

so by an erroneous interpretation of a letter which she received concerning him. After that he invited her to come to him—that is, after a wilful and malicious desertion for more than ten years. I am not going to express any absolute opinion whether after ten years of wilful and malicious desertion repentance comes too late, for I think we have no proof at all here of the defender's honest willingness to take back his wife at any time. Such letters as have been produced in process cannot be received as proof of such willingness without more evidence, and especially the evidence of the writer of them. I do not think it is anything to the purpose that the pursuer when examined as a witness said that she was "not willing to return to the house of one who had so used me, unless I had an assurance that I would be received as a wife should be, and that my person would be safe." I do not like the question—"Would you have been willing to return if something happened that never did happen?" I am not sure that I should allow such a question, but at all events a proper answer to it would have been—If I had been invited I would have considered the subject, but as I never received an invitation I cannot answer. I cannot therefore assent to the conclusion of the Lord Ordinary except in so far as he finds desertion proved. I am of opinion that this interlocutor ought to be recalled and decree of divorce pronounced.

LORD CRAIGHILL—I concur, and have nothing to add.

LORD JUSTICE-CLERK—I also concur. I quite retain the opinion I expressed in the case of *Muir*, and the more the thing is sifted it seems to me the almost inevitable result, because it would never do for a man to desert his wife, however maliciously, for twenty years, and then when an action of divorce for desertion was raised against him, simply to offer to adhere, the result of which must be that whether the wife accepts or rejects her action for divorce is lost. I do not think that is the law. But it is not necessary to decide that question here.

The Court recalled the interlocutor of the Lord Ordinary and granted decree of divorce as craved.

Counsel for Pursuer—Rhind—Millie. Agents—M'Caskie & Brown, S.S.C.

Counsel for Defender—Salvesen. Agent—R. W. Renton, S.S.C.

Thursday, May 26.

SECOND DIVISION.

GALLOWAY v. SIM.

Shipping Law—Liability of Owner for Lighting Wreck Sunk in the Fairway of a Navigable River.

Circumstances in which held that a ship-owner whose vessel had been injured by a collision, and abandoned after the fixing up of one white light by the crew, was not liable for the damage to another vessel which came

into collision with the wreck, the light on which had been from some cause extinguished.

In this action Hugh Henry Galloway, sole registered owner of the steamer "Marmion" of Glasgow, sued William Sim, sole registered owner of the steamer "Loch Etive" of Glasgow, for £316, 16s. 11d., as damages sustained by him in consequence of a collision between the "Marmion" and the "Loch Etive" in the Clyde on 9th February 1880, which was the result, as the pursuer alleged, of the conduct of those for whom the defender was responsible. The circumstances of the collision were thus narrated by the Sheriff-Substitute (ERSKINE MURRAY) in his findings in fact:— "Finds (1) that on 9th February 1880 the 'Loch Etive,' a small screw-steamer whose registered tonnage is about 47 tons, was proceeding down the river Clyde after dark, when she was run into opposite Thomson's Shipbuilding yard, between Renfrew and Dalmuir, by the steamship 'Toward' coming up the river: Finds (2) that a large hole was made in her port quarter, and she was slewed round by the collision, making a semicircle in the river till her bows wheeled round facing the N.-W., in the position laid down in the two maps, with her bow about 50 feet nearer the S. side than the middle of the river, where she sunk by the stern first, having, when sunk, her two masts (the after one of which is a mere pole) and a portion of her funnel, which is situated very near her stern, above the water: Finds (3) that at the time of the collision she was carrying the usual steamer lights—a white light in the foremast and a red and green at the two sides: Finds (4) that when the 'Loch Etive' began to fill, her master and some of the crew—two of whom were somewhat hurt or shaken by the collision—scrambled up the bows of the 'Toward,' which was still jammed into the 'Loch Etive': Finds (5) that the 'Toward' drew up for a short time alongside of Thomson's Wharf and gave the 'Loch Etive' men a boat to rescue the remaining men of the 'Loch Etive,' who were clinging to her foremast rigging: Finds (6) that in taking off the men they also took off the red and green light, leaving the white light on the foremast, which was burning brightly, and which, if undisturbed, ought to have burned for the rest of the night: Finds (7) that the master of the 'Loch Etive' asked the master of the 'Toward' for an additional light to be hung on the 'Loch Etive' for the purpose of additional security, but the latter disregarded his request and started at once for Glasgow, carrying with him the crew of the 'Loch Etive,' and reaching Pointhouse pier, where the wreck was reported to the deputy harbour-master Johnston, at 10.40, and the Custom-house Quay, about three miles further up, probably about 11.15 or 11.30, as vessels come slowly up the harbour: Finds (8) that the master of the 'Loch Etive' then went out to the house of Mr W. C. Sim, the defender, owner of the 'Loch Etive,' at Pollokshields, which he must have reached shortly before or about midnight, to report and to ask instructions: Finds (9) that defender told him to get additional lamps in Glasgow as soon as the ship-chandlers' shops were opened in the morning, and to take them to the vessel, which he accordingly did, reaching the neighbourhood of the vessel about 8 A.M.: Finds (10) that in the

meantime the light left in the foremast continued to be visible till about midnight, when it ceased to be visible: Finds (11) that it illuminated about 20 out of the 32 points of the compass, giving a clear and distinct warning to any vessel coming down the river, but being partially concealed from vessels coming up the river by the mast: Finds (12) that the pursuer's small screw steamer, the 'Marmion,' 32 tons register, leaving the Broomielaw for Innellan about 4 A.M. on the 10th, laden with a cargo of bricks and the fittings of a conservatory, passed the Pointhouse about 4.15 or 4.25; and while vessels going down were warned, as a rule, of the wreck by the deputy harbour-master, it rather appears that the 'Marmion's' crew did not receive while in hearing, or at least did not notice, any such warning: Finds (13) that they proceeded down, giving way a little to the south near Kenfrew, to enable a faster steamer to pass them on the north side: Finds (14) that the crew consisted of the master, engineer, and a third man, which appears to be the usual and sufficient crew for a steamer of that small size: Finds (15) that the master and man steered alternately, the one not steering being on the outlook in front, and the steersman being able, from the small size of the craft, himself to be on the look-out: Finds (16) that the night was dark but clear, so that lights could have been easily seen: Finds (17) that the 'Marmion,' without the 'Loch Etive' being noticed by her crew, struck the 'Loch Etive' on the port bow, and some part of the 'Loch Etive' made a hole in the 'Marmion' below the water line, so that she began to sink, and was run across to the opposite side, and beached, partially sunk, below Thomson's wharf; and the crew got ashore, and two walked up to Thomson's yard, but could not get in, and returned to the neighbourhood of the vessel: Finds (18) that at daylight the 'Marmion's' men got admittance to Thomson's yard, and then noticed the funnel and aftermast of the 'Loch Etive' above water, the foremast having disappeared: Finds (19) that, after getting labourers and discharging the cargo of the 'Marmion,' her owner sent her to a yard at Bowling and had her repaired there: Finds (20) that he has now raised the present action against the owner of the 'Loch Etive' for £316, 16s. damages, said to be incurred through the detention and repairs of the 'Marmion,' and other expenses resulting from the accident."

After these findings in fact his Lordship found in law—" (1) That on the whole it cannot be held that those in charge of the 'Loch Etive' were in the circumstances guilty of fault or negligence such as to render the owner of the 'Loch Etive' liable to the owner of the 'Marmion' for the damages incurred by the latter in consequence of the collision; (2) that, on the other hand, although the Clyde regulations prescribe that two men shall be on the look-out, the rule in question has never been applied strictly to such small craft as the 'Marmion,' where, in fact, from the smallness of the vessel, the steersman can and does act himself as one of the look-outs, and thus in spirit, if not in letter, the rule is obeyed; and that therefore the owner of the 'Marmion' was not in fault in not having an additional hand to act as a second separate look-out; (3) that while there was nothing absolutely wrong in the 'Marmion' keeping the

course she was in at the moment of the collision in the apparent absence of any other vessel from the waterway, yet when those in charge of a vessel take her fifty feet beyond the central line of the river, out of the regular course of vessels going down, and in the regular course of vessels going up, they must be held to incur voluntarily a certain amount of risk, quite apart from the legal presumption against them, which came into force only on 1st September last, and was not applicable at the date of the collision; (4) that in the view taken by the Sheriff-Substitute, it is therefore unnecessary to go in detail into the question of the amount of damages: Therefore assizes defender from the craving of the petition; finds pursuer liable to defender in expenses."

The Sheriff (CLARK) on appeal recalled this interlocutor, and found defender liable in damages, which he assessed at £240.

The defender appealed.

At advising—

LORD JUSTICE-CLERK—In this action Hugh Henry Galloway, writer in Glasgow, sued William Sim, the defender and appellant, for £316, 16s. 11d., being the amount of damage which he alleges his vessel the "Marmion" sustained through running into the steamer "Loch Etive" belonging to the defender, and which had been sunk in the fairway of the river Clyde by the steamer "Toward."

The Sheriff-Substitute found for the defender, but that judgment was reversed by the Sheriff.

It is the Sheriff's interlocutor we are now called upon to review.

The impression I have formed upon this case is in favour of the Sheriff-Substitute's judgment, and against the judgment of the Sheriff.

In coming to that conclusion I must not be supposed to have gone alone with the argument of the appellant's counsel as matter of law. In a few sentences, in which I shall explain my opinion, I shall assume that when a vessel is sunk in the fairway of a river, thereby affording a cause of danger to those who are navigating the river by a projection in the river above the water impeding the navigation, it is the duty of those who were in charge of the vessel when the event occurred to take reasonable precautions to prevent injury to other vessels from collision with that obstruction, whether they were responsible for that obstruction or not. I rather think that is the result of the decisions, which, however, are not of the clearest. In the English decisions, or in the greater part of them, the question arose on the pleading as to how far the declaration disclosed the ground of action. I do not think it in the least degree necessary for the maintaining of the proposition in law to hold that when a vessel is not within the control of the person in whose possession it was when the accident happened he will not be liable. I can only say I have been unable to find any such case. Therefore, if I were obliged to decide the case on the first ground, that is my impression. I am not, however, compelled to lay down any hard and fast rule of that kind for the decision of the rights of parties in this case.

But then comes the second question, Supposing it to be so, were the crew guilty of omitting any reasonable precaution for the safety of the

public in regard to this wreck? That is a question of common sense, and on the whole matter I am of opinion that the crew were so placed as to be at least obstructed, if not prevented, from taking the measures that otherwise a reasonable man should take. I am not in the slightest degree moved by the notion that if an alarm had been given on shore, not only to the officials of the river, but given to the neighbourhood, there would not have been found, and that rapidly enough, aid and assistance to accomplish this matter. It is in vain to say that it has not been shown what particular men would have come to their assistance, or what particular appliances would have been produced. If the case were put on such a footing as that, and if the question depended on what the crew and the boats or appliances might have done, it would have been in vain and ridiculous to say that because it was not shown whom they would have alarmed they were to be liberated from taking any steps. I am not going into that matter.

I am, however, moved by the position in which those unfortunate men, the crew of the "Loch Etive," were placed in after the accident, and I am more impressed with it after reading the evidence carefully. In the first place, they had been rescued with great difficulty from drowning. They had been in risk of their lives, an agitating enough affair of itself. In the second place, two of their number were seriously hurt—one of them so severely that he afterwards died. I do not wonder that they were anxious to get to Glasgow in these circumstances. Nor am I prepared to say that the obligation of protecting the navigation was one which should have been preferred to the obligation of protecting their comrade.

Independently of that, however, the crew found a refuge on board another vessel—the vessel, namely, which had run them down. Perhaps I should not say much about that vessel, as the question may yet arise. The "Toward" is not represented here. As far as we can see on the evidence, the other vessel, instead of taking any precaution or aiding the crew of the sunken vessel to take precautions in order to warn the public of the event which had taken place, put on steam at once, and even refused to give them a couple of lights which they asked for, and which could easily have been given. They were evidently far more desirous to complete their voyage than to remedy, or at least to lessen, the evil which their own want of skilful navigation had occasioned.

It is quite true that Mr Sim was aroused at twelve o'clock at night. He thought, as I think most people would have thought, that a light at the masthead would prove effective. Possibly that was an omission, but I cannot help feeling at the same time that it is but a slender omission, and not sufficient to bring this case up to what is necessary in order to make it a case of neglect of reasonable and ordinary precautions.

That is the general aspect of the case as it presents itself to my mind. On the general question, I should think there was no obligation on the part of those in charge; and having given this expression of the views by which I am impressed, I do not think it necessary to go further into that matter of law.

LOARDS YOUNG and CRAIGHILL concurred.

The Court recalled the judgment of the Sheriff, and assolizied the defender.

Counsel for Defender and Appellant—R. V. Campbell—James Reid. Agent—Thomas Hart, L. A.

Counsel for Pursuer and Respondent—D. F. Kinnear, Q. C.—Mackintosh. Agents—Ronald & Ritchie, S. S. C.

Friday, May 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

RISK v. AULD & GUILD.

Public Company—Shares and Stock—Gaming Contract.

Is a "bear account" a transaction of a gambling nature, so as to bar the parties from coming into Court upon questions that have arisen between them in connection with such an account?

*Opinions—per Lord Justice-Clerk (Lord Moncreiff)—*that as it does not amount to a wager to contract for the sale of goods of which the seller is not in possession, and has no expectation of being in possession, the operations on such an account are not gaming; *per Lord Young—*that where a case is disclosed of transactions in stocks which have no existence, where the balance to be paid by the one party to the other is truly a bet as to whether certain stocks will rise or fall in value by a certain day, the Court will not interfere to aid the parties.

Agent and Principal—Stock Exchange—Closing of Customer's Account between Settling-Days—Misrepresentation by Person Employing Stock-broker as to his Means.

A firm of stockbrokers who had incurred considerable liabilities in acting for a customer who had represented to them that he was possessed of a considerable sum of money, having discovered that his financial position was not what had been described by him, intimated to him that unless he could give them satisfactory references as to his position by the day following their letter, being a day between settling-days, they would at once close his account, and the customer not having complied with their request, they closed his account accordingly. In an action of damages at the instance of the customer—*held* that the brokers were justified in so acting.

Proof—Relevancy—Acquiescence.

In an action against a stockbroker for closing an account contrary to orders, to the damage of his customer, it appeared from statements made by the pursuer on record, and from correspondence produced, that he had induced the defenders to act for him on false representations as to his credit, and further that he had, in answer to a letter in which the broker, as a condition of going on with the transactions between them, demanded satisfactory references as to the pursuer's means, written re-