and it is conclusive against the respondent in so far as it finds that he is fit for any work which does not require unimpaired vision of both eyes. But then the appellants did not state to the Sheriff, and offer to prove, what work could be found for the respondent under these conditions, or that the workman was in point of fact earning wages in some other employment. The Sheriff was therefore driven to decide the case upon the certificate alone, and rightly or wrongly he held that on the only information before him he had not materials for reducing the weekly allowance.

Coming now to the questions put to us—the *first* question is ruled by the case of *M'Avan*. No evidence is competent to contradict the certificate as regards the respondent's present condition.

The *second* question does not properly arise out of what took place before the Sheriff. I indicate no opinion that proof as to matters which are collateral to and do not contradict a certificate may not be admitted. Certainly the decision in the case of *M'Avan* does not exclude it. But as no statement or offer of proof of that kind was made to the Sheriff I do not think we are called upon to answer that question.

As to the *third* question, I think it was for the Sheriff, and not for us, to decide whether on the terms of the certificate he should or should not diminish or end the weekly payments.

I have only to add that I do not think that it would be proper in this case to remit the case to the Sheriff to allow a proof. We do not even now know precisely what proof the appellants desire.

It is always competent to the appellants to apply again to the Sheriff for a revision of the weekly payments if they are in a position to state facts which they desire to prove, which will not go to contradict the certificate, and which will instruct that there is work which the respondent either has got, or might get, for which he is fit in his present condition.

The Court pronounced this interlocutor—

"Answer the first question of law therein stated in the affirmative, and the second question of law therein stated in the negative: Find and declare accordingly: Therefore affirm the award of the arbitrator and decern." . . .

Counsel for the Claimant and Respondent—M'Lennan—Welsh. Agent—John Baird, Solicitor.

Counsel for the Appellants—Campbell, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Tuesday, December 6.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MANN, MACNEAL, & COMPANY (OWNERS OF THE "GLASSFORD") *v.* ELLERMANN LINES, LIMITED (OWNERS OF THE "CITY OF EDINBURGH.")

Ship—Collision—Collision between Moving and Stationary Vessels—Presumption of Fault—Liability of Owners—Inevitable Accident—Compulsory Pilotage—Responsibility of Pilot—Lack of Equipment.

The owners of a vessel which causes a collision are not exonerated from liability by the fact that the vessel was at the time under the charge of a licensed pilot in waters where pilotage is compulsory, unless they can prove that the collision occurred through the fault of the pilot; and if the collision is due to the vessel not being in navigable condition through lack of proper equipment the owners are liable, even although the pilot may have been in fault in attempting to navigate her in the knowledge of her lack of equipment.

The s.s. "City of Edinburgh," in charge of a licensed pilot within the compulsory pilotage district of the river Clyde, while being moved by two tugs out of Queen's Dock, Glasgow, and following the usual and proper course, was struck by a gust of wind, and in consequence collided with the s.s. "Glassford," which was moored to the quay. The weather was gusty, but the gusts were not in character or intensity unusual or such as could not and should not have been contemplated and provided against. The collision might have been avoided had she let go her anchors, but owing to the windlass being under repair they were not available. The pilot had noticed this fact before he started the vessel, but the matter was not mentioned to him, nor was he consulted by the officer in command.

In an action at the instance of the owners of the "Glassford" against the owners of the "City of Edinburgh," *held* that the latter were liable in damages, as they had failed to rebut the presumption of fault against them arising from their vessel being in motion and the other stationary, by showing either that the collision was due to inevitable accident or to the fault of the pilot.

The "Assyria," July 10, 1903, 5 F. 1089, 40 S.L.R. 753, *distinguished.*

Messrs Mann, Macneal, & Company, Glasgow, owners of the s.s. "Glassford," raised this action against The Ellerman Lines, Limited, Liverpool, owners of the s.s. "City of Edinburgh," in the Sheriff Court at Glasgow, in which they sued for £1587, 14s. 6d., as damages caused by a collision be-

tween the two vessels on 21st September 1903 in Queen's Dock, Glasgow.

A proof was led before the Sheriff-Substitute (BALFOUR), from which the following facts appeared. On Monday, 21st September 1903, about eleven o'clock in the forenoon, the steamship "City of Edinburgh," which was laden and not under steam, was being towed out of the Queen's Dock to Prince's Dock, Glasgow, by two tugs, one of them ahead and one of them astern. She was, as required by the Clyde regulations, in charge of a licensed pilot, who was taking her out of the dock according to the usual course. While manœuvring to get through the entrance she was struck by a sudden gust of wind which caused her to collide with the s.s. "Glassford," which at the time was lying moored to the quay. She struck the "Glassford" with very little force, and if there had been two feet more to spare there would have been no collision. There was a certain amount of discrepancy among the witnesses examined as to the condition of the weather at the time, but the bulk of the evidence was to the effect that the wind was gusty but was not in character or intensity unusual or such as could not and should not have been anticipated and provided against. The tugs were powerful vessels, and of the class usually employed for moving ships of the tonnage of the "City of Edinburgh." The windlass of the "City of Edinburgh" was under repair, and the anchors which she usually carried were accordingly unavailable. If she had been able to let them go the collision would have been avoided. The pilot was aware of the fact that the anchors were not available, as he had noticed a part of the windlass being taken on board just before starting, but the officer in charge of the "City of Edinburgh" did not mention the matter to him nor consult him in any way as to the advisability of moving the vessel without her anchors. There was contradictory evidence as to how far it was customary to move ships from one dock to another without anchors.

On 8th July the Sheriff-Substitute pronounced the following interlocutor: — "Finds that on Monday, 21st September 1903, about 11 o'clock forenoon, the steamship 'Glassford," a vessel of 311 tons gross register, was lying moored to the quay at the west end of the Queen's Dock, and to the north of the dock entrance and 20 feet past it, and she was run into by the steamship 'City of Edinburgh,' a vessel of 7803 tons gross register, and damaged: Finds that the 'Glassford' was lying with her port side to the quay, and the 'City of Edinburgh,' which was laden, was being towed out of the Queen's dock by two tugs, the 'Vanguard' and the 'Warrior,' the 'Vanguard' being ahead and the 'Warrior' astern: Finds that the 'City of Edinburgh,' which was drawing 27 feet water aft and 19 feet forward, had been lying on the south side of the tongue or centre quay, shown on the plan No. 7 of process, and she was in charge of a licensed pilot who was taking her out of the dock according to the usual course, which is to make for the dock entrance about north-north-west, and then straighten for the entrance by coming back to north-west: Finds that when the 'City of Edinburgh' was being squared up to the entrance, the 'Vanguard' being on the port bow and the 'Warrior' astern, a squall is said to have struck the starboard quarter of the 'City of Edinburgh' and brought her head to the north, and she ran into the starboard side of the 'Glassford,' but she struck the 'Glassford' with very little force and a space of 2 feet more would have avoided the collision: Finds that the squall struck the 'City of Edinburgh' when she was a distance of at least 200 feet from the 'Glassford,' and if an anchor had been dropped from the 'City of Edinburgh' when the squall struck her the collision would have been avoided: Finds that the tugs 'Vanguard' and 'Warrior' are powerful tugs, and they were strong enough to control the movements of the 'City of Edinburgh' on that occasion: Finds, however, that the anchors of the 'City of Edinburgh' were not available that morning, as the windlass had been sent ashore to get repaired, and part of it was taken on board just before the steamer started: Finds that the 'City of Edinburgh' is provided with patent anchors, and these are very often at the hawse pipe when the defenders' steamers are in dock, and if one of these anchors had been dropped from the port bow on the occasion in question the collision would have been avoided, and such anchors can be used in the dock: Finds that the defenders (on whom the onus lies) have failed to prove that a sudden, heavy, and unexpected gust of wind occurred which placed the 'City of Edinburgh' beyond the control of the tugs: Finds, under these circumstances, that the collision was caused through the failure of the defenders to have the patent anchors of the steamer ready for use, and that there was no such heavy squall of wind as to place the 'City of Edinburgh' beyond control of the tugs: Therefore finds the defenders liable in damages." &c.

On 20th October 1904 the Sheriff-Substitute decerned against the defenders for payment to the pursuers of £1200.

The defenders appealed to the Court of Session, and argued—They were not liable, no one being to blame for the collision, which was caused by an inevitable accident due to a sudden and unforeseen squall. It was said that they were in fault and therefore liable because their vessel was not provided with anchors, but anchors were not part of the usual or necessary equipment of vessels while being towed from one dock to another by tugs. But even if the anchors ought to have been available, and there had been fault, the fault was not theirs but the pilot's, who alone was responsible for the navigation of the vessel, and ought not to have moved her without anchors if he thought them necessary. If a collision occurred while a vessel was in charge of a compulsory pilot through his fault the pilot and not the owners were liable—*The London and Glasgow Engineering and Iron Shipbuilding Company* v. *Anchor*

Line (*Henderson Brothers*), *Limited*, "*The Assyrian*," July 10, 1903, 5 F. 1089, 40 S.L.R. 753; *Burrell, &c.* (*Owners of* "*Strathspey*") v. *Macbrayne* (*Owners of* "*Islay*"), July 3, 1891, 18 R. 1048, 28 S.L.R. 787; *Greenock Towing Company* v. *Hardie*, November 28, 1901, 4 F. 215, 39 S.L.R. 151; "*Argo*," 1859, Swaby's Adm. Reports, 462; *Barclay & Company* v. *Hutchinson & Company* (*The* "*Springburn*"), June 30, 1893 (unreported).

Argued for the respondents—There was a presumption of fault against the vessel which was moving, and the onus of proving that they were not to blame lay upon the appellants—*Indus*, L.R. 1887, 12 Prob. Div. 46. To escape liability they must prove that the collision was due either to inevitable accident or to the specific fault of the pilot, the mere fact that the vessel was in charge of a compulsory pilot being insufficient if the collision was not due to some fault of his—*Clyde Navigation Company* v. *Barclay*, 1876, L.R., 1 App. Cases 790. To sustain the defence of inevitable accident they must prove that the squall amounted to *vis major*, and that by no reasonable precaution could it have been coped with. They had failed to prove this. The anchors would have prevented the collision, and the fact that it may have been usual to move in dock without them would not exonerate those responsible if an accident happened—"*The Merchant Prince*" [1892], Probate Division, 179. They had also failed to prove that the pilot was in fault. It was not suggested that he had taken a wrong course or committed any other mistake in navigation. It was said, however, he was to blame for want of anchors, but that was a defect in the ship's equipment and for such the owners and not the pilot were responsible, a vessel without anchors being unseaworthy—"*Christiania*," 1850, 7 Moore, P.C. 160; "*The Ripon*," 1885, 10 P.D. 65; "*The Livia*," 1872, 1 Aspinall 204; "*City of Peking*," L.R., 1889, 14 App. Cas. 40. The pilot was only responsible for navigation and not for equipment, but even if he were here to blame the only result would be that both he and the appellants would be liable—"*Iona*," 1867, 1 P.C.. Appeals, 426.

Lord Trayner—On 21st September 1903 early in the forenoon the defenders' vessel the "City of Edinburgh" while being removed from the Queen's Dock in Glasgow harbour—and while under way—came into collision with the "Glassford" belonging to the pursuers, then lying stationary at her moorings in that dock, and caused damage to the extent, as agreed, of £1200. For this sum the pursuers seek decree against the defenders on the ground that the collision was caused by the fault of the defenders. It is quite settled that when a collision occurs between two vessels, one of which is under way and the other stationary, the former is presumed to be in fault. The presumption therefore in this case is that the "City of Edinburgh" was in fault, and the defenders are *prima facie* liable for the damage sued for unless they can rebut the presumption. The first defence maintained is that the collision was caused by "inevitable accident." It is said that a sudden squall or gust of wind caught the "City of Edinburgh" just after she left her moorings which drove her down upon the "Glassford." That defence, in my opinion, has not been established. I think it is proved that the wind on the morning and forenoon of the day in question was gusty. But it was not in character or intensity unusual, or such as could not, and should not, have been anticipated and provided against. The second defence is that the "City of Edinburgh" was, when the collision occurred, under the charge of a licensed pilot, in waters where pilotage was compulsory. That is so in point of fact. But it is not enough to exonerate the defenders to say that their vessel was under pilotage in compulsory waters. They must prove that the collision occurred through the fault of the pilot, and in this case the defenders do not even aver that the pilot was in fault, and their whole evidence is directed to show that nobody was in fault. If they have not, as I think they have not, proved that the collision occurred through the fault of the pilot, their defence based upon compulsory pilotage fails—they have not rebutted the presumption against them.

The pursuers, however, have averred that the defenders were in fault by reason of their vessel not being duly equipped, in respect she had no anchors available for use in the event of their being required, and that the want of such equipment contributed to the collision. This leads the defenders to plead that if the want of anchors contributed to the collision, such want was known to the pilot, and he was in fault in attempting to remove the defenders' vessel in her then condition. This fault on the part of the pilot is suggested or implied rather than averred. Whether the want of anchors contributed to the collision or not is a matter on which the proof cannot be said to be conclusive. I rather incline to the view of the Sheriff-Substitute that if there had been anchors, and these had been promptly used, the collision might have been avoided. But the want of anchors was the fault of the defenders, and the pilot cannot be said to be in fault in trying to shift the "City of Edinburgh" without them, because he was not consulted on that subject. He knew that the anchors were not available, because he saw a part of the windlass coming on board, but nothing was said to him on the subject. The chief officer of the "City of Edinburgh," who was in charge (for the captain was not on board), says—"I never consulted with the pilot about it at all. He never spoke to me about the anchors, and I never spoke to him about them." This fact distinguishes the present case from the case of the "*Assyria*," where the defect in the trim of the vessel was brought under the direct notice of the pilot, and an offer made to remedy the defect if he thought it advisable. The pilot in that case assumed the responsibility of navigating the vessel as she stood. Even if the pilot were in fault in starting without available anchors that would not absolve the defenders from

liability. They had a duty as well as the pilot, that, namely, of having their vessel in navigable condition, and on the authority of the decision in the case of the "*Iona*" (and it does not stand alone) I think the defenders' liability has been established on that ground. The additional ground of fault averred by the pursuers that the tugs employed to shift the "City of Edinburgh" were not proper for the occasion is, I think, not established. On the whole matter, my opinion is that the presumption of fault on the part of the defenders, arising from the circumstance that the "Glassford" was stationary, has not been rebutted, and that the defenders have failed to show that the collision was occasioned through the fault of the pilot. I am therefore for dismissing the appeal.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

"Find in terms of the findings in fact in the interlocutor of the Sheriff-Substitute dated 8th July 1904 except the last two findings: Find further in fact (1) that the defenders have failed to prove that the collision in question was occasioned by any fault on the part of the pilot in charge of the defenders' vessel at the time of the collision; (2) that the said collision occurred through the fault of the defenders; and (3) that the damage occasioned by the collision to the pursuer's vessel amounts to the sum of £1200 sterling: Find in law that the defenders are liable to the pursuers for said sum: Therefor of new decern against the defenders for payment to the pursuers of said sum of £1200 sterling with interest as concluded for: Find the defenders liable to the pursuers in expenses in this and in the Inferior Court," &c.

Counsel for the Pursuers and Respondents—Salvesen K.C.—Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders and Appellants—The Lord Advocate (Dickson K.C.)—Younger. Agents—J. & J. Ross, W.S.

Thursday, December 1.

FIRST DIVISION.

[Sheriff Court of Perthshire at Perth.

SCOTTISH UNION AND NATIONAL INSURANCE COMPANY *v.* SMEATON.

Right in Security—Bond and Assignation in Security by Liferentrix—Summary Ejection of Liferentrix in Occupation of Mansion-house—Heritable Securities (Scotland) Act 1894 (57 *and* 58 *Vict. c.* 44), *sec.* 5.

A liferentrix by constitution in certain lands and a mansion-house, assigned to a creditor by a bond and assignation in security her right in the lands and mansion-house. The creditor, having obtained decree of maills and duties, entered into possession and drew the rents of the lands, and thereafter brought an action in the Sheriff Court, under section 5 of the Heritable Securities Act 1894, for the summary ejection of the liferentrix from the mansion-house, of which she was in personal occupation.

Held that, a liferentrix not being a "proprietor" in the sense of section 5 of the Act, the summary remedy of ejection was incompetent, and action *dismissed.*

The Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. c. 44) enacts:—Sec. 5—"Where a creditor desires to enter into possession of the lands disponed in security, and the proprietor thereof is in personal occupation of the same, or any part thereof, such proprietor shall be deemed to be an occupant without a title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such occupant; provided that this section shall not apply in any case unless such proprietor has made default in the punctual payment of the interest due under the security, or in due payment of the principal after formal requisition." Sec. 6—"Any creditor in possession of lands disponed in security may let such lands held in security, or part thereof, on lease, for a period not exceeding seven years in duration."

The Scottish Union and National Insurance Company brought a petition in the Sheriff Court of Perthshire at Perth against Mrs Mary Margaret Young or Smeaton, residing at Coul, Auchterarder, and Elizabeth Margaret Smeaton, also residing at Coul, for warrant to summarily eject the defenders from the lands and estate of Coul, and particularly from the mansion-house of Coul, garden, stables, and offices in connection therewith, in terms of the Heritable Securities (Scotland) Act 1894.

The defender Mrs Mary Smeaton was the widow of Patrick Burgh Smeaton of Coul, and was the liferentrix of the estate of Coul, including the mansion-house and other offices, conform to disposition by the deceased Patrick Burgh Smeaton of Coul in favour of himself and the said Mrs Mary Smeaton, in conjunct fee and liferent, and the heirs of their marriage in fee, dated 10th April, and recorded in the General Register of Sasines, 4th October 1872. The defender Elizabeth Margaret Smeaton was the only child of the said Patrick Burgh Smeaton and Mrs Mary Smeaton. Both defenders resided in the mansion-house of Coul.

In March 1891 the pursuers advanced on loan to the defender Mary Margaret Young or Smeaton the sum of £1000, and in consideration thereof she and the defender the said Elizabeth Margaret Smeaton, and another, by bond and assignation in security duly recorded, bound themselves jointly and severally and their