Lord Adam at p. 614, 28 S.L.R. 446; *Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188, 48 S.L.R. 115. The Judicature Act prescribed a special limited form of reviewing a final interlocutor in an action of removing. Consequently it could not be successfully argued that a more general method of review was open in the case of an interlocutor in an action of removing which was not final.

Counsel for the defender was not called upon.

LORD PRESIDENT — This is an appeal against an interlocutor of the Sheriff-Substitute at Kirkcudbright, dated 7th July 1919, allowing a proof to the parties. The competency of the appeal is challenged on the ground that the action in which the proof has been allowed is an action of removing, and that there is no appeal against a decree of removing. It appears to me that it does not signify what is to happen to the action after proof is led. If the Sheriff-Substitute has granted leave to appeal, then section 28 of the Sheriff Courts Act 1907, as amended by the Act of 1913, is directly applicable. It applies in terms to the case before us, and, if that is so, it appears to me that the Judicature Act 1825 does not apply. It is said that section 44 of the Act of 1825 constitutes a bar to procedure by way of appeal, but that section applies only where a decree of removing has been granted. Here we have no decree of removing, only an interlocutory judgment allowing proof, and therefore I think that the appeal is competent and that the case ought to go to the summar roll.

LORD MACKENZIE—I concur.

LORD CULLEN—I also concur.

LORD SKERRINGTON—I am of the same opinion.

The Court repelled the objection to the competency.

Counsel for Pursuer—Constable, K.C.—R. C. Henderson. Agents—Scott & Glover, W.S.

Counsel for Defender—Gentles. Agents—Baillie & Gifford, W.S.

Wednesday, November 5.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CAMBO SHIPPING COMPANY, LIMITED (OWNERS OF THE S.S. "ROSSETTI") *v.* DAMPSKIBSSELSKABET CARL OF COPENHAGEN (OWNERS OF S.S "MAGNUS").

Ship—Evidence—Collision—Functions of Judge and Nautical Assessor.

Two ships collided on a very bad night. The collision was caused by the "Magnus," which was light, dragging her anchors and coming down on the "Rossetti," which was holding to her moorings. When the "Magnus" was dragging her anchors she had steam up but did not use it. By failure to use her steam she omitted to take a reasonable measure which might have avoided the accident. In an action for damages by the "Rossetti" against the "Magnus" the latter led evidence to the effect that the steam had not been used because those in charge of the "Magnus" did not and could not know owing to the darkness and the weather that they were dragging their anchors. That evidence was uncontradicted. The Lord Ordinary, without expressing any opinion as to whether he credited that evidence or not, accepted an opinion expressed by the nautical assessor to the effect that it would not have been difficult for those on the "Magnus" to know that they were dragging their anchors. He found the "Magnus" liable in damages. *Held* that it was for the Lord Ordinary and not for the nautical assessor to pronounce upon the trustworthiness of that evidence, and to say whether or not the master of the "Magnus" ought to have known when his anchor began to drag; and, on the ground that the evidence did not establish fault, the "Magnus" *assoilzied.*

The Cambo Shipping Company, Limited, owners of the s.s. "Rossetti," *pursuers*, brought an action against Dampskibsselskabet Carl of Copenhagen, owners of the s.s. "Magnus," *defenders*, concluding for £2000 damages in respect of the loss occasioned by the collision of the two ships in Lerwick Harbour. The defenders counterclaimed, and stated the damage to their vessel at £3515, 14s. 6d.

The pursuers *pleaded, inter alia*—"1. The pursuers having suffered loss and damage to the amount sued for through the fault or negligence of the defenders or those for whom they are responsible, are entitled to reparation therefor. 3. The defenders are not entitled to decree for their counterclaim or any part thereof in respect that (*a*) their averments in support thereof are unfounded in fact, and (*b*) any loss and damage suffered by them was caused or at least materially contributed to by their own fault and negligence."

The defenders pleaded, *inter alia* — "3. The said collision not having been caused by the fault of the defenders, they should be assoilzied from the conclusions of the summons. 4. The said collision having been caused or contributed to by the fault of the pursuers, the defenders are entitled to absolvitor. 5. The defenders' vessel having been damaged in said collision through the fault of the pursuers, the defenders are entitled to decree for the sum counter-claimed in name of damages."

On 12th December 1918 the Lord Ordinary (HUNTER), after a proof, found that the s.s. "Magnus" was alone responsible for the collision and continued the cause, granting leave to reclaim.

Opinion (from which the *facts* of the case appear): — "The question that has to be determined in this case is as to liability for

a collision which occurred in Lerwick Harbour between the 'Rossetti' of London and the 'Magnus' of Copenhagen.

"On 14th December 1917 the 'Magnus' reached Shetland from Norway. When passing Kirkabister Lighthouse she took an Admiralty pilot on board. All merchant ships using Lerwick Harbour at that time anchored according to Admiralty instructions. The 'Magnus' was berthed in the south harbour to the north of a boom fence which stretched right across from the Nabb to Taing of Ham, and about 300 or 400 yards from the Holm of Lera Ness. Her port anchor was dropped first, the vessel then steamed up in a north-westerly direction, and her starboard anchor was let go. When finally anchored the port anchor was aft and the starboard forward with about 45 fathoms of chain on each anchor. The 'Magnus' was then heading about N.N.W., and the wind was in a north-westerly direction and not very stiff.

"On 16th December 1917, the 'Rossetti' came into the harbour of Lerwich under the charge of an Admiralty pilot. She was moored in the proximity of the 'Magnus' at about 3·30 p.m. on that day. She was anchored with a running mooring—*i.e.*, both her anchors were out, being separated from each other by about 60 or 70 fathoms. There was about 45 fathoms of cable on each anchor. Both her anchors were leading on the bow, so that when riding at anchor she was riding with both anchors holding her up against the wind. The wind was blowing from about the north.

"Shortly after the 'Rossetti' anchored the wind began to increase and went on increasing with frequent heavy squalls until the evening. It also veered somewhat to the east. About 5·30 the 'Magnus,' which was in ballast and light, began to drag her anchor and to sheer. She altered her position until she touched the 'Rossetti.' By using her engines she managed to move ahead. Meantime she had picked up her starboard anchor and dropped it again, bringing herself to anchor a little more to the north and west of the 'Rossetti' than she had been originally.

"The master of the 'Rossetti' explains that after he saw the 'Magnus' anchored about three lengths ahead of him he thought things were all right and he went below, but that he came on deck again shortly after seven. He further explains that he then saw 'the "Magnus" was dragging broad on the starboard bow. She was not sheering about; she was heading more in a north-westerly direction, so that she was swinging across with her port side coming down upon us. Just after that her engines were started, and she came across our bows. Her engines were going very fast. She drove down on us with her port side, practically lying across us—I slackened away the cable at that time to try and get away from her, to give her more room. I slackened the cable up a bit, and then the "Magnus" struck me and the cable parted. She struck me right on my stem. The part of the "Magnus" that struck me was somewhere about her bridge deck. About that time my starboard cable snapped and went off with 75 fathoms.'

"As the 'Magnus' was the vessel which came into collision with the 'Rossetti' where the latter was moored I think that the *onus* of explaining the collision rests upon the former vessel. It is maintained for her that the real cause of the collision was the fault of the 'Rossetti' in coming in and anchoring so close to her as to give her a foul berth. The master and mate of the 'Magnus' say that the 'Rossetti' was anchored at a distance of only 15 fathoms from them. The former witness says that it was obvious to him that the 'Rossetti' was being anchored dangerously near his vessel, which was in ballast and therefore more liable to sheer and drag her anchor than if loaded; but that he abstained from making any representation to the Admiralty pilot under whose directions the 'Rossetti" was being moored. If he appreciated the danger, as he says he did, I do not think that he was entitled to take no action. In my opinion, however, the distance separating the 'Rossetti' and the 'Magnus' was considerably greater than that given by these witnesses, and was approximately about 50 or 60 fathoms. In ordinary times a greater distance than this would probably have separated vessels moored in winter in Lerwick Harbour if one of the vessels was in ballast; but as a considerable number of vessels had to be accommodated in harbour I am not prepared to say that there was fault in mooring the 'Rossetti' dangerously near to the 'Magnus.'

"It was also suggested that the 'Rossetti' was in fault in not paying out cable so as to ease the situation. This ground of fault is not supported by the evidence for the 'Magnus,' and is contradicted by the testimony of the master of the 'Rossetti' and other witnesses. It is, in my opinion, not established.

"So far as the 'Magnus' is concerned, I do not think it can be maintained that she was originally improperly moored. Looking to the increasing force of the wind, to the change of its direction, and to the fact that the vessel was in ballast, I think that the master should have had steam up to assist his vessel in maintaining her position if her starboard anchor, on which alone she was riding, began to drag. On the evidence it appears that he only put on steam after his vessel touched the 'Rossetti.' In re-anchoring his vessel he took up a position that with the prevailing wind was likely to aggravate the effects of his being driven down upon the 'Rossetti.' It would have improved her moorings if she had shifted her port anchor so as to hold by both anchors; but I am advised by the Nautical Assessor that after her starboard anchor dragged it would have been difficult for her, in view of her proximity to the 'Rossetti,' to pick up her port anchor which may have shifted its position, although the master and mate of the 'Magnus' consider that it was only their starboard anchor that dragged. In any event the master might have employed steam to

maintain his position. From the entries in the engineer's log it appears that the engines were stopped between 7 and 8, and that they never had more than half-speed on until after the collision. The 'Magnus' must have been dragging her anchor for some time before the engines were again started at eight o'clock. It was suggested for the 'Magnus' that it was difficult for those on board that vessel to know that their anchor was dragging, but I am advised by the Nautical Assessor that this is not so. I shall pronounce a finding to the effect that the 'Magnus' was alone responsible for the collision, and continue the cause."

The defenders reclaimed, and, so far as the subject of this report is concerned, argued—On the evidence there was no fault on the part of the "Magnus." It was for the Lord Ordinary to consider the evidence and form his judgment upon it. Instead of doing so he had accepted an opinion of the nautical assessor and as a result had rejected evidence—"*The Gannet*," [1900] A.C. 234, *per* Halsbury, L.C., at p. 235; "*The Melanie*," [1919] W.N. 151. The Nautical Assessors Act 1894 (57 and 58 Vict. cap. 40), sections 2 and 3, were referred to.

Argued for the pursuers (respondents)—The opinion of the nautical assessor founded on by the Lord Ordinary was not of the essence of the judgment and the same conclusion might have been reached without such an expression of opinion.

At advising—

LORD PRESIDENT—The Lord Ordinary's narrative of the facts of this case is brief but sufficient. I agree with and do not repeat it. But his main conclusion on the evidence I am unable to support. He finds the "Magnus" alone to blame for the collision. I consider that neither ship was blameworthy and that those in charge of both ships displayed seamanlike care under very trying conditions of wind and weather in a crowded harbour. That the "Rossetti" was moored much nearer the "Magnus" than was safe under the weather conditions which came to prevail I regard as certain. Had this not been so, the first ground of fault pleaded against the "Magnus" would have been pressed with overwhelming force—that she dragged her anchor because "an insufficient length of cable had been let out." She had 120 fathoms of cable in her locker, and yet at no time prior to the collision had she much more than half its length out. Yet it was never contended in argument or suggested in the evidence that more cable should have been paid out. The reason is obvious. The ships were moored too close to one another to make that other than a dangerous manœuvre. And so in the end the main question came to be—Ought the master of the "Magnus" to have set his engines going ahead as soon as his anchor began to drag on the second occasion? He certainly ought if he knew his anchor was dragging; for it is proved that he had steam up. Did he know or ought he to have known when the anchor commenced to drag? That is the crucial question. He says, and the first officer supports him, that on account of the darkness of the night, the gale which was blowing, and the blinding snow squall which was on at the time, he did not know that the anchor was dragging until his vessel was close down upon the "Rossetti," when, of course, nothing could be done to avoid the collision. If this answer be well founded, as I think it is, then his defence is complete. It is essential therefore on this point to make a careful scrutiny of the evidence. In the following passages the master of the "Magnus" explains his position:—"(Q) Weren't you practically alongside of the 'Rossetti' before you began to steam ahead the first time?—(A) Yes. (Q) Why didn't you steam ahead before you came down upon her the first time?—(A) Because the squall came up with the snow, and we could not see anything; it was impossible to do that with the squall then. (Q) I see by the engineer's log that from 6·45 onwards you were never more than half-speed ahead; was there any reason why you should not have been full speed ahead before you came alongside the 'Rossetti'?—(A) No; at that time the ship was dragging, we could not see with the heavy squalls. (Q) Wasn't it squally from five o'clock onwards?—(A) No, the squall only lasted half-an-hour then. The squalls began at half-past five. That was when we began to drag for the first time. . . . . (Q) If your anchor or anchors are not holding you as you begin to drag—I am speaking of the second time—isn't it your duty to help your anchors with steam?—(A) Yes, certainly, but we must find out that the ship is dragging first. (Q) Did you know at eight o'clock that she began to drag again?—(A) Yes, but then we have to see it. . . . (Q) After you went up to very near the old place, a little to the west, and where you lay for an hour, when she began to drag you did not use your steam till she was in contact or almost in contact with the 'Rossetti'?—(A) No, because the other squall came up and we did not see her until we were nearly alongside her. . . . (Q) . . . . can you tell exactly just the moment when a vessel begins to drag?—(A) No, you cannot say exactly; it is impossible to say exactly the moment. (Q) Of course you can if it is daylight and you can see objects ashore, or if you have lights to judge by at night?—(A) Yes, but in the dark you cannot see. (Q) On either of the occasions when you were drifting down, either on the starboard side or on the port side, did you know you were dragging until you found yourself alongside the 'Rossetti'?—(A) No. (Q) And therefore had you any opportunity of putting on steam to resist the dragging until you found the 'Rossetti' alongside you?—(A) No, I had not. . . . *Re-Cross.* (Q) Didn't you see the lights of the 'Rossetti' when you began to drag and while you were dragging down upon her?—(A) No. (Q) If you had looked you would have seen them?—(A) No. (Q) Had she not a light up?—(A) Yes. (Q) And the other vessels had all lights up?—(A) Yes, but I could not see the other vessels. At the beginning we could not see the lights of the 'Rossetti.' (Q)

Couldn't you see by the 'Rossetti's' lights, before you dragged down upon her, that you were colliding?—(A) No, not exactly."

The first officer of the "Magnus" supports the captain in the following passages—"I remember the storm coming on in the afternoon of 16th December. It came on about dusk, about five o'clock. The storm was accompanied by heavy squalls of snow. Those squalls were very near to hurricane strength. In my log I speak of 'a very heavy squall.' I also say that 'at times it reached hurricane-like snow squalls. The snow was very thick while it lasted; not always in the squall, but sometimes in the squall it was very thick; you could not see anything almost.' . . . On the second occasion there was a renewal of the snow squall; there was a heavy squall. At the beginning our vessel did not drag, but the squall got heavier and heavier and then the snow became very thick, and then the last time we were dragging. This time we came down upon the other side of the 'Rossetti'—upon the port side. . . . We could not see lights around when the snow squall was thickest. I could not see the light of the 'Rossetti' when the snow squall was thickest, but it was not the same thickness all the time; sometimes we could see it and sometimes not. . . . In my view it was impossible to do anything to avoid the collisions which took place; it was impossible in that gale of wind. . . . (Q) As you were dragging down was there any reason why your engines should not have been on and assisting the anchor? — (A) The weather was not that bad before the squall came, so that there was no reason to have the engines ready. (Q) But after the squall was over which had caused the first dragging, why didn't you have the steam up and assisting the anchor, or have you nothing to do with that?—(A) Well, we had the steam up. (Q) But you never used it for the purpose of assisting the anchor until you were in contact with the 'Rossetti'; are you aware of that, as the log shows?—(A) No, when the squall came and she began to drag the order was given for the steam; and it takes some time to get steam up. (Q) But when the steam was up there was no reason why it should not have been used to help the anchor; was there any reason that occurs to you?—(A) Well, we used it as soon as we got ready, and we got away. (Q) But you never used it until you were in contact with the 'Rossetti'?—(A) No—the second time. . . . (Q) On the second occasion when she dragged could you tell she was dragging until you found yourselves close to the 'Rossetti'? — (A) No, because it was very thick at the time when she was dragging; we could not see her, it cleared a bit and then we could see her, but then we were alongside of her? (Q) Was there any time that night at which you knew you were dragging and yet never put the engines in motion to help the ship to resist the dragging?—(A) Yes, afterwards, when we came alongside of the 'Argo.' (Q) But so far as the 'Rossetti' was concerned, was there any time at which you knew you were dragging and yet you gave the ship no assistance from the engines to resist the dragging?—(A) No."

This evidence is not contradicted by any witness adduced for the pursuers. It could not well be. Indeed it seems to be supported by the evidence given by the second officer of the "Rossetti," who said, "I slackened our cables just before she (the 'Magnus') struck. . . . I slackened away the cable the second time immediately I saw the 'Magnus' dragging." This witness therefore did not see the "Magnus" from the forecastle of the "Rossetti" until the collision was just about to occur.

Now if this evidence be accepted then the "Magnus" is absolved from blame. I see no reason to doubt it. The credibility of the witnesses was not challenged. The Lord Ordinary makes no adverse comment on their evidence. Why then does he reject it? He says in his opinion that "it was suggested for the 'Magnus' that it was difficult for those on board that vessel to know that their anchor was dragging, but I am advised by the Nautical Assessor that this is not so."

Now it is to be observed that the witnesses do not say merely that it was difficult to know when the vessel commenced to drag. They say they did not know and could not know on account of the darkness and blinding snow. It was for the Lord Ordinary and not for the Nautical Assessor to pronounce upon the trustworthiness of the evidence, and to say whether or not the master of the "Magnus" ought to have known when his anchor began to drag. I hold upon the evidence that he could not tell, and hence was not to blame for not steaming ahead. But it may be said there are other means besides eyesight which might enable those on board the "Magnus" to know when their ship commenced to drag her anchor and the Nautical Assessor may have had those other means of knowledge in his mind. We do not know if this be so: no other means of knowledge is averred on the record or suggested in the evidence. If such there be, then the appropriate questions ought to have been put to the master of the "Magnus" in order that he might have an opportunity of making his reply. In the absence of any evidence at all on the subject we are not entitled to make the assumption that other means of knowledge were available, that they were not availed of, and that if availed of they would have avoided the collision.

I ought to add that the Nautical Assessor who sat with us advises that under the circumstances which existed on the night of the collision there were no means available by which the master of the "Magnus" might have known when his anchor began to drag; and that assuming the facts of the case to be as stated by the officers of the "Magnus," there was nothing they could have done to avoid the collision. In short, her master managed his ship with seamanlike care and skill, and hence is free from blame.

[*His Lordship then proceeded with another*

branch of the case with which this report is not concerned.]

I am for recalling the Lord Ordinary's interlocutor and assoilzieing the defenders from the conclusions of the summons.

LORD MACKENZIE, LORD SKERRINGTON and LORD CULLEN concurred.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders from the conclusions of the summons.

Counsel for the Pursuers (Respondents)—Watt, K.C.—A. M. Mackay. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders (Reclaimers)—The Dean of Faculty (Murray, K.C.)—Normand. Agents—Boyd, Jameson, & Young, W.S.

HIGH COURT OF JUSTICIARY.

Friday, October 31.

(Before Lord Dundas, Lord Salvesen, and Lord Guthrie.)

WAUGH *v.* CAMPBELL.

Justiciary Cases — Statutory Offences — Motor Car—"Recklessly or Negligently" —Process—Appeal—Motor Car Act 1903 (3 *Edw. VII, cap.* 36), *sec.* 1 (1).

The Motor Car Act 1903, section 1 (1), enacts—"If any person drives a motor car on a public highway recklessly or negligently or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act." *Held*, in an appeal by stated case, (1) that the recklessness or negligence need not be wilful, and (2) that while the existence of recklessness or negligence was a question of fact on which the Sheriff was final, where the stated facts were against an acquittal but the Sheriff had, owing to misconception of the degree of recklessness and negligence required to constitute an offence, acquitted, the Court were entitled to sustain an appeal.

Observed per Lord Salvesen that "there is at common law a distinction between a negligence which will be sufficient to impute civil liability to a person and a negligence which will be sufficient to justify a conviction in the criminal courts."

The Motor Car Act 1903 (3 Edw. VII, cap. 36), sec. 1 (1), is *quoted in rubric.*

Robert Waugh, procurator-fiscal, *appellant*, brought a summary complaint in the Sheriff Court at Kirkcudbright against William Campbell, *respondent*, in the following terms—". . . You are charged at the instance of the complainer that on Friday, 23rd May 1919, on the public highway between Creetown and Gatehouse of Fleet, known as the Mail Coach Road, and particularly at a part thereof at Kirkdale Bridge, in the parish of Kirkmabreck and stewartry of Kirkcudbright, you did drive a motor car recklessly and negligently, and did run into and damage a motor car there and then being driven on said highway by Henry A. Chrystie 23 Royal Exchange Square, Glasgow, and did cause bodily injury to the said Henry A. Chrystie, contrary to the Motor Car Act 1903, section 1; whereby you are liable to a fine . . ."

On 19th June 1919 the Sheriff-Substitute (NAPIER) found the accused not guilty, from which decision an appeal was taken by Stated Case.

The Case stated—"I found the following *facts* proved:—On Friday 23rd May, the respondent left Newton-Stewart in a motor car, which he was driving, about 4 p.m., and proceeded on the road leading therefrom towards Gatehouse. He is well acquainted with the road, and has driven a motor car for fully five years. As he approached Kirkdale Bridge he was on his own or left-hand side of the road, and was going at about 14 miles an hour. Immediately after the road crosses the bridge it takes a very sharp turn to the south, as shown on the Ordnance map produced at the trial, and owing to the parapet wall and foliage no one can see round the turn. On entering on the bridge, and until he was about half-way across it, the respondent kept well on his own or left-hand side of the road, in order, as he said, to see round the corner as far as possible. Thinking that there was no one on the road, and being of opinion that he could take the turn better if he were on his right-hand side of the road, the respondent, when about half-way across the bridge, crossed to his right-hand side of the road. After he had proceeded about 15 yards on his right-hand side, *i.e.*, on his wrong side of the road, and before he had rounded the turn, his motor car collided with a small low motor car, which was being driven by Mr Henry A. Chrystie at the rate of about 10 miles an hour, close into its own or left side of the road, in the direction of Newton-Stewart, at a point on the side of the road nearly opposite the bench mark on the said Ordnance survey map, and close to the southern parapet of the bridge. Mr Chrystie had given warning by blowing his motor horn as he approached the bridge, though this warning was not heard by respondent or by Mr Donnan, the other occupant of his car. The respondent did not blow his horn. Mr Chrystie was pretty badly injured, and the respondent and Mr Donnan were also injured. Both cars were damaged. The road, though part of the main highway between Dumfries and Stranraer, is a comparatively quiet road. Motor cars and other vehicular traffic pass along it from time to time every day. But there was no special reason why the respondent should that day be on the lookout for a motor car or other vehicle at this particular place