

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 grant-

ing 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

within any district where the employment of a qualified pilot is compulsory by law."

A steamship in charge of a pilot in a compulsory district, owing to her taking a sheer, collided with and injured a tug moored to a pier. The steamship had a considerable list owing to the position of her coal, but it was not such as must necessarily affect the steering of a vessel. There was contradictory evidence as to what had passed between the pilot and the captain with regard to the list.

In an action of damages at the instance of the owners of the tug against the owners of the steamship, held that as the defenders, in order to come within the statutory exemption, must show that the collision was due to the pilot's fault, and the fault of him alone, and had failed on the evidence to do so, they were, there being no question of inevitable accident, liable in damages.

The "*Indus*," L.R., 12 P.D. 46, applied; The "*Assyria*," July 7, 1903, 5 F. 1089, 40 S.L.R. 753, distinguished.

On 1st December 1905 the Clyde Shipping Company, Limited, 21 Calton Place, Glasgow, the registered owners of the paddle tug "*Flying Wizard*," raised an action against William S. Miller, steamship owner, 109 Hope Street, Glasgow, the registered owner of the s.s. "*Sunbeam*," in which they sued for £900 damages in respect of injuries caused to the "*Flying Wizard*" through a collision with the "*Sunbeam*."

At the time of the collision the "*Sunbeam*," in charge of a compulsory pilot, had just come out of the Queen's Dock at Glasgow and was proceeding to go down the Clyde, and was being straightened in her course. She took a sheer to the north and ran into the "*Flying Wizard*," which was moored on the north bank of the river. The "*Sunbeam*" had a list to the extent of eleven degrees owing to the mode in which her coal had been stored (*v.* also opinion of Lord President).

The defender pleaded, *inter alia*—“(3) The collision having been occasioned, so far as the s.s. '*Sunbeam*' is concerned, through the fault of a compulsory pilot, the defender should be assoilzied with costs.”

On 7th July 1906 the Sheriff-Substitute (BALFOUR) found in fact that the collision was due to the failure of the "*Sunbeam*," owing to the list, to answer her helm, and that no fault on the part of the pilot had been proved; and found in law that the defender in the circumstances was liable in damages, which on 3rd September 1906 he assessed at £467, 5s. 2d.

The defender appealed, and argued—The collision was due to faulty navigation, *i.e.*, the fault of the pilot. There was no proof that the "*Sunbeam*" went out at her owner's risk or that the pilot's orders were not obeyed. It was not proved that the master had declined when asked to properly trim her, if the suggestion was that her trim caused

defective steering. The pilot ought to have refused to take her out if he thought that it would. Not having done so, he took the risk of any accident. [The LORD PRESIDENT referred to Marsden, *Collisions at Sea*, 5th ed., p. 231, as to the shipowners' liability for "trim" and "equipment."] The present case was on all fours with the "*Assyria*," July 7, 1903, 5 F. 1089, 40 S.L.R. 753. "If the trim of the vessel contributed to the collision that was the fault of the pilot"—*per* Lord Trayner in the "*Assyria*." The pilot was the sole judge whether a vessel, with such a list as the "*Sunbeam*" had could be safely navigated through his jurisdiction. In these circumstances the pursuers must, in order to succeed, prove contributory negligence on the part of those in charge of the vessel—Marsden, 224; *Owners of the "Strathspey" v. Owners of the "Islay*," July 3, 1891, 18 R. 1048, 28 S.L.R. 787. The rule laid down in the "*Iona*," L.R., 1 P.C. App. 426, that it was not enough to prove fault on the pilot's part, but that the owner must prove that there was no default on the part of the master and crew, had been overruled, and the onus of proving contributory negligence was on the pursuers—*Clyde Navigation Trustees v. Barclay, Curle, & Company*, May 23, 1873, 3 R. (H.L.) 44, 13 S.L.R. 753; L.R., 1 A.C. 790 (*per* Lord Selborne); the "*Indus*," L.R., 12 P.D. 46, *per* Lord Esher, M.R. In *Mann, MacNeal, & Company v. Ellerman Lines*, December 6, 1904, 7 F. 213, 42 S.L.R. 159 (relied on by the respondents), the ground of judgment was defect in the "equipment," not in the "trim" of the vessel. [The LORD PRESIDENT referred to the "*Argo*," 1859, Swabey's Adm. Rep. 462 (cited in *Mann, MacNeal, & Company*, Marsden, 227) as not being consistent with the "*Assyria*."] In the "*Meteor*," Ir. Rep., 9 Eq. 567 (Marsden, 228) the pilot was not informed as to the vessel's trim.

Argued for respondents—The effect of section 633 of the Merchant Shipping Act 1894 (57 and 58 Vict. c. 60) was that where the owners were guilty of contributory negligence the mere fact of their being in charge of a compulsory pilot did not exempt them from liability—*Mann, MacNeal, & Company, cit. supra*. To escape liability they must show that the collision was caused by the fault of the pilot—*Clyde Navigation Trustees, cit. supra*. Such fault had not been proved. The evidence showed that the collision was due to the ship's inability, owing to the list, to answer her helm. The vessel was therefore in fault, and accordingly her owners were liable. In the "*Assyria*" (relied on by the appellant) the pilot had accepted the risk of the vessel not being in proper trim.

At advising—

LORD PRESIDENT—This is an appeal from one of the Sheriff-Substitutes of Lanarkshire in the matter of a collision which took place in the Clyde. The circumstances of the case are these:—The "*Sunbeam*" was in the Queen's Dock on the Clyde, and was proceeding to go down the river, and in order to do so she had to go out of the

Queen's Dock, and as the Queen's Dock lies at an angle to the river she had to straighten herself in the river to proceed down. The angle coming from the Queen's Dock is such that as a boat comes out she naturally gets upon the south side to begin with, and that, of course, is not the proper side for proceeding down the river, and she has to go forwards to the north side. The "Sunbeam" came out under the charge of a pilot. She got over to the south side and was put on the port helm to get her head round, being also assisted by a tug which was moored to her bow. By that means she was headed across the river to the north, but she gave a rather violent sort of sheer to the north, and, although her helm was starboarded, she did not properly answer her helm, and plunged into the tug called the "Flying Wizard," which was lying moored on the north side of the river, doing damage to it. The present action is brought by the owners of the "Flying Wizard" against the owner of the "Sunbeam" for the damage so occasioned.

I do not hesitate to say that this case has given me considerable difficulty, for I think the facts are narrow; and I think it is a matter of anxiety to decide whether the case falls on the one side or the other, in the light of the law which has been laid down in decided cases.

The only other fact that I ought to mention as regards the condition of affairs at the time is, that the "Sunbeam" had a considerable list when she left the dock, owing, seemingly, to most of the coal having been put into the port bunkers, and the list extended to eleven degrees. There is a conflict of evidence as between the pilot on the one hand and the master of the "Sunbeam," who is corroborated by the mate, on the other, as to what exactly passed between the pilot and the officers of the "Sunbeam" as regards this list. The pilot's version is that as soon as he saw the list he complained of it, and indicated that in his opinion it was not safe and would affect the steering of the ship; that he got an assurance from the captain that he was well aware of the behaviour of the ship under such a list as the present, and that he assured him that it would not affect the steering, and that he might safely go on; that going upon that assurance he took out the vessel, but that, as he feared, the result was that the vessel did not act properly in steering, and that that was the cause of the accident. The captain's and the mate's version does not agree with that of the pilot. They deny that they gave any assurance to the pilot, but they themselves say that there was some conversation upon the subject of the list. They also say that as a matter of fact the list had no effect upon the steering, and that they had often gone with such a list before, and that such lists are common.

Now, the learned Sheriff-Substitute has decided the case on this ground. He has held that the fault lay entirely upon the "Sunbeam," and he has held that the owner of the "Sunbeam" has failed to prove that there was any fault on the part of the pilot, because he holds it proved that

the whole accident occurred through the default in the steering capacity of the ship, and that that fault in the steering capacity of the ship was due to the list. The learned Sheriff-Substitute holds that it is an undoubted fact that a ship with a list of eleven degrees will be affected in steering, and that that was an improper condition for a ship to be sent out in. I have a little difficulty in going the length the Sheriff-Substitute does on that last ground. I am bound to remark that I think the learned Sheriff has here rather gone on his experience in other cases, and indeed he tells us so. But there is undoubtedly evidence here which cannot be disregarded of quite competent men who say that a list of eleven degrees is not very uncommon, and that as a rule they do not think it will affect the steering. I confess that the result on my own mind of the evidence about that matter is this, that it is not a universal rule that a list of eleven degrees would affect the steering of a ship, but that, on the other hand, it might affect the steering of a particular ship. In other words, I think the matter is one of what I might call special circumstances, as to which probably nobody can be dogmatic and lay down a general rule which is to apply to all ships. Ships in the matter of steering, we all know, do behave very differently, and behave very differently from reasons which are not always explainable. One ship is quick in answering the helm, another is slow, and I do not think one is able to give a scientific reason for the difference between the one and the other; and the result to my mind of the evidence is, that though it cannot be laid down as a general rule that the steering would be affected by a list of eleven degrees, which is not uncommon, yet, on the other hand, it cannot be said that the steering might not be affected.

Now, in this state of the facts what is the decision to be come to? I think that the only way to try a case like this is to go very carefully along the lines which have been indicated to us in decided cases, and apply the rules there clearly laid down to the facts of this particular case. I had occasion in a case yesterday to say that the rules for this class of case are very clearly and authoritatively laid down in the judgment of Lord Esher in the case of the "*Indus*" (L.R., 12 P.D. 46). Now, we start here with the fact of the collision, and with the fact that the collision took place between a moving ship and a ship that was lying moored in a place which everybody admits was a perfectly proper place for her to be moored; she was not moored at a place which interfered with or curtailed the fairway of the river, and there is no question as to any contributory negligence on the "Flying Wizard's" part. There was no time or possibility for her to get out of the way. That, I think, according to the decisions in many cases, and among others the "*Indus*," discharges the first onus that always is on the pursuers, and puts the blame upon the "Sunbeam;" and then, if the blame is to be taken off

the "Sunbeam," that must be done by one of two things, either by showing that the accident was inevitable, that is to say, by some cause outside the power of those in charge of her, or by showing that the fault was that of the pilot, he being a compulsory pilot.

Now, the "*Indus*" lays down, and I think rightly, that if persons who are *prima facie* in fault want to get off upon statutory exemption, they must bring themselves very clearly within that statutory exemption; in other words, they must show that the fault was that of the pilot and nobody else. That does not mean that you must go through the impossible course of disproving every other cause. It may be quite enough if you begin by showing that it was the fault of the pilot, and then leave the matter there, and leave the other side to extricate themselves by showing that there were other contributory causes of fault. But none the less you must begin by showing that it was the fault of the pilot, and show it in such a way as not to complicate it with any other proximate cause.

The facts of the "*Indus*" were a very good illustration of that. There was no doubt that it was the fault of the pilot in one sense, because the one ship ran into the other. The moving ship was being navigated by the pilot, and accordingly it was his fault, but nevertheless there were certain other contributory causes found in the non-obeyance of a certain order. Well, when I come here to apply that test, I come to the same conclusion as the Sheriff-Substitute, though in rather a different way—that the appellant here has failed to discharge the onus upon him of showing that the fault was the fault of the pilot. I do not think it is enough merely to say that the accident happened, and that the ship was in the pilot's hands at the time, unless you can show also that nothing else was happening of an extraordinary character. Now, undoubtedly the ship here did behave in an extraordinary manner, that is to say, it steered very wildly; and I have come to the conclusion that the onus being upon the party seeking to free himself, he has not discharged that onus, because he has not really shown here that the accident, such as it was, rested upon the pilot's fault alone.

I do not myself think it necessary to decide the question whether the bad steering was due to the list or not. It may or may not have been, I cannot tell; but there are one or two things that are undoubted. It is undoubted, I think, as a matter of fact, that the ship did not answer her helm. That is made clear among other things by the log of the chief officer on the "Sunbeam," and I prefer to take these documents to what the witnesses say, because they were made up at a time when people did not know they were to be in Court. He says, describing the accident—"3:30 p.m., while trying to get squared up in mid-river, tide being two hours ebb, helm hard to starboard, and tug towing to port;

wind on port bow, and tide under starboard quarter, owing to which we did not answer our helm;" and in the same way it is very noticeable that the captain himself does not attribute the accident to the fault of the pilot, but puts it down to something that I suppose would come to inevitable accident, because in his deposition he says that, "In deponent's opinion the cause of the casualty was the sweep of the ebb tide on the starboard quarter and the wind on the port bow;" and in the same way, in his evidence in the case, he says—"I do not think the pilot could have done anything that might have prevented the collision in any way." Now that is testimony given by the persons in the boat in fault. It is quite true that their evidence, such as it is, would go to something like inevitable accident, but inevitable accident won't do in this case, because to say that the existence of a very slight breeze—for there was nothing more here—and the existence of a tide in the opposite direction, should therefore make it impossible to navigate the Clyde is a conclusion which, of course, is absurd on the statement of it. In other words, their testimony as regards inevitable accident is, I am afraid, not worth much. But it is worth something in this way, that at the time they never thought of saying that the pilot was wrong. Now the learned counsel, of course, tried hard to assimilate this case not to the "*Indus*," but to the case of the "*Assyria*" (5 F. 1089), and undoubtedly at first sight there is a great deal of similarity between the two cases. But a distinction between the two cases is this, that in the "*Assyria*" the learned Judges came to a decision on the question of fact, and—of course, whether they were right or whether they were wrong does not matter, it still remains the ground of decision—that the pilot had given a wrong order, because I find that, first of all, in the findings of the Sheriff-Substitute which were there under appeal there is this finding—"Finds . . . that the pilot ordered the engines to be put slow ahead and afterwards full speed ahead, and when he saw a collision to be inevitable, hard astern: Finds that a collision would have been avoided if the order to go astern had been given at first, and that it was unduly hazardous to give the order full ahead in the hope of passing the 'Monmouth.'" Now that was a mistake on the part of the pilot; and in the same way the Lord Justice-Clerk, after describing the accident, says this—"Instead of that, the evidence satisfies me that the pilot caused the collision by giving an order to go ahead when there was risk of a collision, and that he by this error of judgment caused the collision." Well then, that of course is a finding directly contrary to what would be warranted here by the evidence of the captain of the "Sunbeam" when he says—"I do not think the pilot could have done anything that could have avoided the collision." In other words, you have there just that initial fault proved on the part of the pilot which I think the evidence fails to prove here, and that I think is what creates the distinction be-

tween the two cases. There is of course a very great similarity about the question of the trim of the vessel. Now upon that matter I do not think it is necessary to discuss whether the dictum of Lord Trayner, which certainly goes very far, is in all circumstances justifiable or not, because I think here—although I am not going to say, in this conflict of evidence between the pilot on the one side and the captain and the mate on the other, that I actually believe the one side or the other—it is perfectly clear that there was some talk between them about the trim. That I think is abundantly clear from a letter, which is in the papers, from the captain himself. There is a letter from the captain to his own owner, in which he says—"In reply to Pilot M'Millan's written statement, I beg to reply as follows: On September 13th, about 1 P.M., pilot came on board to take 'Sunbeam' to Greenock. When on bridge with me he passed the remark to me the ship had a heavy list, and asked me if she was safe to go to sea, as he did not think so. I replied to him that I had been in the ship nearly sixteen years and thought her quite safe." Now that of course is no confirmation of what the pilot says, because what the pilot says is not that he talked about going to sea but whether the list would make her steer properly or not. But it is near enough to make it, in my mind, perfectly clear that there was some talk between these two people as to the effect of the list, and that in some way or other the pilot had, so to speak, complained of the list and had been assured by the captain that he had better go on. Well now, I think that takes the case at least out of the sort of case which is figured by Lord Trayner, where the trim, being no doubt *prima facie* a matter for the crew and not for the pilot, yet the pilot, seeing that her trim was wrong, might say, "Either you put this right or I don't start." Evidently there was some sort of conflict between the two, with the result that some sort of assurance was given to the pilot and he went on. I mention that to show that I have not overlooked it, but I do not put my judgment on that; I put my judgment on this, that in the rules laid down in the "*Indus*" it is necessary in some way so far to show fault on the part of the pilot. The mere fact that there is a collision does not necessarily show a fault, although, of course, if you show that the collision is the result of orders given by the pilot and that these orders were obeyed, you probably would not need any more. But here you have a ship that, as a matter of fact, did not answer her helm, and you have persons on board the ship saying that they do not see what the pilot could have done to avoid a collision, and I think the onus of proof has not been discharged. I am therefore for adhering to the judgment of the Sheriff-Substitute and refusing the appeal.

LORD KINNEAR—I am entirely of the same opinion, and without reviewing the facts, I think all that is necessary for me to

say is that I think the case is directly governed by the rule laid down in the case of the "*Indus*." The vessel that was run down was stationary and moored to a pier. The "*Sunbeam*" coming down the river ran into her, and there is therefore a *prima facie* case of fault on the part of the "*Sunbeam*." The owner of the "*Sunbeam*" in the Court below maintained that he had displaced this *prima facie* case by proof that the real fault lay on the "*Flying Wizard*," because she was moored in a place where she ought not to have been, and was not being properly looked after. But the defence on that ground was abandoned when the case came into this Court, and we were told that the defender accepted the judgment of the Sheriff-Substitute against him on that point. The only remaining grounds of excuse that he now presents are the two that your Lordship has adverted to—either that the collision was caused by inevitable accident, which no precaution on the part of anybody in charge could have avoided, or was caused by the fault of the pilot in charge. The two defences are quite inconsistent with one another; and I agree, without examining the evidence in detail, that the first of these two grounds is untenable, and therefore the question comes to be whether the defender has shown that the accident was due to the fault of the pilot and not to the fault of those in charge of the ship. Now, the case of the "*Indus*," which is entirely in conformity in this respect with other authorities, laid down that in order to take advantage of the statutory exemption which enables a shipowner to set up the fault of a pilot as an excuse for the damage caused by his vessel, he must prove that the damage was caused solely by the fault of the pilot and not by the joint fault of the pilot and anybody for whom he himself is responsible, and I agree with your Lordship, for the reasons that you have stated, that the defender has entirely failed to show that the fault was due solely to the pilot, even if the pilot had not successfully cleared himself from the charge of fault altogether. I may add that the result of the evidence to my mind is that the direct cause of the collision was that the ship did not answer her helm, and that the only explanation to be found in the evidence of her failure to answer her helm is that she had a list to port to the extent of eleven degrees. I think the evidence is conflicting as to whether the list to port to that extent would necessarily make it unsafe to take her down the narrow waters of the Clyde, but the preponderance of the evidence to my mind shows that that depends upon the ship, and not upon an absolute rule. If it did depend upon the ship, then I am disposed to think, although the evidence is certainly conflicting, that the pilot has shown that he consulted the master of the ship, who had been sailing in her for a number of years, as to what the effect of this would be, and relied on the master's statement that it would not affect the sailing capacity of the vessel. Whether that can be taken to be

proved or not, I think it is certain that the pilot alone cannot be held responsible for taking the ship out of the dock with such a list, because in the first place the owners and their master and crew are responsible for the trim of the vessel, and the pilot is not. It may be that if a pilot thinks that the vessel is not in such trim as to be navigable with safety it lies upon him to say so, but I do not think it is proved that a reasonably prudent and competent pilot must in the actual circumstances have refused to take the "Sunbeam" down the river: and if that is not proved there is no evidence of violation or neglect of duty on the part of the pilot in question. But if this were doubtful it is a sufficient ground of judgment that even supposing that the pilot was in fault it has not been proved that the master and crew were not in fault also, that is to say, that if the real cause of the ship's failure to answer her helm was the list created by the way in which the port bunkers were loaded, then that is a fault for which the owners were responsible, and therefore, if there was any fault on the part of the pilot at all, which I say again I am not persuaded there was, it is not shown that the accident was due to his fault solely. I therefore concur with your Lordship.

LORD DUNDAS—I think this case is a narrow one, and at the first impression a somewhat puzzling one, but after the fullest consideration that I have been able to give it I have arrived entirely at the conclusion which your Lordships have so fully expressed, and I do not desire to add anything on my own behalf.

LORD M'LAREN and LORD PEARSON were absent.

The Court pronounced this interlocutor:—

"Dismiss the appeal: Recal the findings in fact contained in the interlocutor of the Sheriff-Substitute dated 7th July 1906, and in lieu thereof find that on the afternoon of 13th September 1905 the tug 'Flying Wizard' was lying moored at Partick Wharf with her port-side to the wharf when the steamer 'Sunbeam,' which had come out of the Queen's Dock, passed to the south side of the river in charge of the tug 'Chieftain,' and she then proceeded on her starboard helm to the north side of the river, and ran into the 'Flying Wizard,' striking her on the starboard paddle-box: Find that Partick Wharf is a usual and proper place for tug boats to lie, and there is plenty of room left for the navigation of the river by other vessels: Find that the collision was due to the fault of those in charge of the 'Sunbeam,' and that there was no negligence on the part of the 'Flying Wizard': Find that the 'Sunbeam' was in charge of a compulsory pilot, but that the defender has failed to prove that the collision was due to the negligence or incapacity of the said pilot: Find in terms of the finding in law in said interlocu-

tor: Affirm the interlocutor of the Sheriff-Substitute dated 3rd September 1906, and of new decern in terms thereof: Find the defender liable in the expenses of the appeal, and remit," &c.

Counsel for the Pursuers (Respondents)—
Scott Dickson, K.C.—Sandeman. Agents
—Webster, Will, & Co., S.S.C.

Counsel for the Defender (Appellant)—
Hunter, K.C.—C. D. Murray. Agents—
Macpherson & Mackay, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

[Lord Johnston, Ordinary.

LOWS v. GUTHRIE AND ANOTHER
(LOW'S TRUSTEES).

*Writ—Attestation—Witness Attesting—
Evidence Subsequently Given by Witness
that Signature neither Adhibited nor
Acknowledged in His Presence—Conveyancing (Scotland) Act 1874 (37 and 38
Vict. cap. 94), sec. 39.*

"When a deed is *ex facie* perfectly regular and duly tested it cannot be set aside on the sole and unsupported statement of one of the witnesses that she did not really attest what her signature bears that she did attest. It can only be set aside on the clearest possible evidence. . . . [The case] must be determined on a comparison of her statement and the contrary testimony of other witnesses . . . and these conflicting statements must be weighed with reference to the circumstances and the probabilities of the case."

Circumstances in which held that a will was valid although one of the attesting witnesses denied that the testator's signature had been adhibited or acknowledged in her presence.

Opinion that section 39 of the Conveyancing (Scotland) Act 1874 does not affect the necessity for an attested signature being adhibited or acknowledged in the presence of the attesting witnesses. Smyth v. Smyth, March 9, 1876, 3 R. 573, 13 S.L.R. 356, followed; Lord Young's opinion in Geddes v. Reid, July 16, 1891, 18 R. 1186, 28 S.L.R. 879, commented on.

Agent and Client—Will—Undue Influence—Onus—Agent Benefitting under Will—Position of Agent not a Law Agent.

A country bank agent, who was not a law agent, prepared and saw executed the will of a testator. He was himself the residuary legatee. The testator's sons sought to have the will set aside.

Held, assuming the bank agent's position towards the testator fell to be treated as the same as that of a law agent, (1) that the rule that a person in a fiduciary relation cannot obtain a gift did not apply inasmuch as this was the case of a legacy and not a gift; and