Friday, May 25.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

M'LEANS *v.* JOHNSTONE AND OTHERS.

Process — Proof — Proof or Jury Trial — Appeal for Jury Trial—Collision at Sea —Action of Damages—Interpretation of Regulations—Nautical Assessor—Judicature Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 40—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 73.

An action of damages for collision at sea raised in the Sheriff Court and appealed to the Court of Session for trial by jury under section 73 of the Court of Session Act 1868 and section 40 of the Judicature Act 1825, *held* unsuitable for jury trial, and *remitted* to a Lord Ordinary for proof, on the ground that it involved not a pure question of fact but the construction of the regulations for preventing collisions at sea, and called for the presence of a nautical assessor.

Opinions per the Lord Justice-Clerk and Lord Kyllachy — That collision cases involving merely questions of fact may be suitable for jury trial.

Per the Lord Justice-Clerk—"I know of no case where the judge trying a case with a jury has had a nautical assessor."

Per Lord Stormonth Darling—"I am quite clear you cannot have both a nautical assessor and a jury . . . When these two demands are both made I think the demand for a jury must give way."

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 73, enacts—"It shall be lawful, by note of appeal under this Act, to remove to the Court of Session all causes originating in the inferior courts in which the claim is in amount above £40 at the time and for the purpose and subject to the conditions specified in the 40th section of the Act 6 Geo. IV, c. 120, and such causes may be remitted to the Outer House."

6 Geo. IV, c. 120 (The Judicature Act 1825), section 40, contains this proviso—"But it is hereby expressly provided and declared that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof to lie *in retentis* or granting diligence for the recovery and production of papers) it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation . . ."

The pursuers John and Helen M'Lean, owners of the "Bonnie Lass," sued the defenders Peter Johnstone and others, the owners of the "Sunshine," in the Sheriff Court at Aberdeen for the sum of £1588 in name of damages caused by a collision which took place between the two vessels. The Sheriff-Substitute on 4th May pronounced an interlocutor allowing parties a proof of their averments.

The pursuers appealed to the Second Division of the Court of Session and proposed issues for the trial of the cause by jury.

On the case being called in the Single Bills the defenders asked for proof, and intimated their intention of asking for a nautical assessor.

The following were the averments of parties on record so far as material:—"(Cond 2) On 14th February 1906 the 'Bonnie Lass' left Sunderland, under the charge of the pursuer John M'Lean, on a voyage to Cromarty, with a crew of five hands, including the said John M'Lean, and with a cargo of coals. All went well until the vessel was about four miles off Scotstown Head on the following day. The weather was then fine and clear, the regulation lights of the vessel were burning brightly, the wind was in the south-south-west blowing a moderate breeze, and there was a very little sea from the same direction. The 'Bonnie Lass' was sailing before the wind, under all sails except her flying jib, and her course was being steered north-by-east for Rattray head. While on this course, those on board the 'Bonnie Lass' saw a steam trawler on their port side, between them and the shore, showing a green light, and going in the same direction as themselves. The defenders' averments are denied. (Ans. 2) . . . Explained that the weather was fine, but that the night was dark, that the schooner did not show the regulation lights, that in particular she did not show a port light nor a stern light. (Cond. 3) Shortly after sighting the said trawler, and about a quarter past seven o'clock in the evening, William Lochrin, one of the crew of the 'Bonnie Lass,' was sent by the mate of that vessel to the bowsprit to make fast the flying jib, and while he was engaged in this duty the trawler suddenly and with extreme recklessness changed her course, ported, and at full speed attempted to cross the bows of the 'Bonnie Lass.' In doing so the trawler collided with that vessel, striking the bowsprit, carrying it away and knocking overboard the said William Lochrin. Those on board the 'Bonnie Lass' did all they could to avert the collision. Both before and after the trawler struck their vessel they hailed her and endeavoured by shouting to get her to keep clear of them, but without effect. The trawler, after striking the 'Bonnie Lass,' failed to stand by, held on her course, and shortly afterwards disappeared from view. . . . If those on board the defenders' vessel did not see the 'Bonnie Lass,' that was due entirely to their having no sufficient lookout and by their failure to stand by after the collision. (Ans. 3) Denied. On 15th February about seven o'clock in the evening while the trawler 'Sunshine' was about eight miles to the east-south-east of Rattray Head, and while she was proceeding on a course north-east a half

east, the jib-boom of the schooner caught the mizzen boom topping lift of the trawler and carried it away. No other parts of the two ships were in collision. William Lochrin, one of the crew of the schooner, was at the time of the collision on the bowsprit making fast the flying jib, and was projected on to the deck of the trawler. The defenders believe and aver that the immediate cause of the collision was that just as the trawler had got abreast of the schooner the latter (in breach of article 21 of the regulations) shifted her course to clear Rattray Head and Kinnaird Head, and so pass into the Moray Firth. In doing so she did not give the trawler, which was keeping on her course, sufficient time to get out of the way, and before the trawler had passed her the jib-boom of the schooner caught the mizzen boom topping lift of the trawler and carried it away. In any event the schooner was in fault in respect that while she saw there was risk of collision she kept on and took no steps to avert it by going to starboard or by using such other precautions as the circumstances required in order to avoid a collision. The schooner (in breach of articles 10 and 5 of the regulations) did not show her stern or port lights, and those on board the trawler were in consequence unaware until the collision had taken place that there was a vessel in the vicinity, and so were unable to take any steps to prevent a collision had such been practicable. The schooner, after striking the trawler, failed to stand by but held on her course to the Moray Firth, and disappeared from view. . . . (Cond. 10) The said collision, and the consequent loss and damage which the pursuers have sustained, was caused entirely through the fault and negligence of those in charge of the said trawler 'Sunshine,' for whom the defenders, the owners of that vessel, are responsible. The 'Sunshine' ran into and collided with the 'Bonnie Lass' entirely through the gross recklessness and carelessness of those in charge of the former vessel. In particular, it is averred that those on board the 'Sunshine' were in fault in failing to keep clear of the 'Bonnie Lass,' in endeavouring to cross her bows as aforesaid, and in failing to stay by her and render her and her crew assistance after the collision. The defenders or those in charge of their said vessel, for whom they are responsible, were thus in breach of the regulations for preventing collisions at sea (1897), and in particular were in breach of articles 20, 22, 23, and 24 of said regulations, and they also contravened the provisions of section 422 of the Act 57 and 58 Vict. cap. 60. It is also believed and averred that no proper or sufficient lookout was kept by those on board the 'Sunshine,' and that that vessel was being navigated in reckless disregard of other vessels. The defenders' averments in answer are denied. At the time of the collision the pursuer John M'Lean was at the wheel of his vessel; all his crew except Lochrin, who was on the bowsprit, were on deck. A sufficient lookout was kept on the 'Bonnie Lass.' After the collision the said John M'Leanshowed signals of distress, and did all he could to attract the attention of those on board the 'Sunshine,' and to save his vessel, but without success. (Ans. 10) Denied. The cause of the collision was that the schooner changed her course from about north-east to about north-west while the vessels were running on the same course and almost abreast of each other. The schooner was also in fault in respect she did not show the regulation lights. It is believed and averred that at the time the collison took place a proper watch was not kept on board the schooner. In any case the loss of the vessel was caused through the fault and want of ordinary care of the pursuer John M'Lean, in respect (1) he failed to stand by, or even to come to anchor, and thereby secure the assistance of the trawler; (2) he failed to give signals indicating his whereabouts and that he wanted assistance; (3) he failed to make for Fraserburgh and to ascertain the extent of his damage before proceeding to Cromarty. It was the duty of the pursuer John M'Lean to adopt one or other of these expedients, and if he had so acted the schooner would not have been lost. By failing to stand by, the schooner acted in contravention of section 422 of the Merchant Shipping Act 1894, and in failing to give signals of distress she acted in breach of article 31 of the Regulations."

Argued for the pursuers and appellants—The action fell under the class specially appropriated by statute to jury trial, and must go to a jury unless the defender could show "special cause" why it should not—*Sharples* v. *Yuill & Company*, May 23, 1905, 7 F. 657, 42 S.L.R. 538. The mere fact of its being a collision case was not a "special cause," many such cases having been tried by jury, *e.g.*, *Livermore* v. *Duncan*, January 21, 1865, 3 Macph. 410; *Morison and Milne* v. *Bartolomeo & Massa*, June 8, 1867, 5 Macph. 848, 3 S.L.R. 366; *Dent and Others* v. *North British Railway Company*, February 4, 1880, 17 S.L.R. 368; the case of "*The Hogarth*" and "*The Pomegranate*," heard by Lord Salvesen and a jury, March 1906, *unreported*. Further, it was not a collision case involving any special difficulty, the point being whether certain of the Regulations had or had not been infringed. There was no good reason why a nautical assessor, if one was required, should not sit with the judge at the jury trial, and such a possibility was evidently before the framers of the Act of Sederunt of 8th December 1894 for carrying into effect the purposes of the Nautical Assessors (Scotland) Act 1894 (57 and 58 Vict. cap. 40), *vide* section 3 of the Act of Sederunt, last three lines, where the words "*trial*, proof, or hearing" were used.

Argued for the defenders and respondents—The case was one for proof, not jury trial. The fact of its being a collision case involving the interpretation of the Regulations and necessitating the presence of a nautical assessor was sufficient special cause. The defender was entitled to demand a nautical assessor—Nautical Asses-

sors (Scotland) Act 1894, section 2, and no case had ever occurred in which a jury and a nautical assessor had both taken part.

LORD JUSTICE-CLERK—It is in the discretion of the Court when they think that a case is unsuitable for jury trial to send it to proof before a judge. In the present instance I cannot imagine any case less suitable for trial by jury. A collision case suitable for jury trial would be one involving a pure question of fact, such as the question whether or not a certain course had been followed. But where, as here, we have an elaborate question whether certain Regulations have been observed in the spirit or in the letter, and where the Regulations themselves are difficult to interpret and apply, I think the case should be tried by a judge assisted by a nautical assessor. I know of no case where the judge trying a case with a jury has had a nautical assessor. There are two things which a nautical assessor must do. He must advise the Court as to questions of seamanship and the meaning of Regulations, and he must also advise whether the course actually taken was one which would have been taken by a skilful seaman. Looking to the nature of his functions, it is difficult to see how it would be possible to combine trial before a jury with the employment of a nautical assessor.

LORD KYLLACHY—I agree. I can quite conceive cases of collision which would be suited for jury trial. I remember, for instance, a case where the sole question was whether a red light had been in fact exhibited by one of the ships. That case, although in fact tried by a proof, was no doubt quite suitable for jury trial. But in cases involving questions as to the construction of the Regulations, and nautical opinion as to the application of particular Regulations, the presumption is very strong against the suitability of jury trial. I think this case should be sent to proof.

LORD STORMONTH DARLING—I agree. I am quite clear that you cannot have both a nautical assessor and a jury. Whether that result is arrived at on considerations of competency or judicial discretion does not much matter. The provisions of the Judicature Act must now be read in the light of the Nautical Assessors (Scotland) Act 1894. Here we have one of the parties demanding a jury subject to the Court's approval, and the other a nautical assessor as of right. When these two demands are both made, I think the demand for a jury must give way.

LORD LOW—I agree. I think this case is not suitable for jury trial.

The Court pronounced this interlocutor—

"The Lords having heard counsel on the issues for the appellants, Disallow the same: Appoint the cause to be tried by a proof before Lord Salvesen, and remit to him to proceed in the cause, reserving all questions of expenses."

Counsel for Appellants—Scott Dickson, K.C.—Macmillan. Agents—Henry & Scott, W.S.

Counsel for Respondents—Lippe. Agents—Beveridge, Sutherland, & Smith, S.S.C.

TEIND COURT.

Tuesday, March 13.

(Before the Lord President, Lord Kinnear, Lord M'Laren, and Lord Adam.)

[Lord Pearson, Ordinary.

BAIRD *v.* EARL OF WEMYSS.

Teinds—Locality—Teind Rental—Grazings and Plantations Forming a Park and Policies—Principle of Valuation.

Certain lands, the teinds of which fell to be valued because of an augmentation of stipend, consisted of grazings and plantations forming the park and policies attached to a mansion-house. *Held* (*rev.* Lord Pearson, Ordinary) that the teinds should be valued at one-fifth of the rent which could have been got for the subjects in their actual condition as at the date of the augmentation. *Burt* v. *Home*, January 12, 1878, 5 R. 445, 15 S.L.R. 472, *commented upon.*

Teinds — Locality — Objection — Title to Object.

Objection was raised by one of two titulars to an interim scheme of locality and rectified state of teinds on the ground that a third titularity existed in the parish which had not been recognised by the common agent. *Held* (*per* Lord Pearson, Ordinary) that the objector's title to insist on the objection depended on his interest to do so, and there being no interest the objection *disallowed.*

Teinds—Locality—Glebe Lands—Lands Excambed for Old Glebe and Designed as New Glebe—Liability for Stipend.

A new glebe was designed in 1776 out of part of the lands of A given in excambion for the lands formerly constituting the glebe. In connection with this excambion it was stipulated that the remainder of the lands of A should be burdened, *inter alia*, with the teinds affecting the whole of the lands of A, including the new glebe. *Held* (*per* Lord Pearson, Ordinary) that the new glebe lands not being teind free lands the teind thereof should not be deducted in a process of locality so as to affect the interests of the heritors *inter se.*

Teinds — Valuation — Valuation by Sub-Commissioners at instance of Tacksman without Mention of Titular—Order by High Commissioners to Desist from Valuing the Lands—Validity of Sub-Valuation.