The Act 1579, c. 83, enacts—"That all actions of debt for . . . merchants comptes and uther the like debts that are not founded upon written obligationes be persewed within three zeires, utherwise the creditour sall have na action, except he outher preife be writ or be aith of his partie."

Mrs Margaret Macpherson or Mackay, carrying on business under the former name, grocer and spirit merchant, Oban, brought an action in the Debts Recovery Court there against James Jamieson, roadman, Kilninver, near Oban, concluding for payment of £48, 19s. 5½d., conform to account commencing 4th December 1895 and ending 8th May 1900. The summons in this action was dated June 13, 1901.

The defender pleaded—(1) Prescription. (2) Tippling Act.

Mrs Macpherson produced an account consisting of a large number of items partly for spirits and partly for provisions. The only entries in this account within three years of the date of the summons were three entries for spirits in 1899, amounting in all to 2s. 7d., and one entry in May 1900 —"Spirits 6d."

On 21st July 1901, the Sheriff-Substitute (MACLACHLAN) granted decree for payment of £42, 3s. 1d.

On appeal the Sheriff (FERGUSON) affirmed.

The defender appealed to the Court of Session, and argued that the items in the account which fell under the provisions of the Tippling Act 1751 (quoted *supra*) were illegal, and could not be looked at judicially for any purpose — *Maitland* v. *Rattray*, November 14, 1848. 11 D. 71. If these entries could not be looked at, the account had prescribed.

The respondent argued that the Tippling Act, although it deprived the publican of the right to recover such items by action, did not affect them as an interruption of prescription.

At advising—

LORD ADAM—This is an action brought under the Debts Recovery Act by M. Macpherson, under which designation a Mrs Mackay carries on the business of a grocer and spirit merchant in Oban, against the defender for payment of an account for groceries and other furnishings, amounting to £48, 19s. 5½d.

In defence, the defender pleads prescription, the Tippling Act, and payment.

It appears to me that the first plea, which ought to have been considered and either sustained or repelled, was that of prescription. The Sheriffs, however, did not take that course, but held that the plea was barred by the defender's writ, and allowed a proof at large.

Now, on turning to the account libelled on, it appears that the four entries subsequent to April or May 1898 are all for small quantities of spirits under the amount of 20s., and the pursuer did not dispute that the Tippling Act (24 Geo. II. cap. 40), applied to these charges. Now, in the case of *Maitland* v. *Rattray*, 11 D. 71, it was decided that the Tippling Act did not merely cut off the right of action for such furnishings, but rendered them positively illegal. On the authority of that case, accordingly, I think that these entries must be struck out of the account, and the account regarded as if the entries had never been in it. If that be so, then the last entry in the account falls beyond the three years of prescription, and the account is prescribed.

I am therefore of opinion that the plea of prescription ought to have been sustained.

[*His Lordship then dealt with the question whether the constitution and resting-owing of the debt was proved by the writ of the defender*].

I am of opinion, therefore, that we should recal the interlocutors appealed from, sustain the plea of prescription stated for the defender, and find that the constitution and resting-owing of the debt can only be proved by the writ or oath of the defender; find that the pursuer has failed to prove the constitution and resting-owing of the debt by such writ; and therefore assoilzie the defender.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court pronounced an interlocutor in accordance with the last paragraph of Lord Adam's opinion.

Counsel for the Pursuer and Respondent —D. Anderson. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Defender and Appellant —W. Mitchell. Agent—James F. Mackay, W.S.

Thursday, November 28.

SECOND DIVISION.

[Sheriff Court at Glasgow.

HARDIE *v.* GREENOCK TOWING COMPANY.

Shipping Law—Pilot—Compulsory Pilotage—Liability of Pilot—Pilot Deprived of Effective Control of Vessel—Duties of Pilot.

When a licensed pilot is embarked on board a vessel to act as pilot in a place where pilotage is compulsory, so long as he continues to act as pilot he is responsible for any damage that is caused by the faulty performance of the duties incumbent on a pilot, and if he continues to act he will not escape responsibility by showing that he was ordered by the owner's representative to place himself in a disadvantageous position for controlling the navigation, and that he complied with that order instead of declining to continue to act as pilot on such conditions.

The pilot's duty is to insist upon taking full charge of the vessel, or if that is refused to cease to act as pilot.

The Greenock Towing Company and the individual partners of that Company, owners of the tug "Commodore" of Greenock, raised an action in the Sheriff Court at Glasgow against William Hardie, river pilot, Glasgow, a licensed pilot for the river Clyde, in which they craved decree for £123, 10s. as damages for injuries sustained by the "Commodore" through the fault of the defender.

The pursuers averred that on 31st March 1900 the s.s. "Furnessia" of Glasgow, belonging to the Anchor Line, which was shifting from Govan Dock to Finnieston Crane, was being canted in the river opposite Stobcross Quay, being a place where pilotage was compulsory, under the charge of the defender as pilot, and that while being so canted she was negligently permitted to strike the "Commodore," damaging her to the extent of the sum sued for.

The defender averred that three tugs were employed by the owners of the "Furnessia" to shift her, and that he gave instructions to the masters of the tugs which were proper and safe had they been duly carried out. He also averred as follows:—"Before leaving the graving dock one of the dock superintendents of the Anchor Line, the owners of the 'Furnessia,' who holds a master's certificate, arrived at the vessel with her mate, and having asked for and received from the defender the instructions he had given to the tugs, the dock superintendent ordered the defender to take his station aft, the mate to take his station forward, while he himself went on the bridge. To this arrangement, which is a practice of the Anchor Line, the defender, who is a pilot constantly employed by the Anchor Line, and termed a picked pilot, was forced to conform. The position of the pilot aft was such that he could not see beyond the bridge forward. The dock superintendent was in charge of the vessel, and the pilot was in a subordinate position." He further averred that the collision was caused through the failure of one of the tugs to obey his instructions, and by the "Commodore" lying in a position dangerous to navigation.

The pursuers pleaded—"The pursuers having suffered loss and damage to the extent condescended on through the fault and negligence of the defender, decree should be granted as craved."

The defender pleaded, *inter alia*—"(2) The defender not being in charge of the "Furnessia" in the circumstances condescended on, and the collision not having been caused by his own fault, he is entitled to absolvitor with expenses."

Proof was allowed and led.

R. C. M'Fee, the dock superintendent of the Anchor Line referred to by the defender, deponed as follows in cross-examination:—"I had no conversation with defender as to where he was to go. I don't recollect telling the defender that he was to go aft, that I was to go to the bridge, and that the mate would go forward. I might have said so. If defender says that I did so I will not deny it. It is possible that I may have said so, because that is the natural position of the pilot when the ship is canting. (Q) You said the usual place for the pilot to be during canting operations was aft. Do you know any other company on the Clyde in whose vessels the pilots, when canting them in the harbour go aft?—(A) I don't particularly take notice of other vessels canting in the river. I have seen a great many vessels canted in the river. I have seen many vessels canted with the pilots aft, but I could not give the names of them. It is my opinion that the proper place for the defender to be was aft. (Q) Did you tell me on one occasion that if the defender or any other pilot wanted to go on the bridge when you were there that it would be the last time he would do so on any of your vessels?—(A) If he insisted on being on the bridge beside me, and not attending to the business end of the ship, I certainly would not employ him again. In my opinion the after end is where the pilot should be standing when canting a vessel in these circumstances. I never saw defender standing on the bridge while canting any ships. I have been often on the bridge acting as master to pass the word along. It is the case I am oftener ashore watching the operations, but I am not in the habit when ashore of giving orders to the pilots. I may have sung out once or twice from the quay. If I saw a pilot running astern, and there was imminent risk of damage, I might sing out to go ahead. I am not in the habit of shouting orders from the quay to the pilots who are piloting ships. I never interfere with the pilots. If I shouted an order to a pilot he would be bound to attend to it. The position of a picked pilot is a desirable position. Picked pilots are specially under our call. They are bound to come to us when called for. (Q) If defender had on this occasion come on the bridge, I presume it would have been the equivalent of getting his own discharge?—(A) I don't know. I would have felt much annoyed. I would have considered he had not the interest of the company at stake. The advantage of going aft is that he could judge the distance from any object while canting better than he could do when standing on the bridge. The length of the 'Furnessia' is 440 feet. The defender would remain aft throughout the canting." . . .

The defender deponed as follows:—"I then proceeded to carry out the operations. I went towards the stern of the vessel. (Q) Why did you go there?—(A) That is the rule with the Anchor Line people. The pilot has always got to go to the stern in manœuvring in all the vessels, whether canting in or out of the wharf or into any of the docks. That is the position which the firm distinctly tells the pilot he is to take up. I was told to go to the stern by Captain M'Fee. He told me that before he went on board. Both Captain M'Fee and I went on board together. The chief officer was forward on the bow, and the second officer was towards the stern. Captain

M'Fee was on the bridge. I was standing on the top of the wheel-house, near the stern. It took me all my time to see as far as the bridge, the night being dark. I was not in a position there to take the same charge of the vessel as I would have been had I been on the bridge. The practice of the pilot being at the stern of the vessel when canting was the rule in the Anchor Line before I went to it. If I had raised any objections to it I would have been told to go ashore." . . . "*Cross-examined*—I was instructed to go to the 'Furnessia' as pilot. I have canted ships many a time at the same place, but not exactly in the same position. This was an unusual cant. I have not canted the 'Furnessia' in the same way before. I was not in charge of the whole of the vessel on the night in question. Captain M'Fee, one of the marine superintendents, was in charge of the 'Furnessia' from the bridge to the bow. Captain M'Fee was under my orders at my end of the ship. (Q) The pilot's duty is to take charge of the vessel when on board of her?—(A) Not from the position I was in. I was not in the position I ought to have been on the night in question. I say that not being in the position I ought to have been in I was to a certain extent deprived of the charge of the vessel. If I told Captain M'Fee I was not in my proper place he would have told me my services were required no longer. I would have preferred to have been on the bridge. I have canted the 'Furnessia' during the day. I was on the top of the wheel-house on that occasion also. I never canted the 'Furnessia' previously at night. I never on any occasion complained to the owners of the 'Furnessia' that I was not being allowed to station myself at the proper place on the 'Furnessia.' If I had reason to make a complaint I would go to Captain Meiklereid, chief marine superintendent. I did not complain to the owners, Captain Meiklereid, or Captain M'Fee, that I am aware of. The stern was not the best place to be in when canting the 'Furnessia' on the night in question. The stern was the proceeding end. I reckon I should see the vessel turning round if I was on the bridge, the same as she was turning on a pivot. I would be on a higher elevation, and have a better opportunity of seeing whether the vessel was having a stern movement or a head movement."

By interlocutor dated 8th July 1901, the Sheriff-Substitute (GUTHRIE) found that the collision was caused by the fault of the defender, and therefore found him liable in damages, but in respect of section 50 of the Clyde Navigation Act 1899, restricted the damages to £100, and the sum of 10s. being the pilot's fee.

The defender appealed, and argued, *inter alia*—He was not liable as he was not in full charge of the vessel at the time the accident occurred. He did not accept the position of pilot in full charge, he was only in the position of a servant of the owners assisting in carrying out the operations.

Counsel for the pursuers were not called on.

LORD JUSTICE-CLERK—When a pilot is placed in charge of a vessel it is his duty to take full charge of her, and to give such orders as are necessary to carry out what he thinks requires to be done. In the ordinary case the pilot is responsible if a collision takes place. There are no special circumstances in the present case taking it out of the ordinary rule. It is stated on the pilot's behalf that he was placed by the owner of the vessel in a disadvantageous position. I do not think that can be accepted from him. His duty was to see that he was placed in the position from which he could best manage the operation. If he took no steps to resist being placed in a disadvantageous position he must be held to have acquiesced in the arrangement. His business was to insist on having sole charge of the vessel and, if that was not given to him, to refuse to have anything to do with the operations, the vessel being thus taken out of his hands. [*His Lordship then dealt with the proof of fault.*]

LORD YOUNG—I am of the same opinion. When a vessel is under charge of a river pilot in such circumstances as the present the owners are not responsible for any errors which may take place in the navigation or movement of it.

Of course, if the owners fail to employ a pilot at all they will be responsible for any collision and also for breaking the law. And if they employ a pilot and take the vessel out of his charge, so as simply to carry him as a passenger, they will not escape responsibility simply because they have a pilot on board. Here the pilot averred that the vessel was not under his charge but had really been taken from under his charge, so that he was not in the position of a pilot in charge at all, and that therefore this action is not well taken against him. I am of opinion that this contention is not supported by the evidence. I think that the vessel was under the pilot's charge. If it was true that it was the practice of the Anchor Line to put the pilot in the stern instead of on the bridge, and the pilot thought that the bridge was the proper position to enable him to perform his duty properly, then I think it was the pilot's duty to refuse to be placed in any position in which he was unable to discharge his duty properly. If he acquiesces in being placed in such a position I think he will be responsible for anything which happens through his not taking the best position for the discharge of his duty. There is nothing here to show that the vessel was not under the charge of the defender, and that he is not responsible for an avoidable accident not having been avoided. I am therefore of opinion that the judgment of the Sheriff is right.

LORD TRAYNER—I agree with what your Lordships have said. Canting manœuvres are ordinary manœuvres in the Clyde, and have to be performed under the direction of a licensed pilot. As long as a licensed pilot on board a vessel, in a place where pilotage is compulsory, remains personally in charge of her, he and not the owner of the vessel is

liable for damages caused by navigation of the vessel. The pilot can shift the responsibility from himself only by showing either (1) that the navigation of the vessel had been taken out of his hands, and that he had ceased to act as pilot; or (2) that the accident did not happen by reason of any fault on his part. I think the defender has failed to establish either the one or the other of these alternatives. [*His Lordship then dealt with the facts.*]

LORD MONCREIFF—I am of the same opinion, and have nothing to add.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuers and Respondents—Jameson, K.C.—Sandeman. Agent—W. B. Rainnie, S.S.C.

Counsel for the Defender and Appellant—Salvesen, K.C.—Spens. Agent—Harry H. Macbean, W.S.

Thursday, November 28.

SECOND DIVISION.

CATTANACH'S TRUSTEES *v.* CATTANACH.

Succession—Faculties and Powers—Power of Apportionment—Validity of Exercise—Power to Apportion among Issue—Contingent Gift to Grandchildren—Marriage-Contract.

Terms of marriage-contract containing power of apportionment among issue upon which *held* that it was not competent to give a share to grandchildren in the event of their parent predeceasing a postponed period of vesting.

Succession—Faculties and Powers—Power of Apportionment—Validity of Exercise—Effect of Invalid Exercise—Election—Approbate and Reprobate.

Under an antenuptial contract of marriage a husband had a power of apportionment of the capital of the funds contributed by him to the trust among the issue of the marriage. In default of apportionment the trustees were directed to hold for the children who being sons should attain the age of twenty-one, or in the case of daughters should attain that age or be married, equally among them.

By his trust-disposition and settlement the husband directed his trustees to hold the residue for behoof of his children equally, the shares of sons to vest in them on their respectively attaining thirty years of age, the issue, if any, of them dying before that age being entitled to their parent's share, and further, in exercise of the power, directed that the marriage-contract funds were to be treated as part of the residue. The Court having found in view of the terms of the marriage-contract that the exercise of the power, in so far as in favour of grandchildren was invalid, and that consequently the daughter of a son who had died before attaining the age of thirty was not entitled in her own right to any share of the marriage-contract funds; *held per* Lord Justice-Clerk and Lord Trayner that the invalid provision in favour of grandchildren was to be held *pro non scripto*, the appointment in other respects remaining effectual; that the exercise of the power in so far as it postponed vesting in the case of sons till they attained the age of thirty was valid and effectual, and that consequently no share in the marriage-contract funds had vested in the son who did not attain the age of thirty so as to pass to his widow and children at his death; and that the whole of the marriage-contract funds fell to be held for the surviving children only; *diss.* Lord Moncrieff, who held that the fifth share which would have been payable to the son who died before attaining the age of thirty fell to be dealt with as unappointed, and that consequently one share of it vested in that son at the age of twenty-one, and on his death intestate passed to his widow and his daughter.

Held also *per curiam* that while the three surviving sons of the truster were not barred from calling in question the validity of the appointment, the child of the deceased son was entitled to have any loss occasioned to her by their doing so made up out of the three sons' shares of the truster's estate.

Succession—Vesting—Provisions to Children at Postponed Period, and Failing them to their Issue—Period of Vesting in Grandchildren.

A truster directed his trustees to hold the residue of his estate for behoof of his children equally, the shares of the sons to vest in them on their attaining thirty years of age, and not sooner, the issue of any of them dying before that age being entitled to their parent's share.

One of the truster's sons survived his father, but died before attaining thirty years of age leaving a pupil child.

Held that the right of the child of the deceased son to the share which her father would have taken had he lived to be thirty years of age vested in her at the date of her father's death.

By antenuptial contract of marriage between Alexander Cattanach of Auchentorlie and Agnes Aitken, dated 26th August 1868, Mr Cattanach conveyed £7000 to trustees for the purposes therein set forth. In this deed the trustees were directed to pay the free revenue of the trust funds to Alexander Cattanach "during all the days of his lifetime or so long as the said Agnes Aitken or any issue of the marriage survive, as an alimentary provision for the support of himself, his wife, and family." In the event of Mrs Cattanach surviving her husband the trustees were