursuer's statement of the case that I am bound in the discharge of my duty to state my opinion.

The captain here followed a common practice, but I think that according to the evidence it is the more common and certainly a safer practice not to order the bow-rope to be loosed, when the tide is rising and the bow of the vessel is pointing down the river, until the gangway is withdrawn. There is no doubt evidence that it was a common practice among the steamers plying on the Clyde to give the order as it was done here, that is, simultaneously. I think the safe practice is to see the gangway withdrawn before the bow-rope is thrown off and the tide forces the boat's head away from the pier. I asked more than once during the debate if there was any reason for adopting the less common, though no doubt common enough practice of giving the orders simultaneously on this occasion, but no reason was given. The safety of the course of removing the gangway before the bow-rope is thrown off is obvious. I do not mean to throw any doubt upon the truthfulness of the witnesses, who say that they tried to prevent the pursuer from going on board, but it is curious that no word was spoken. The only way in which anyone endeavoured to prevent the pursuer from rushing on the gangway was by the stretching out of an arm. Now, in the circumstances as they were here, at the moment of the vessel's departure that would not be a very striking incident, and I do not think that the pursuer thought he had got any warning that there was danger in venturing on to the gangway, and I think that the import of the evidence of the bystanders, some of whom were very near, was that nothing of that kind to direct attention was done. But even if it was, according to the opinion I have formed, that the most usual and obviously the safest course was to see that the communication by the gangway from the pier to the vessel was removed before the vessel

was allowed to leave the pier, I do not think that it would be an answer to an action for the consequence of their acting in an unsafe way that an arm was put out to prevent a man exposing himself to danger. With respect to the question, if it is material to be considered, whether the pursuer had ever got safely on the vessel from the gangway, and then had returned, my opinion again is, that the preponderance of the evidence is in favour of the pursuer, and against the defender, but I do not think that that part of the case is of first-class importance.

The gist of the pursuer's case is that the gangway was left on the pier, and communicating with the vessel, so that passengers were invited to go on board while the vessel was moving away from the pier. I think that with every disposition to lean to the judgment of the learned Sheriff in such a case as this, where he has taken the proof, heard the witnesses, and judged of their credibility, I am bound to follow my own opinion, and I am the more encouraged to do so because I think the result that is reached in that way is the most wholesome result for the sake of safety. It is said that if the course of having the gangway withdrawn before the bow-rope is thrown off were followed, risky things would be done, but risky things are done every day, and go on being done even if no accident happens. Why should the vessel not be kept close to the pier until the gangway is withdrawn? To see that the gangway is off the vessel before the order to throw off the bow-rope is given would not delay the vessel any appreciable time, and it would be a course attended with perfect safety. I think it right to say that steamboat owners ought not to run any unnecessary risk.

On the whole matter, I am of opinion that we should recal the judgment of the Sheriff-Substitute, and make the necessary findings in fact to bring out that the defenders were in fault in allowing the vessel to move away from the pier before the gangway was withdrawn; that the pursuer was guilty of no contributory negligence; and find the defenders liable in damages, which I would propose to your Lordships should be fixed at £150.

Lord Craighill—The pursuer of this action was thrown into the Clyde at the Broomielaw on 1st July last as he was, according to his own statement, walking along the gangway between the quay and the defender's steamer the "Benmore." He suffered considerable injury, and the present action has been raised against the owner of the steamer for recovery of damages upon the ground that the accident was caused through fault on the part of the defender.

The ground of action is that the bow-rope was thrown off before the gangway was drawn ashore, the consequence being that the head of the vessel moving outwards the end of the gangway resting upon the paddle-box lost its support, and both gangway and the pursuer, who was upon it, were thrown into the river. Fault is denied, the defender contending in the first place that the bow-rope was not thrown off before its time; secondly, that the pursuer forced his way to the gangway in the face of opposition on the part of the servants of the defenders who at the time were in the act of drawing ashore the gangway; and lastly, that the pursuer reached the steamer in safety, and met with the accident only because he, in the face of a seen danger, ventured again upon the gangway that he might communicate with a friend who was left behind upon the quay. The Sheriff-Substitute has assoilzied the defender, and I concur in his judgment.

With reference to the ground of action, my opinion is that it has not been proved. The weight of the evidence is that the signal was given by the master in the usual way to throw off the bow-rope, and to draw ashore the gangway, and the operations which were thus ordered were expected to be, as they usually are, simultaneous. Had they been simultaneous the accident in question would not have occurred. The course followed was that which is according to the custom of the Broomielaw. There are many cases, no doubt, in which the bow-rope is thrown off before the order to remove the gangway is given, but there are at least as many in which the order as to both is given at one time. The master of the "Benmore" accordingly did only that which was the every-day practice on the Clyde, and the witnesses who support the one course are as numerous as those who support the other. My opinion has in large measure been determined by Mr Darroch, the harbour-master, who depones—"I am usually present when the steamers leave wharf unless other duty calls me elsewhere. The bell is rung; then the master gives orders to haul away the gangway and let go the ropes. The orders are given simultaneously, as at one breath; there are men in attendance to let go the ropes, and there are men in attendance at the gangways as well. The orders are carried out simultaneously as a rule." It seems to me that it would be unfair to find that the master of the "Benmore" was in fault when he gave his orders in the very way in which such orders are in use to be given, according to the evidence of the harbour-master, by whom such things are supervised. Nor can it be said that there was fault on the part of the servants of the defender to whom the gangway was entrusted. They were in the act of pulling it ashore when they were interfered with, and their efforts delayed by the rush of passengers, one of whom was the pursuer, to get upon the gangway, and so to reach the steamer.

The view of the matter thus presented is enough for the decision of the case against the pursuer; but I may say further, that I think that, even if the ground of action had been established, the defenders would still have been entitled to prevail. The bell had been rung, the bow-rope had been thrown off, Campbell and Smith, the servants of the defenders appointed to the duty, were about to draw ashore the gangway, and the pursuer in the face of their opposition was not entitled to force his way to the ship. There is a conflict as to what had occurred. Witnesses for the pursuer say they did not see Campbell raise his hand and attempt to prevent the pursuer from going on board; but Campbell swears that he did stretch out his hand. Smith, who was assisting Campbell, says he saw Campbell lay hold of the arm of the pursuer, and the master of the "Benmore," who was on the bridge and saw what occurred, corroborates the testimony of Campbell and Smith. Others may be mistaken, but it is not ipossible that Campbell and Smith can be mistaken, and therefore, as there is no

reason for discrediting them rather than the pursuer's witnesses, I think their evidence must be taken to be the truth of this part of the case.

The other question is that upon which the Sheriff-Substitute has been chiefly influenced in giving his judgment. His view is that, danger or no danger, the pursuer made his way to the "Benmore," that he reached the steamer in safety, and that if he had remained on board in place of again entering upon the gangway to communicate with his friends on shore, he could not have suffered by the fall of the gangway. There is here again a conflict between the witnesses for the pursuer and those for the defender; but when Duncan and Armour and the master swear that they saw the clerk of the steamer in something like a struggle with the pursuer to keep him where he was, it is not, I think, possible—certainly it appears to me that it would not be reasonable—to resist their testimony.

On the whole matter, my opinion is that the defender has been rightly assoilzied.

Lord Rutherfurd Clark—I agree with your Lordship in the chair, and have nothing to add to the grounds of judgment which your Lordship has expressed. I would only say that my opinion in regard to this case is a very clear one indeed.

The Lord Justice-Clerk was absent.

The Court pronounced the following interlocutor:—

"Find in fact (1) that on the occasion in the record referred to, the pursuer while going on board the defender's steamer 'Benmore' was thrown into the water from the fall of the gangway over which he was passing between the said steamer and the shore, and in consequence sustained severe bodily injuries; (2) That the gangway so fell, and the pursuer was so injured, owing to the fault of the defender's servants who were in charge of the said steamer; (3) That there was no contributory negligence on the part of the pursuer: Find in law that the defender is liable to the pursuer in damages; modify the same at one hundred and fifty pounds: Sustain the appeal, recal the interlocutor of the Sheriff-Substitute appealed against: Ordain the defender to make payment to the pursuer of the said sum of One hundred and fifty pounds: Find him liable to the pursuer in expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer — A. J. Young — Orr. Agent—W. G. L. Winchester, W.S.

Counsel for Defenders—R. V. Campbell—Ure. Agents—Campbell & Smith, S.S.C.

Saturday, December 5, 1885.

OUTER HOUSE.

[Lord M'Laren, Ordinary.

FINLAY *v.* FINLAY.

Jurisdiction—Adherence and Aliment—Forum conveniens—*Arrestment* ad fundandam jurisdictionem.

A Scotswoman, wife of a Scotsman, and married to him in Scotland, raised an action of adherence and aliment against her husband in the Court of Session, while she was residing in Australia and he was in the Fiji Islands. Funds in Scotland belonging to the defender were arrested *ad fundandam jurisdictionem*. *Held* that the arrestments were good, and that Scotland was the *forum conveniens*.

This was an action of adherence and aliment raised at the instance of "Mrs Jemima Rae or Finlay, residing in Alma Street, Rockhampton, Queensland, Australia, wife of George Charles Finlay, who is a member of the Society of Solicitors-at-Law of Edinburgh, and now or lately residing on the estate of the Denba Estate Sugar Company, Serna, in the Fiji Islands, and James Rae Shand, S.S.C., Edinburgh, her mandatory, against the said George Charles Finlay, against whom arrestments *ad fundandam jurisdictionem* had been used."

The parties were married at Edinburgh on December 25th 1871, and from that date up to the year 1882 they cohabited at various places, of which the last was Greenlake, near Rockhampton, Queensland, Australia. There were seven children of the marriage. The parties lived unhappily together, and it was alleged that during the summer of 1882 the defender deserted the pursuer, and thereafter never assisted or communicated with her.

The defender had an alimentary annuity of £100 which his father's trustees had purchased for him from a Scottish insurance office. In 1870 he was admitted a member of the Society of Solicitors-at-Law, incorporated by Royal Charter, and he was still a member thereof. This society on the 14th July 1884 obtained the royal assent to an Act entitled the Society of Solicitors-at-Law of Edinburgh Act 1884, whereby it was, *inter alia*, enacted that the affairs of the society were to be wound up and the residue of the funds and property of the society to be divided among its members. The share falling to each member became, by virtue of the Act, a vested interest on the 1st day of August 1884. Arrestments *ad fundandam jurisdictionem* were used in the hands of the said society.

Defences were lodged. The defender admitted that he had been in Scotland on a visit in 1882. He averred that he was so for a visit for the sake of his health. He stated that he had altogether abandoned his Scottish domicile and did not intend again to live in Scotland.

The defender pleaded, *inter alia*—"(1) Neither the pursuer nor the defender having a domicile in this country, the Court has no jurisdiction to entertain a consistorial action against the defender. (2) *Forum non conveniens.*"

Argued for the pursuer—The action was not one of *status*. It was really for a debt. (1) The mar-