Tuesday, July 7.

SECOND DIVISION.

[Sheriff Court at Glasgow.

LONDON AND GLASGOW ENGINEERING AND IRON SHIPBUILDING COMPANY, LIMITED *v.* THE ANCHOR LINE (HENDERSON BROTHERS), LIMITED—THE "ASSYRIA."

Shipping Law — Collision — Compulsory Pilotage—Proof of Fault of Pilot—Onus —Trim—Pilot—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 633.

The "Assyria" collided with another vessel, the "Monmouth," in the river Clyde at a place where pilotage was compulsory and while the "Assyria" was in charge of a licensed pilot. In an action by the "Monmouth" against the "Assyria," the pursuers alleged that the collision was due to the fault of the defenders, in respect that the "Assyria" was not in trim for navigating narrow waters, and that she was recklessly and carelessly navigated. The defenders pleaded that the collision was due to the fault of the pilot in charge of the "Assyria." The "Assyria," which was a screw steamship 450 feet long, was 15 inches down by the head owing to the tanks aft having been pumped out. The captain had informed the pilot as to the vessel's trim, and offered to refill the ballast tanks aft, but the pilot, after asking the captain if she would be all right, and being told by him that she would, elected to proceed up the river without altering the trim.

Held (1) that if the collision was due to faulty navigation the defenders had sufficiently discharged the onus upon them in establishing their defence if they showed that the ship was in charge of a pilot and that all his orders were obeyed, as if that were so any fault in navigation must be the fault of the pilot; and (2) that even if the collision was due to the defective trim of the vessel that was a defect which in the circumstances was the fault of the pilot and not of anyone for whom the owners of the "Assyria" were responsible.

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 633, enacts — "An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law."

The London and Glasgow Engineering and Iron Shipbuilding Company, Limited, raised an action in the Sheriff Court at Glasgow for £1500 against the Anchor Line (Henderson Brothers), Limited.

The pursuers averred that while they were in the course of completing the cruiser "Monmouth," which was lying moored at their wharf at Govan, the s.s. "Assyria" belonging to the defenders, which was proceeding up the river to Glasgow, ran into the "Monmouth" about 11·20 p.m. on 23rd March 1902, and caused damage to the amount sued for; that the collision occurred through the fault or negligence of the defenders or those for whom they were responsible; that the "Assyria" was not in safe and proper trim for her navigating in narrow waters, she being considerably down by the head, and that she was recklessly and carelessly navigated.

The defenders explained "that at the time of the collision the 'Assyria,' which was proceeding up the river with the assistance of two tugs, one at her head and the other at her stern, was being carefully navigated, and that the collision was due to her taking a sudden sheer when near Meadowside caused by her smelling the ground, and by the want of lights on the 'Monmouth,' whose position was in consequence not seen in time to prevent a collision. At the time of the collision the 'Assyria' was in charge of a pilot Daniel M'Millan, whose employment was compulsory. He joined the vessel when she was anchored at the Tail of the Bank, and thereafter took charge. If the said collision was caused by the fault of anyone on the 'Assyria' it was the fault of said pilot."

The pursuers pleaded — "The pursuers having suffered loss and damage through the fault of the defenders, or those for whom they are responsible, to the extent of the sum sued for, decree should be granted with interest and expenses as craved."

The defenders pleaded—"(5) The collision not having occurred through any fault of the defenders, or those for whom they are responsible, they should be assoilzied with expenses. (6) Inevitable accident. (7) The collision having been caused or materially contributed to by the failure of the pursuers to exhibit lights, the defenders should be assoilzied with expenses. (8) The defenders' vessel being at the time of the collision in charge of a pilot whose employment was then compulsory, and the said collision being due to his fault if to the fault of anyone on defenders' said vessel, the defenders should be assoilzied with expenses."

Proof was led before the Sheriff-Substitute (GUTHRIE). The result is stated in the following findings of fact set forth in his interlocutor:—"Finds that on 23rd March 1902 the defenders' steamer 'Assyria' was lying off Greenock waiting for the tide to go up to Glasgow, and that being in compulsory pilotage waters the licensed pilot came on board about five o'clock p.m., and was informed as to the trim of the vessel: Finds that he was told that she was fifteen inches down by the head, the ballast tanks aft having been emptied before coming to Greenock, and that they could be refilled if necessary: Finds that such trim, though not the best, is not such as to make a vessel like the 'Assyria,' 450 feet in length, unsafe to navigate with due care in ordinary circumstances: Finds that, after conversation with the master, he elected to proceed to

Glasgow without changing the trim of the vessel, saying that the tanks could be filled, if necessary, on the way up: Finds that the vessel, which had tugs aft and forward as usual with ships of that size, steered well enough on the passage until after passing Shieldhall she was compelled to slow down on approaching Govan Wharf and ferries: Finds that she took a sheer which brought her close to the north bank of the Clyde at Meadowside Shipbuilding Yard, and that, probably in consequence of smelling the ground there, after being brought up straight in the river, she took another sheer to the south and collided with the 'Monmouth,' which was being fitted up by the pursuers, and was lying at their wharf, within the harbour of Glasgow, above Govan Ferry: Finds that when she did so the pilot ordered the engines to be put slow ahead and afterwards full speed ahead, and, when he saw a collision to be inevitable, hard astern; Finds that a collision would have been avoided if the order to go astern had been given at first, and that it was unduly hazardous to give the order full ahead in the hope of passing the 'Monmouth': Finds that the 'Assyria' came in contact with the moorings and stern of the 'Monmouth' and did considerable damage."

The pilot M'Millan was not called by either party. Captain Frederick Blight, who was the master of the "Assyria" at the time of the accident, gave the following evidence as to the trim of the vessel when it was handed over to the pilot:—"I was anxious to get up to Glasgow at once, and asked the pilot if he could take me up. He said there was not enough water for us, and we would require to wait. He asked what the draught was. That is the usual question that pilots ask. I told him that it was about 19 feet forward and about 18 feet aft. The draught had been taken by the carpenter and chief officer. I also told the pilot that she was a few inches by the head. I told him that I had emptied the deep tank. I told him he could have the ship in what trim he liked, only to say the word. I could have filled up the deep tank. The pilot said, 'I suppose she will be all right?' and I said, 'Yes, she will.' He seemed quite satisfied. If he had asked me to alter the trim of the vessel I could have done it by putting water into the deep tank. That only meant the opening of the sea-cocks. A great portion of the deep tank is below the level of the sea water. It goes right down to the bottom of the ship. I could have filled a good portion of that tank without pumping."

Captain White, harbour-master of Glasgow, deponed . . . *Cross-examined*—"If the rudder is well submerged and the screw well under water there is no risk in taking a vessel up or down the river when she is slightly down in the head. With a vessel 450 feet long I would not hesitate a moment or raise any question about her being down by the head. You will want extra vigilance in looking out for the steering; that would be the main thing."

On 16th April 1903 the Sheriff-Substitute pronounced an interlocutor whereby, after the findings above quoted, he found as follows:—"Finds that the collision was caused by the fault of the pilot in charge of the 'Assyria,' and that the defenders are not liable in damages to the pursuers: Assoilzies the defenders, and decerns."

The pursuers appealed.

The Court was assisted by a nautical assessor.

Argued for the pursuers and appellants—The accident was caused by the defective trim of the vessel. For this the master and through him the owners of the vessel were responsible. The master knew the vessel and was responsible for allowing it to go up the river in such a defective trim—*The Oakfield*, 1886, 11 P. D. 34. If the defect in the trim of the vessel was known to the master he could not shift the blame on to the pilot. In order to avail themselves of the protection provided by section 633 of the Merchant Shipping Act 1894, the onus lay on the defenders to show that fault or incapacity on the part of the pilot occasioned the damage—*Clyde Navigation Trustees* v. *Barclay, Curle, & Company*, May 23, 1876, 3 R. (H.L.) 44, opinion of Lord Selborne, 51, 13 S.L.R. 753 and 757. The defenders had failed to discharge this onus. They did not directly aver on record that the damage had been caused by the fault of the pilot, and he had not been called as a witness. Strict proof of bad navigation on the part of the pilot was necessary—"*The Carrier Dove*," 1863, Brown and Lushington, 113, opinion of Lord Chelmsford, 115. The evidence showed that the captain before the vessel started told the pilot that the ship would be all right. The precise extent to which the defective trim would affect the vessel was known to the captain, and he should have made a full disclosure to the pilot not merely that the ship was down by the head (a thing which the pilot would see for himself) but as to how the ship would behave in that condition. There was thus no disclosure to the pilot of latent defects and he was not responsible—"*The Meteor*," 1875, Irish Reports, 9 Eq. 567. The case of *The Owners of "The Strathspey"* v. *The Owners of "The Islay,"* July 3, 1891, 18 R. 1048, 28 S.L.R. 787, was distinguished, as in that case the pilot was held responsible for knowledge of the river. But there was no case where a pilot had been held responsible for latent defects or the trim of the ship.

Argued for the defenders and respondents—They had led evidence showing (1) that the vessel at the time of the accident was in charge of a compulsory pilot, (2) that the vessel was in compulsory pilotage waters, and (3) that the accident was due to the fault or incapacity of the pilot. They were therefore free from all responsibility for the accident—Merchant Shipping Act 1894, sec. 633. The pilot had been proved to be in fault. He was in charge of the vessel, and no order on his part had been shown to have been performed wrongly or left undone on the part of the captain or crew. The onus on the defenders to prove fault on the part of the pilot was sufficiently discharged by their showing that

he was in full charge and that his orders were obeyed. It was not necessary to put the pilot into the witness-box; proof of faulty navigation could be led without doing so—*The "Winston,"* 1883, 8 P.D. 176. Whether the accident was due to trim or navigation, the fault could attach to no one but the pilot who was in sole charge at the time—*The Owners of the "Strathspey," supra*; *Greenock Towing Co.* v. *Hardie*, November 28, 1901, 4 F. 215, 39 S.L.R. 151.

At advising—

LORD JUSTICE-CLERK—When the defenders' vessel was to be taken up the river Clyde those responsible for her had no choice. They were compelled to hand her over to a pilot, and the only responsibility they had was to supply him with such tug and manual assistance as he might require. The only allegation against them is that the vessel was handed over when her water ballast had been so adjusted that she was down by the head about a foot or a little more. The pilot was informed that she was down by the head, and that if he thought it needful her trim could be altered. He did not think it needful, and proceeded to take her up the river as she was. Now, I take it that it was for him to judge of her trim when he was informed that it was by the head and not by the stern, for it was upon his judgment that the vessel had to be navigated. Even if it had been otherwise, I am satisfied that this trimming, which was the only thing that could be said to be abnormal, did not cause the vessel to be in an unsuitable condition for going up the river. I think the evidence is to be accepted that so trifling a droop by the head in a vessel 450 feet long could not materially affect her, and in this I am confirmed by the views of the nautical assessor. There was therefore nothing wrong in her being in that state. It only remains to consider whether anything that happened while she was going up before the collision removed responsibility from the pilot and laid it on the master or any of his subordinates. I am of opinion that no such thing is proved. The vessel had to slow down to pass a ferry, and while slowed down took a sheer to the northward. She then took a sheer southwards, and before she could be brought straight up channel she struck the "Monmouth." Whether the helmsman had at the time given her too much of the wheel may be a question, but we are advised by the assessor that the person navigating a vessel in such circumstances must be ready for such an emergency and act promptly to prevent a collision. In the present case that was plainly to be done by stopping and reversing, whenever there was a chance, from the way in which the vessel was paying off, of her striking the "Monmouth" moored at the river side. Instead of that the evidence satisfies me that the pilot caused the collision by giving an order to go ahead when there was risk of a collision, and that he by this error of judgment caused the collision. Whether his error was great or venial I do not stop to inquire. It was his action in my opinion which led to the collision, and if that view be sound, then it is plain that the owners of the "Assyria" cannot be liable in damages, as she was compulsorily out of their control and absolutely in the pilot's for navigation.

I am therefore of opinion that the defenders are entitled to succeed, and that the judgment in the Court below should be affirmed.

LORD TRAYNER—The pursuers claim damages from the defender for the injuries sustained by the "Monmouth" from a collision between that vessel and the "Assyria." The grounds of claim as set forth by the pursuers are (1) that the "Assyria" was not in proper trim for navigating in narrow waters; (2) that her steering gear and appurtenances were not in proper order and condition; and (3) that she was recklessly and carelessly navigated. To these causes, or one or other of them, the collision is attributed. With regard to the second of these causes, it was conceded that no case had been established, and accordingly in opening the debate Mr Ure directed his attention only to the first and third of the enumerated causes. I understood Mr Younger in his reply to give up and abandon the third cause, namely, faulty navigation. But in case of any misunderstanding on that subject, I shall take the case as if the pursuers still insist on the first and third grounds of action to which I have referred. The defence is that when the collision occurred the "Assyria" was in waters where pilotage was compulsory, and was then in charge of a duly licensed pilot. It is not disputed—at all events it is proved—that all the orders which the pilot gave while navigating the "Assyria" were promptly obeyed by the crew. In these circumstances it appears to me that the case stands thus—Either the collision occurred through fault in navigation, or it did not. If not, then the defenders are not liable on the ground of fault, or if it did occur through fault, it was the fault of the pilot, and for that the defenders are not responsible. A good deal was said about the necessity of the defenders proving fault on the part of the pilot. But positive proof of that was not necessary. The navigation of the vessel being entirely in the hands of the pilot, if there was fault in the navigation, it could only have been his fault. He was the sole navigator. It was open to the pursuers to show, if they could, that the faulty navigation was not attributable to the pilot, on the ground that the captain of the vessel interfered with the pilot's orders, or that those orders were not obeyed. But given the case which we have here, that the pilot had entire charge of the navigation of the vessel and that his orders were all obeyed, the fault, if there was any, could only be that of the pilot. That view leads to the result that the defenders are not responsible for anything that resulted from careless or otherwise faulty navigation.

The first ground of action, as I have said, is that the "Assyria" through the action of her captain was put into a condition in

which she could not safely or properly be navigated in narrow waters. The captain of the "Assyria" had pumped out his water ballast, with the effect that when the pilot went on board at Greenock the vessel was down by the head, that is, her draught forward was 19 feet 4, and aft 18 feet 1. This was her trim, and this the pursuers say was not "a safe and proper trim for her navigating in narrow waters." The evidence satisfies me that this trim, although perhaps unusual, was neither unsafe nor improper. The evidence of Captain White, the harbour-master at Glasgow, examined by the pursuers, appears to me conclusive upon this point, and Captain White's views are quite in accordance with the opinion of the assessor who heard the case with us. But if the trim of the vessel was not safe or proper for navigating the Clyde, I think it was the duty of the pilot to have got this rectified before he undertook the navigation. He knew that the "Assyria" was down by the head, and the captain offered to refill the water-ballast tanks if the pilot desired this to be done. The pilot, however, did not desire this, and undertook the navigation of the "Assyria" up to Glasgow in the condition in which she was. No doubt he asked the opinion of the captain as to whether the ship was "all right" in that condition, and was told that in his opinion she was. But the captain's knowledge of the Clyde was not equal to that of the pilot, and even if it had been, the pilot was bound to act upon his own view of what was right and proper or necessary in the circumstances. If therefore the trim of the vessel contributed to the collision, that was still the fault of the pilot, who, if he thought the trim unsafe or unsuitable in any way, could and should have had it changed before he left Greenock. I think the principle on which the case of *Burrell*, 18 R. 1048, was decided is quite in point. There the pilot left dock in circumstances which apparently called for the employment of a second tug. He was content to go with one. It was held that for the consequences of this mistake or neglect of the pilot the defenders were not liable. Here it is the same. The pilot knowing the Clyde, the obstructions in it, the local rules as to slowing and stopping, and all the other circumstances affecting the navigation of the river, should have altered the trim of the "Assyria" if he deemed that necessary or proper. If he took the vessel in the trim in which she stood he is responsible if that trim caused the collision.

The Sheriff has held it proved that the collision was proximately caused by the pilot giving an order to go full speed ahead when he should have gone astern. I cannot say that I am so clear as the Sheriff is that it has been proved that the pilot gave that order. But there is some proof which supports the Sheriff's finding, and I can only say that on this point I do not see sufficient ground for dissenting.

On the whole matter I agree in the result at which the Sheriff has arrived, and think the present appeal should be dismissed.

LORD MONCREIFF—My view of this case is that whether the collision was caused by faulty navigation or by the trim of the "Assyria" or by both, the defenders are not liable because the vessel was at the time in charge of a compulsory pilot.

It is by no means clear that although the "Assyria" was down by the head 15 inches or so, that trim (which was practically only 1 foot in 400) appreciably affected its steering. My impression is that it had some, though a very slight effect; but even if it had the pilot was responsible. It was his duty to observe the trim of the ship before he started, and he did know that it was down by the head. If the master had been asked and had refused to correct the trim, that fact might have made the defenders liable although it might not have absolved the pilot. But the master offered to correct it, and the pilot with his superior knowledge of the requirements of the river did not think it necessary. He therefore, in my opinion, accepted responsibility for the trim.

If the trim to any extent affected the steering of the "Assyria" it merely called for somewhat greater care on the part of the pilot.

It is not easy to fix upon the precise cause of the collision. One thing is clear, namely, that the defence prominently put forward on record that the collision was due to the want of proper lighting on the "Monmouth," is absolutely disproved. Unless the collision was due to pure accident for which no one was responsible (which is practically out of the case) the fault lay either in bad navigation or in the defective trim of the vessel. The initial mistake was in allowing the vessel to get too close to the north bank, which resulted in the "Assyria" smelling the ground and sheering to the south. The sheer to the north may have been due either to careless navigation or to the trim of the vessel acting upon the slow pace at which she was compelled to go at that point. It is not clear whether after the vessel smelt the ground and sheered to the south the catastrophe could have been averted, but I think the Sheriff has pretty nearly reached the truth in holding that the pilot was in fault in not at once putting the "Assyria" full speed astern.

But whatever the precise cause of the collision was I am quite satisfied that it was not one for which the defenders are responsible.

I fully accept the statement by Lord Selborne in *Barclay, Curle, & Company*, 3 R. (H.L.) 51, as to the circumstances in which the onus will change in such cases. But applying these standards to the present case I think the defenders have fully discharged any burden which lay upon them. They pleaded that the pursuers were in fault; in that they were wrong. But they pleaded alternatively that if the fault lay with the "Assyria" they were not responsible, as the vessel was under the control of a compulsory pilot, and in that, in my opinion, they were right. It was argued for the pursuers that the defenders

were not entitled to the statutory protection unless they proved that the collision was due to the fault or incapacity of the pilot. This is only true in a limited sense. The defenders were not bound to negative every kind of objection which the pursuers might take to the fittings or trim of the vessel. They sufficiently discharged any burden that was upon them by showing that the vessel was in charge of a compulsory pilot, that all his orders were obeyed, and that if there was fault in the navigation of the vessel they were not responsible for it. The onus was thus shifted to the pursuers. In the end, apart from the objection to navigation, which was clearly met by the defence that the vessel was under the control of a compulsory pilot, the only charge that was pressed against the defenders was that they were responsible for the trim of the vessel, and that the collision was due, or partly due, to that cause. It lay upon the pursuers to prove this, and in my opinion they have failed to do so.

In the result I am for affirming the judgment of the Sheriff, with perhaps one or two immaterial alterations in the findings.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Having heard counsel for parties in the appeal and considered the cause, with the assistance of Captain Hoare, one of the brethren of Trinity House, as nautical assessor, dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law of the interlocutor appealed against: Of new assoilzie the defenders, and decern."

Counsel for the Pursuers and Appellants—Ure, K.C.—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—Hunter. Agents—Webster, Will, & Co., S.S.C.

Tuesday, July 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

JOHNSTON *v.* JOHNSTON'S TRUSTEES.

Succession—Restrictions Imposed on Disponee—Restrictions Ineffectual to Bind Disponee—Docquet to Trust-Deed Signed by Disponee—Personal Bar.

The proprietor of certain estates by trust-disposition and settlement *inter vivos* conveyed his estates to trustees, among whom were his nephews A, B, and C, directing them on his death to convey the estates to A and his heirs-male, whom failing to B and his heirs-male, whom failing to C and his heirs-male, whom failing to their other brothers, under the reservation and condition that in the dispositions to be executed by the trustees a clause should be inserted prohibiting the disponee from selling or burdening the estates with debt except with the consent in writing of his two immediate younger brothers. After the execution and delivery of the trust-deed, A, B, and C signed a docquet to the trust-disposition whereby they accepted the office of trustees, and "individually" concurred in and agreed to "the terms and conditions of said deed." After the death of the truster three dispositions were executed by the trustees conveying the estates to A, each disposition bearing that it was granted in terms of the trust-settlement, and "under the prohibition that the disponee for the time being under the destination therein contained shall not sell or burden with debt the subjects disponed except with the consent in writing of his two immediate younger brothers."

Held, in an action of declarator brought by A, the disponee, against the trustees (in which his younger brothers B and C were compearing defenders) that under the dispositions A was absolute fiar of the estates conveyed to him, and had full power to sell or burden the estate with debt and alter the order of succession thereto and execute any deeds necessary for these purposes; that he was not barred from maintaining his rights under the disposition by having signed the docquet to the trust-deed; and that an averment to the effect that the trust-deed was granted as the result of a family arrangement, and in reliance upon the pursuer agreeing to be bound by its terms, which he had approved, was not relevant to be admitted to probation.

Archibald Francis Campbell Johnston of Carnsalloch, Dumfriesshire, brought an action against Augustine Campbell Johnston, Conway Campbell Johnston, and others, to have it declared that three dispositions dated December 28, 1896, and January 31, 1897, set forth in the summons granted by the pursuer and Augustine Campbell Johnston and Conway Campbell Johnston, two of the defenders, as trustees under the trust-disposition and settlement of the deceased General Thomas Henry Johnston of Carnsalloch to and in favour of the pursuer as an individual and his heirs-male, whom failing to certain other persons, should be deemed and taken to be invalid and ineffectual in so far as, but only in so far as, the dispositions were granted subject to certain declarations and prohibitions (quoted *infra*), and that notwithstanding these declarations and prohibitions in the foresaid three dispositions the pursuer "holds and is entitled to hold" the lands and properties conveyed by the foresaid three dispositions "as unlimited fiar and fee-simple proprietor thereof, and that he has full power to sell, alienate, or dispone the said lands and others in whole or in part in any way he may think proper, and to contract debt thereon, and to dis-