shares. This at first sight does not appear consistent with a vested interest in a several share *a morte*. But it is not so inconsistent as not to be intelligibly explicable and as to override the further consideration that power is given to the trustees, "notwithstanding the foregoing provisions as to the period at which children shall become entitled" not to take a vested interest in but merely to payment of their shares of capital, to make advances of capital to them before they attain twenty-five and even during minority, "such advances to form deductions from the ultimate shares of the children receiving the same." I cannot read "ultimate" as equivalent to "prospective," and I cannot understand how a deduction could be made from an ultimate share of a child who should subsequently predecease twenty-five, if that share never was or became his but is to accresce to those who survive him. Lastly, the provisions in favour of the children are to be in satisfaction of legitim, and as legitim vests *a morte* this also indicates, though not by itself conclusively, that the provisions given in satisfaction are given *a morte*. This therefore adds weight to the last-mentioned consideration.

I have considered the cases of *Paxton's Trustees*, 13 R. 1191, *Menzies' Factor*, 1 F. 128, and the other cases cited, but while I do not think that reference to them is necessary for the judgment, nothing in these decisions appears to me to conflict with the opinion which I have formed.

I therefore answer the first question in its first alternative in the affirmative, and in its second and third alternatives in the negative, the second question in its first alternative in the affirmative, and in its second alternative in the negative, and find it unnecessary to answer the third query.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Stormonth Darling.

LORD LOW was absent.

LORD ARDWALL was in the Extra Division.

The Court answered question 1 (*a*) in the affirmative, 1 (*b*) and 1 (*c*) in the negative, and the first alternative of the second question in the affirmative and the second alternative in the negative.

Counsel for the First Parties—Forbes. Agents—Cumming & Duff, S.S.C.

Counsel for the Second Parties—Scott Brown. Agent—R. F. Calder, Solicitor.

Counsel for the Third Parties Mercer. Agents—Cumming & Duff, S.S.C.

Tuesday, July 9.

FIRST DIVISION.

[Sheriff Court at Airdrie.

LANARKSHIRE COUNTY COUNCIL *v.* AIRDRIE MAGISTRATES. LANARKSHIRE COUNTY COUNCIL *v.* COATBRIDGE MAGISTRATES.

(Reported *ante*, May 22, 1906, 43 S.L.R. 632, and 8 F. 802.)

River—Rivers Pollution Prevention Acts—Burgh—County Council—Pollution Committed Outside District of Petitioning Sanitary Authority—Defences; Prescriptive Use; Upper Pollution; Chemical Re-agents — Relevancy — Title to Sue—Rivers Pollution Prevention Act 1876 (39 *and* 40 *Vict. cap.* 75), *secs.* 3, 8, 20; 1893 (56 *and* 57 *Vict. cap.* 31), *sec.* 1—*Local Government (Scotland) Act* 1889 (52 and 53 *Vict. cap.* 50), *sec.* 55.

The county council of a county divided into districts, in virtue of section 55 of the Local Government (Scotland) Act 1889, presented petitions in the Sheriff Court against the magistrates of certain burghs, seeking, under the Rivers Pollution Prevention Acts, to have them ordained to abstain from "causing to fall or flow or knowingly permitting to fall or flow or to be carried" into certain streams passing through its district any solid or liquid sewage matter. The burghs averred in defence that prior to their taking over the drainage systems their inhabitants had discharged, and had acquired by prescription a right to discharge, sewage into the so-called streams, which were covered over, channelled, and bottomed, and had been as they alleged from time immemorial only channels used mainly for sewage; that the streams were used for the discharge of sewage and industrial refuse by the upper proprietors, over whom they had no control; that the streams in their course received chemical discharges from public works, which acted as re-agents and rendered innocuous any sewage. The Sheriff, holding that there was an admission of pollution, proposed to remit, under section 10 of the Rivers Pollution Prevention Act 1876, to skilled parties on the "best practicable and available means." The burghs appealed.

Held (1) that the averment as to the character of the streams and the use thereof by the inhabitants was irrelevant; (2) that the averment as to use by the upper proprietors was, looking to section 1 of the Rivers Pollution Prevention Act 1893, also irrelevant; (3) that the averment as to the discharge of chemical re-agents did not, if proved, bring the defenders within the exemption, granted by section 3 of the Rivers Pollution Prevention Act 1876, to persons "using" the best available means

to render the sewage harmless, and was consequently also irrelevant; but (4) that an amended averment to the effect that there was no pollution when the streams entered the county council's jurisdiction struck at the title to sue conferred by section 8 of the Rivers Pollution Prevention Act 1876, and must be remitted for probation.

These cases are reported *ante ut supra.*

The Rivers Pollution Prevention Act 1876 (39 and 40 Vict. cap. 75), section 3, enacts—"Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act.

"Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act if he shows to the satisfaction of the Court having cognisance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream. . . . ."

Section 8—"Every sanitary authority shall, subject to the restrictions in this Act contained, have power to enforce the provisions of this Act in relation to any stream being within or passing through or by any part of their district, and for that purpose to institute proceedings in respect of any offence against this Act which causes interference with the due flow within their district of any such stream, or the pollution within their district of any such stream, against any other sanitary authority or person, whether such offence is committed within or without the district of the first named sanitary authority. . . . ."

Section 10—"The County Court having jurisdiction in the place where any offence against this Act is committed may by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this Act may require him to perform such duty in manner in the said order specified; the Court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the Court seems meet. Previous to granting such order the Court may, if it think fit, remit to skilled parties to report on the 'best practicable and available means,' and the nature and cost of the works and apparatus required, who shall in all cases take into consideration the reasonableness of the expense involved in their report. . . ."

Section 20—". . . 'Stream' . . . includes rivers, streams, canals, lakes, and watercourses, other than watercourses at the passing of this Act mainly used as sewers and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this Act. . . ."

Section 21—"In the application of this Act to Scotland the following provisions shall have effect:—(1) The expression 'sanitary authority shall mean and include the local authority in any parish or burgh in Scotland acting under the Public Health (Scotland) Act 1867. . . . (5) The expression 'the County Court' shall mean the Sheriff of the county, and shall include Sheriff-Substitute. . . ."

The Rivers Pollution Prevention Act 1893 (56 and 57 Vict. cap. 31), section 1, enacts—"Where any sewage matter falls or flows or is carried into any stream after passing through or along a channel which is vested in a sanitary authority, the sanitary authority shall, for the purposes of section 3 of the Rivers Pollution Prevention Act 1876, be deemed to knowingly permit the sewage matter so to fall, flow, or be carried."

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 55, enacts—". . . A county council shall have power, in addition to any other authority, to enforce the provisions of the Rivers Pollution Prevention Act 1876 . . ., and for that purpose they shall have the same powers and duties as if they were a sanitary authority within the meaning of that Act . . . and the county were their district."

On August 28, 1905, the County Council of the County of Lanark presented a petition in the Sheriff Court at Airdrie against the Provost, Magistrates, and Councillors of the Burgh of Airdrie, seeking under the Rivers Pollution Prevention Act 1876 to have the defenders ordained "to abstain from causing to fall or flow or knowingly permitting to fall or flow or be carried" into certain streams, "all of which streams flow through or by the parishes of New Monkland, Old Monkland, and Bothwell in the County of Lanark, and within the district of the pursuers, and the waters of which ultimately reach the river Clyde, any solid or liquid sewage."

A similar petition was presented against the Provost, Magistrates, and Councillors of the Burgh of Coatbridge, and the two petitions were taken together.

The following averments by the defenders are taken from the statement of facts for the Magistrates of Coatbridge—[the portion in italics was tendered as an amendment in the Division]:—"(Stat. 2) The present arrangement of the drainage system of the burgh of Coatbridge has been in existence for more than thirty years, and was in operation prior to the passing of the Rivers Pollution Act 1876, and was taken over by the defenders on their constitution as a burgh in 1885. The burns and streams mentioned in pursuers' condescendence have been covered over, channelled and bottomed for a long period, and within the burgh boundaries have

been regularly used as public sewers. They are not burns and streams within the meaning of the Rivers Pollution Act, but from time immemorial have always been channels mainly used for sewage, and the waters therein have been unfit for the primary purposes. The owners of lands and heritages within defenders' burgh have prescriptive rights of permitting liquid or solid sewage matter to fall or flow into said sewers and all streams with which they combine, and are beyond the control of the defenders. In so far as the defenders have acquired the sewers and drains of the burgh under the Burgh Police Act 1892, they also acquired on behalf of the burgh prescriptive rights of use of said channels and watercourses for the purpose of permitting liquid and solid sewage matter to fall or flow into them and all streams with which they join. From time immemorial the upper waters of said burns and streams have received sewage and industrial refuse and effluent water, and where they pass through the burgh of Airdrie have been used as public sewers for the prescriptive period, and have been unfit for the primary purposes, and the defenders have no control over the burgh of Airdrie and the upper heritors to prevent such use. The Middle Ward District Committee of the pursuers also pass sewage into said upper waters. The lower waters of the said burns and streams are not polluted by the defenders. Any sewage therein is harmless and innocuous. From time immemorial they have received sewage from the upper waters under the prescriptive rights foresaid, and have been unfit for the primary purposes. (Stat. 3) *At the point where said burns and streams leave the territorial jurisdiction of the defenders and enter that of the pursuers they are not polluted by any solid or liquid sewage matter.* The burns and streams mentioned in the pursuers' condescendence receive between their source and their outfall in the river Clyde chemical and other discharges from public works of a great variety of kinds on their banks or in their immediate vicinity, which discharges act as re-agents and purify and render innocuous any solid or liquid sewage matter which falls or flows or is carried into them. The introduction into such burns or streams of such chemical or other re-agents renders all sewage matter discharged into them innocuous, and, moreover, is the best practicable and available means of rendering harmless any sewage matter falling or flowing or carried into such streams.

On November 16, 1905, the Sheriff-Substitute (GLEGG), finding that there was involved a question of heritable right exceeding £1000 in value (*Portobello Magistrates* v. *Edinburgh Magistrates*, 10 R. 130, referred to), put the cases to the roll that the pursuers might determine their next step, but on appeal the Sheriff (GUTHRIE) recalled this interlocutor (referring to the Rivers Pollution Prevention Act 1876, sec. 21 (7), and to *Midlothian County Council* v. *Pumpherston Oil Company*, 6 F. 387) and appointed parties to be further heard. On April 10th the Sheriff pronounced an interlocutor finding that the defenders admitted they were permitting sewage to be carried into the said streams, and that they were thus committing an offence against the Rivers Pollution Prevention Act 1876, sec. 3; repelling the defenders' pleas save (in *Airdrie* case) the eighth, which was, "(8) There being no means practicable and available by which the defenders can render the sewage less harmful, the defenders should be assoilzied," and which he reserved; and, before making a remit as directed by section 10 of the said Act, appointing parties to be heard as to the terms of the remit.

Note (*Airdrie case*).—"The defenders do not deny that they discharge sewage into the burns and rivers mentioned in the petition and condescendence. But they have stated a number of pleas as to competency and relevancy, and supported them with much apparent earnestness. On examination it is difficult to discover in them any real answer to the pursuers' case. But out of respect to the important communities represented by the defenders, and the able procurators who addressed me, I shall try to enumerate the principal points discussed and state my opinion in regard to each.

"1. Title to sue. I can only look upon the 55th section of the Local Government Act as adding the County Council as an authority entitled to take proceedings against all offenders against the provisions of the Rivers Pollution Act passed thirteen years previously. Probably it was thought that that Act was not duly enforced, and that the newly instituted County Council should be invested with powers in addition to other sanitary authorities, whether created by the Act or previously existing. And it is to be observed that the section not only invests the County Council with 'powers,' but imposes on it 'duties.' This disposes I think of the point, which was more than once put forward, that the County Council has no 'interest' to prosecute. I apprehend that an interest is not required when Parliament imposes a duty. But even if it were not so, has not the county an interest in the purity of its rivers?

"2. It is said that the burns and rivers are not streams in the sense of the statute, but are water-courses which at the passing of the Act were 'mainly used as sewers and emptying directly into a tidal river.' I do not think this can be seriously maintained. . . .

"3. It is said nuisance is not averred. The Rivers Pollution Prevention Act says nothing about nuisance. It assumes that sewage should not be discharged into rivers, and seeks to prevent that from being done.

"4. The defenders plead that as private persons in the burgh have a right by use and prescription to lead their drains into these streams within the burgh, they have no power to prevent sewage from reaching them. It is rather unusual in these days for municipal persons to depreciate or minimise their powers. But a perusal of

the 219th, 222nd, and adjoining sections of the Burgh Police Act 1892 shows the real position of the defenders with regard to the drainage and sewers within burgh, and negatives their pleas on this point.

"I regret not to be able to deal at greater length with arguments which occupied a considerable time. But there are really, as it seems to me, no relevant defences to the petition, and no course is open but to find, as the defenders admit, that they are permitting sewage to flow into the streams condescended on, and to remit to an engineer to report as to the best practicable and available means of preventing sewage matter from flowing or falling into the said streams, or of rendering it harmless, and as to the nature and cost of the work and apparatus required. The defenders do not allege that they have used any means to render the sewage passing into the streams harmless. Thus there is no case falling within the second paragraph of section 3, and the remit required is simply one under section 10 for the information of the Court.

"Perhaps I should notice two decisions referred to on both sides. The *Portobello* case already cited (10 R. 130) differs from this in respect that a proof was taken before the Sheriff as to the history of the streams and the extent of pollution. The Judges did not comment on this, or hold it to be unnecessary, and as pollution was not admitted, perhaps it could not have been avoided. The proof, however, seems to have dealt with a good deal of matter which, in the light of subsequent cases and on a true construction of the Act, was irrelevant.

"The other case is the *West Riding of Yorkshire Council* v. *Holmfirth Urban Sanitary Authority*, 1894, 2 Q.B. 842, which shows that even where a sanitary authority does not increase the quantity of sewage matter entering a stream by ancient sewers within its district, it is within the third section of the Act.

"The principle of this judgment is illustrated and confirmed by the *Midlothian County Council* v. *Oakbank Oil Company*, 6 Fr. 387, a case under the fourth section of the Rivers Pollution Prevention Act.

"Although the defenders' pleas as answers to the charge of committing an offence against the Act and to their being ordered to do their duty are repelled, it does not follow that the referee and the Court may not give effect to some of their contentions when the manner in which they are to do their duty comes to be determined. Thus, as one example, it may be shown that the continued use of the channels of the streams within the burgh for drainage purposes may be expedient under conditions."

Stated cases were taken and presented to the Division under the Rivers Pollution Prevention Act 1876, sec. 11. Owing to the amendment tendered at the hearing (*v. sup.*) it was unnecessary to deal with the questions submitted.

Argued for appellants—This was the statutory method of review—Rivers Pollution Prevention Act 1876, section 11—*County Council of Lanark* v. *Magistrates of Airdrie*, May 22, 1906, 8 F. 802, 43 S.L.R. 632. The Sheriff had gone wrong. The offence charged was one of knowingly permitting sewage to fall or flow (*vide* section 3 of Act of 1876), and this was denied. He ought, therefore, either to have dismissed the petitions or allowed proof. In the *Pumpherston* and *Oakbank* cases, December 15, 1903, 6 F. 387, 41 S.L.R. 181, which were decided on section 4 of the 1876 Act, the offence charged was different, viz., that of *causing* the pollution. That an offence was committed was denied on a variety of grounds all of which required inquiry if they were not to be at once sustained. There were private prescriptive rights involved here over which the defenders had no control, and the Court could not, especially against a public body, proceed without full inquiry—*Attorney-General* v. *Guardians of Poor of Union of Dorking*, L.R., 20 C.D. 595: *Kirkheaton District Local Board* v. *Ainley, Sons, & Company* (1892), 2 Q.B. 274. The Court would not compel the defenders to do what they were unable to perform—*per* Lindley, L.J., in *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* (1894), 2 Q.B. 842, at p. 849.

Argued for respondents—The Sheriff was right. The appellants had no substantive case and were merely fighting for delay. *Esto* that private owners might pollute, that did not affect the liability of the burgh, for the burgh was bound to purify all sewage entering the streams within their district. That was the effect of the amending Act of 1893 (56 and 57 Vict. c. 31). That Act was specially passed to get rid of all such qualifications of the burgh's liability. For it provided that where sewage *actually* fell into a stream the local sanitary authority should be deemed to "knowingly permit" it so to fall in. Prior to that Act it would have been very difficult to dispense with inquiry but the reason for it had now been obviated. There was no averment here either that the burns were not in fact polluted when they entered the pursuers' jurisdiction (the appellants amended to meet this argument), or that the defenders had adopted the best known means of preventing pollution. The burgh had power under the Public Health Act of 1897 to adopt compulsory measures if such were necessary, but it had done nothing at all.

At advising—

LORD PRESIDENT—These are two special cases which are brought under the provisions of the Rivers Pollution Prevention Act of 1876, submitting for review a finding of the Sheriff to whom the complaint was presented. The complaint in each case is at the instance of the County Council of the County of Lanark, and is directed against the Magistrates of Coatbridge and the Magistrates of Airdrie in their capacity as Public Health Authority; and what the complaint seeks is to have a declaration that these two public authorities are committing an offence under the third section of the Rivers Pollution Prevention Act and should

be restrained from so doing. The offence which they are alleged to have committed is that they have allowed sewage matter from their system of drains to go into a certain set of small streams which are mentioned in the petition. Now, the defence that is made by the two local authorities is twofold. The defence of which we heard most at the time of the discussion was that these two local authorities, who admit that they are the drainage authorities and that they have a system of drains, took over their system of drains, to a great extent at least, at a time prior to the passing of the 1876 Act; that as a matter of fact the streams in question had long ago been turned into what are practically sewers; and that the inhabitants of the two respective burghs had long ago gained a prescriptive right to put their sewage into these streams. On that state of facts the appellants have argued that no offence could be committed, and that they are entitled to be free. There is a second line of defence, which I shall presently notice, but as regards the first I think it is necessary first of all to look carefully at what the statute has laid down upon the matter. The offence is determined by the third section of the Act of 1876, which is in these terms—". . . [*Quotes first paragraph of section, supra*] . . ." Now, the burghs deny that the streams mentioned in the petition are streams in the sense of the Act. The Sheriff has decided that against them, and I think that there can be little doubt that the Sheriff here was right. A stream does not cease to be a stream because as a matter of fact after a portion of its passage through land you cover it up and practically make a drain of it. It still retains its character as a stream, which is not purely historic, and it emerges as a stream after you get outside the territory. I think this is made still more clear by the terms of the definition which is given in section 20, where "stream" is said to include—I am omitting other parts of the section—". . . [*Quotes from section* 20, *supra*] . . ." Now, the streams in question here are not streams which empty directly into the sea, and therefore I think that ends it.

Now, the next branch of their defence is that inasmuch as the sewage is being contributed by other persons who have, as they allege, a prescriptive right to put in the sewage, the appellants cannot be "causing to fall or flow or knowingly permitting to fall or flow" that sewage. I think that would have been a question of considerable difficulty if the matter had rested upon the Act that I have quoted alone, but then it does not, because there is the Explaining Act of 1893, and that Act, which is headed "An Act to explain the Rivers Pollution Prevention Act 1876," provides by the first section—". . . [*Quotes, supra*] . . ." I entirely agree with the remark of the learned Dean of Faculty that that section was passed for the very purpose of avoiding these difficult questions, and in my judgment that section concludes the matter. We are here, on these facts, directly under the words of the section, and therefore I think it is out of the question to say that these local authorities here do not permit to fall or flow or be carried into any stream any solid or liquid sewage matter provided that solid or liquid sewage matter goes in.

Now, another point was incidentally raised. The third section which I have quoted goes on thus—". . . [*Quotes* 1876 *Act, sec.* 3, *second paragraph, supra*] . . ." Now, the local authorities here have put in an averment to this effect. They say that besides the sewage which is in these streams or sewers there are also a great many chemical discharges and other discharges from works, and that these chemical discharges act as re-agents, with the result that the whole liquid is purified; and accordingly counsel argued to us that there could not be an offence here, because they had really come under the terms of this second bit of the third section. I think here, again, the Sheriff has taken the right view, that we are not within the scope of that provision at all, because I think the second part of the third section clearly points to a person who allows the sewage to go in doing something to prevent the contaminating nature of that sewage when it gets there, whereas the point of the averment here is that they do nothing. I think therefore that there is no averment which brings them under that second part of the third section. That, however, does not conclude the whole matter against them, as I shall presently show when I come to the other sections. The result, as far as I have gone at present, therefore seems to me this, that the learned Sheriff is perfectly right in holding that upon the face of the proceedings there had here been an offence committed, and that the local authorities of these two burghs could not take any help either—first, from the fact that the sewage was put in by persons whom they allege to a great extent had a prescriptive right to put it in; or second, from the fact that they further said that other things went in which rendered the sewage innocuous.

But then there is another matter which I think perhaps a little escaped notice through the form of pleadings, and chiefly through the fact that the brunt of the contest in the Court below was upon the topics which I have just handled, and that is this—the complaining authority here have only got a title, they not being in the district themselves, under the 8th section of the Act. Now, the 8th section of the Act says this—". . . [*Quotes* 1876 *Act, sec.* 8, *supra*] . . ." Now, here it is quite clear that the offence is committed outside the district of the complaining sanitary authority, and therefore the complaining sanitary authority can only have a title if there is caused pollution within their district of any such stream. Now, I have already mentioned these averments to the effect of there being chemical matters put in which acted as re-agents and purified the sewage. The averments are put in with reference to the point which I have already dealt with, but of course if they were true in fact it

would lead to the conclusion that when the general liquid went out of the district of the first sanitary authority into the second's it emerged as a pure liquid. Something very near an averment to that effect is put in the pleadings, because speaking of what they call the lower water they do say in Statement 2 of the Statement of Facts for the Defenders—"The lower waters of the said burns and streams are not polluted by the defenders." Your Lordships thought that that was not a very satisfactory state of averment, and the averment has now been cleared up by the defenders having put in a minute in these terms—"They crave leave to amend the record by inserting, 'At the point where said burns or streams leave the territorial jurisdiction of the defenders and enter that of the pursuers they are not polluted by solid or liquid sewage matter.'" Now, that seems to me a perfectly straight and satisfactory averment, and if that averment is true then I think it is quite clear that the title of the complaining authority disappears, because they do not bring this within the words of section 8, which alone gives them a title; and therefore I think with regard to that averment, which I think they are of course entitled to make, that the finding of the Sheriff, who without proof has decided that an offence has been at this moment committed, cannot stand. I do not think that it is at all the Sheriff's fault, because I think as I say that the brunt of the discussion turned upon the other topics before him, and this particular topic was rather lost sight of and not sufficiently accentuated in the pleadings of the defenders; but I think, the defenders are clearly entitled to have an opportunity of proving that, and if they prove it satisfactorily, then I think the pursuers would have no title to ask for a finding that an offence had been committed. Accordingly I think what your Lordships ought to do is to send back the case to the Sheriff with the intimation that is contained in our opinions that he should allow this amendment of the record and allow a proof upon that specific point, and upon that specific point alone. But I think we can do nothing else, because if I may assume for the moment that the defenders—I am merely assuming by way of hypothesis—if I assume for the moment that the defenders fail upon that, then I think the Sheriff's finding that an offence has been committed was quite right—that is to say, that I do not think there was any good case upon the second portion of section 3—anything which hung up the question of an offence having been committed. What I think did then ensue was an inquiry under section 10, and that the Sheriff was prepared to make, because he had made a remit under section 10. Section 10 does not compel the Court to pronounce interdict at once, for it provides that the Court may insert such conditions as to time or mode of action as it may think just, and really puts the Court in complete possession of the matter. Moreover, it also provides—"Previous to granting such order the Court may, if it thinks fit, remit to skilled parties to report on the best practicable and available means."

The matter is somewhat complicated, but I hope I have made it sufficiently clear that I think the Sheriff's judgment was completely right, with the exception that there was this question of fact which is disputed and which underlies the whole matter of title. If that is cleared out of the way I think the Sheriff's judgment is right. Under these circumstances I do not think it is necessary to answer the specific questions, but simply to remit the case *simpliciter* to the Sheriff with this indication that we think he ought to allow the amendment of the record and proof upon that single point.

LORD KINNEAR—I concur.

LORD DUNDAS—I agree with the course your Lordship proposes, for the reasons which you have stated.

LORD M'LAREN and LORD PEARSON were absent.

The Court in respect of the minute of amendment found it unnecessary to answer the questions submitted in the case, recalled *in hoc statu* the interlocutor of the Sheriff dated 10th April 1906, and remitted to him to allow the amendment proposed in the minute and to allow parties a proof upon the averments contained therein.

Counsel for the Pursuers (Respondents)—Dean of Faculty (Campbell, K.C.)—C. D. Murray. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for the Defenders (Appellants), the Burgh of Airdrie—Scott Dickson, K.C.—Morison, K.C.—Horne. Agents—Drummond & Reid, W.S.

Counsel for the Defenders (Appellants), the Burgh of Coatbridge—Hunter, K.C.—Horne. Agents—Laing & Motherwell, W.S.

Thursday, July 11.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CLYDE SHIPPING COMPANY, LIMITED (OWNERS OF THE "FLYING WIZARD") *v.* MILLER (OWNER OF THE "SUNBEAM.")

Ship — Collision — Pilot — Proof—Onus — Liability for "Trim" — Merchant Shipping Act 1894 (57 *and* 58 *Vict. c.* 60), *sec.* 633.

The Merchant Shipping Act 1894 (57 and 58 Vict. c. 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