Saturday, November 14.

FIRST DIVISION.

MACLEAN AND OTHERS (MACLEISH'S TRUSTEES), PETITIONERS.

Bankruptcy — Sequestration — Declarator that Sequestration is at an End—Nobile Officium.

The estate of a deceased bankrupt was sequestrated, and the trustee in the sequestration, after effecting a compromise as to the bankrupt's heritable estate with his testamentary trustees, wound up the estate and was discharged, but the sequestration was not recalled.

The testamentary trustees, who were desirous of giving a good title to the purchaser of part of the heritable estate, having applied to the Court, with the concurrence of the representative of the only claiming creditor in the sequestration, the Court *declared* the sequestration at an end, and the trustees reinvested in the subject in question.

This petition, presented at the instance of Mrs Jessie Maclean and others, the testamentary trustees of the late John Meiklem Macleish, merchant in Glasgow, set forth the following facts:—On 13th August 1888 the Lord Ordinary on the Bills awarded sequestration of the estate of the said Mr Macleish, on the petition of the testamentary trustees of James Shearer, and that James Martin was appointed trustee on the sequestrated estate.

Part of the sequestrated estate consisted of a villa at Helensburgh burdened to almost its full value, which the trustees in vain attempted to sell for £150 more than the sum in the bond.

The trustee having realised the rest of the bankrupt estate, "entered into an arrangement or compromise with the bankrupt's testamentary trustees and widow, by which they in 1889 paid the sum of £200 in full of all claims against the trustees and the heirs and representatives of the bankrupt. The said sum represented the full value of the reversion of the said Balfunning Villa, and it was part of the arrangement, as set forth in the receipt and discharge for the said £200, dated 31st January 1889, that the trustee should concur in any petition that might be presented by the bankrupt's testamentary trustees (the present petitioners) for the recal of the sequestion."

In September 1889 the trustee was duly discharged.

"The petitioners the said John Meiklem Macleish's trustees have sold the said villa at Helensburgh, and require, in order to give a good title to the purchaser, to clear the record, which can be done by having the sequestration recalled or declared to be at an end."

The present application was presented with consent of the judicial factor, who had been appointed on James Shearer's estate.

The petitioners accordingly craved the Court, after advertisement and service, "to pronounce judgment recalling the sequestration of the estates of the said John Meiklem Macleish, or otherwise to declare the said sequestration at an end, and the petitioner reinvested in the said villa of Balfunning, Helensburgh, described in the titles thereof as follows," &c.

Argued for the petitioners—Section 32 of the Bankruptcy Act 1856 (19 and 20 Vict. cap. 89) provided that recal of a sequestration should be granted on a petition of nine-tenths of the creditors.. The present application was in keeping with the whole spirit, if not the exact letter, of that section. The peculiarity of the case was that the whole sequestration had been carried through and the trustee discharged. Nevertheless, without the interposition of the Court, the testamentary trustees of the bankrupt would not be in a position to give a good title to the property which they were selling—*Anderson*, March 13, 1866, 4 Macph. 577, referred to.

The Court pronounced the following interlocutor:—

"Declare the sequestration of the estates of the deceased John Meiklem Macleish . . . at an end, and the petitioners and trustees of the said John Meiklem Macleish reinvested in the subjects described in the prayer of the petition: Grant warrant for recording the deliverance in the Register of Sequestrations and in the Register of Inhibitions."

Counsel for the Petitioners—J. C. Lorimer. Agents—Cowan & Dalmahoy, W.S.

HOUSE OF LORDS.

Monday, November 16.

(Before the Lord Chancellor (Halsbury), Lords Watson, Herschell, Morris, and Shand.)

CURRIE *v.* M'KNIGHT.

(*Ante*, vol. xxxii. p. 520, and 22 R. 607.)

Shipping Law — Law Administered by British Courts of Admiralty—Maritime Lien for Damages.

The maritime law administered by Courts of Admiralty in England and Scotland is the same, and the doctrine of maritime lien for damages is part of that law.

In order that a maritime lien should attach to a ship for damages done to another, some act of navigation of the ship itself must either mediately or immediately be the cause of the damage. It is not sufficient that there is a wrongful act on the part of the crew, unless the ship is itself the instrument by which the damage is caused.

The ss. "Dunlossit" and the ss. "Eas-

dale" were moored alongside of an open quay in the Sound of Islay. The "Easdale" lay outside of the "Dunlossit," and was moored to the quay by cables passing over the deck of the "Dunlossit." There was a gale of exceptional violence during the night, and the master of the "Dunlossit," in order to prevent danger to his vessel by contact with the "Easdale," cut the moorings of the "Easdale" and put to sea, with the result that the "Easdale" drifted on the rocks and was injured.

The owners of the "Easdale" afterwards obtained decree for the amount of the damage against the owners of the "Dunlossit," on the ground that the act of the master of the "Dunlossit," in cutting the "Easdale's" moorings, was a wrongful act.

The "Dunlossit" was sold judicially, and in a competition as to the proceeds between a mortgagee of the "Dunlossit" and the owners of the "Easdale," who claimed a preference in respect of a maritime lien for the damages due to them, *held* that no maritime lien attached, the damage not having been caused in the course of navigation of the ship, but by an act of the crew before she had moved from the quay.

This case is reported *ante* vol. xxxii. p. 520, and 22 R. 607.

The defender appealed.

At delivering judgment—

LORD CHANCELLOR — This is a claim to establish a maritime lien against the ship "Dunlossit" by reason of damage sustained by another vessel under circumstances which it is necessary to state briefly to see whether the claim is sustainable.

The crew of the "Dunlossit," in order to enable that ship to go to sea, cut the cables of another vessel, the "Easdale." This proceeding on the part of the crew I will assume for this purpose to have been an unlawful act, and subjecting those responsible for the acts of the crew of the "Dunlossit" to a liability for the damage suffered by the "Easdale." But there seems to me to be no connection between the damage to the "Easdale" and any act or thing done by the "Dunlossit." That the act done was done in order to enable the "Dunlossit" to start does not make it an act of the "Dunlossit." That it was done by the crew of the "Dunlossit" does not make it an act of the "Dunlossit," and the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports in my opinion that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed, some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.

I am therefore of opinion that it would be impossible in an English Court of Admiralty to maintain that the injury suffered by the "Easdale" gave rise to a maritime lien any more than if the master of the "Dunlossit" had unlawfully taken away some of the "Easdale's" property.

Having arrived at this conclusion, I am not certain that to discuss the other matters involved in this appeal is not outside any question properly arising here. If the judgment had been the other way, it would have been necessary to discuss whether the law which prevails in England prevails also in Scotland.

I cannot doubt that on such questions it is the law of Great Britain that prevails, and that Scotch Admiralty Courts and English Admiralty Courts administer the same law. The Admiralty law, as we know it, differs from the common law of England, and the common law of Scotland differs from the common law of England. But the reason is obvious—the laws of England and Scotland were derived from different sources in respect of these two branches of the law. The Admiralty laws were derived both by Scotland and England from the same source, and as it is said by no mean authority that the Admiralty law was derived from the laws of Oleron, supplemented by the civil law, it would be strange, as well as in the highest degree inconvenient, if a different maritime law prevailed in two different parts of the same island.

I only wish to add that I think the case of the "Bold Buccleuch" (7 Moore, P.C. 267) in the Privy Council was well decided. Its authority, I think, has never been shaken, and I should be sorry to see at this distance of time anything done which would weaken its authority.

I am therefore of opinion that this appeal should be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON — The steamship "Dunlossit" was sold under a warrant issuing from the Sheriff Court of Lanarkshire at the instance of Samuel M'Knight, a mortgagee, now deceased, whose executors have now been made respondents in this appeal. The price of the vessel having been paid into Court, a competition arose between the mortgagee and the present appellant, who holds a decree for damages against the registered owners of the "Dunlossit," in respect of which he claims a preferable lien attaching to the proceeds of her judicial sale as a *surrogatum* for the ship.

The findings of the decree upon which the appellant's claim is founded show that during a night in November 1893 three vessels were moored alongside of an open quay at Port Askaig, in the Sound of Islay, where there is no harbour. The "Dunlossit" was in the centre of the tier, the steamship "Easdale," belonging to the appellant, being outside of her, and moored to the quay by cables passing over the deck of the "Dunlossit." There was a gale of exceptional violence during the night, which made the position of the vessels very insecure. In the morning the crew of the "Dunlossit," which was in serious peril of damage from contact with the vessels between which she lay, and the possibility of another vessel moored in front of her com-

ing into collision with her, got up steam, and, after notice of their intention, cut the mooring-ropes of the "Easdale," and stood out to sea. The "Easdale" was short-handed owing to the defection of two of her crew, and being unable to get up steam was driven ashore and damaged. The master of the "Dunlossit" acted solely for the protection of his ship against present and possible damage. The First Division of the Court, reversing the decision of the Sheriff-Substitute, held that the cutting of the "Easdale's" ropes by the crew of the "Dunlossit" was a wrongful act, for which her owners were responsible. That decree is final, and I have no right to express, and am not to be understood as expressing, any opinion with regard to its merits.

The Sheriff-Substitute in the present suit sustained the appellant's claim, being of opinion that in the sense of law, the proceedings of the "Dunlossit" crew constituted an act of the ship which was sufficient to create a maritime lien for the damage thereby occasioned to the "Easdale." His decision was reversed on appeal by the Second Division of the Court of Session, who dismissed the claim. Three of the learned Judges held that, according to the law of Scotland, no lien attaches to a ship for damage wrongfully done by her to another vessel, whether by collision or otherwise. Lord Rutherfurd Clark abstained from expressing any opinion upon that point, which did not appear to him to arise for decision. All of the learned Judges held that, assuming the same right of lien to exist in Scotland as in England, the injuries suffered by the "Easdale" were not due to the fault of the "Dunlossit" as a ship.

Both these grounds of judgment involve considerations, not of municipal but of maritime law. Had they been confined to the second point I should have seen no reason to differ. But the first point is one of considerable importance to the shipping community, and I am unable to concur in the views which were expressed with regard to it by the majority of the Court.

From the earliest times the courts of Scotland, exercising jurisdiction in Admiralty causes, have disregarded the municipal rules of Scotch law, and have invariably professed to administer the law and customs of the sea generally prevailing among maritime States. In later times, with the growth of British shipping, the Admiralty law of England has gradually acquired predominance, and resort has seldom been had to the laws of other States for the guidance of the courts Mr Bell, who wrote more than sixty years ago, states (2 Comm. (5th ed.) p. 500) that the decisions which were at that time of the greatest authority in Scotch Maritime Courts were those of the High Court of Admiralty of England. His statement is fully borne out by the authorities, to three of which I think it sufficient to refer. In 1788 the Court of Session, in a case relating to lien for furnishings made to a ship (*Wood* v. *Hamilton*, Mor. Dic. 6,269), ordered the opinion of English counsel to be taken to ascertain the practice of England in such cases, and thereafter gave judgment in accordance with that opinion, although it was contrary to previous decisions of their own Court; and their judgment was affirmed by this House (3 Paton 148). In the well-known case of *Hay* v. *La Neve*, the Court of Session followed what they understood to be the rule of the English Admiralty Court; and in moving the reversal of the judgment, Lord Gifford, who delivered the opinion of the House, said—"We are here on the law of the Admiralty in England" (2 Shaw's App. Cas. 395, 403). In *Boettcher* v. *Carron Company* (23 Sess. Ca., 2d series, 333) the identity of the maritime law of Scotland with that of England was distinctly proclaimed by the late Lord President Inglis, then Lord Justice-Clerk, who was certainly not disposed to accept English law in any case where it differed from the law of Scotland. After referring to various causes which had contributed to produce that identity, his Lordship observed —"It would be very surprising if, at the present day, ships enjoying the privileges and subject to the conditions of British registry, should sail from the ports of the United Kingdom under the same flag, and subject to the same statutory regulations in all respects, and yet that in cases of collision the legal rights of the parties might vary according as the case might be tried in one British Admiralty Court or another."

It does not appear to me to be doubtful that if the "Dunlossit" had been so negligently navigated as to run into and sink the "Easdale," she would, in the absence of contributory fault by the "Easdale," have been subject to a lien for the damage occasioned to the latter vessel in any English port, whereas, according to the law laid down in this case, no such lien would have attached to her in a Scottish harbour. That such a conflict should be possible is inconsistent with the views expressed by the late Lord President in *Boettcher* v. *Carron Company*, and also with the maritime code which ought to prevail in both countries, which in my opinion is neither English nor Scotch but British law. That there may be conflicting decisions by the courts of the two countries is possibly unavoidable, seeing that different conclusions may be arrived at even by courts of the same country administering the same law; and I do not mean to suggest that a Scotch Admiralty Court is less free to examine the merits of an English authority than an English Court is to estimate the value of a Scotch decision, and to accept or reject it according to its own view of the law maritime. But it does not follow that the law either is or ought to be different in the two countries. This House has now become the ultimate forum in all maritime causes arising in the United Kingdom, and as your Lordships are, in my opinion, bound to apply one and the same law to the decision of all such cases, your judgments upon a proper maritime question, whether given in an English or in a Scotch appeal, must be of equal authority in all the Admiralty Courts of the kingdom.

The "Bold Buccleuch," which was decided

by the Judicial Committee of the Privy Council, affirming the judgment of Dr Lushington (7 Moore P.C. 267), is the earliest English authority which distinctly establishes the doctrine that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. The principle of that decision has been adopted in the American courts, and in the Admiralty Court of England it has for nearly forty years been followed in a variety of cases, in which lien for damage done by the ship has been preferred to claims for salvage and seamen's wages, and upon bottomry bonds. In my opinion, the substantial question which your Lordships have to determine in this case is, whether the "Bold Buccleuch" was decided according to the maritime law of Britain. If it was, the rule which it lays down must apply to all maritime causes of a similar kind arising in the courts of Scotland.

It is unquestionably within the authority of this House to reconsider, and if necessary to overrule, the judgment of the Judicial Committee in the "Bold Buccleuch"; but it is no less clear that the opinions of the eminent Judges who took part in the decision of that case ought not to be disregarded without good cause shown. To my mind their reasoning is satisfactory; and the result at which they arrived appears to me to be not only consistent with the principles of general maritime law, but to rest upon plain considerations of commercial expediency. The great increase which has taken place in the number of sea-going ships propelled by steam power at high rates of speed, has multiplied to such an extent the risk and occurrence of collisions that it has become highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And, in my opinion, it is a reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her, and may be without the means of making due compensation.

The other point, as to which the learned Judges of the Second Division were unanimous, relates to the limits of the shipping rule which was followed in the case of the "Bold Buccleuch." I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches. Such an act or manœuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship, because the ship, in their negligent or unskilful hands, is the instrument which causes the damage. In the present case, according to the findings of fact contained in the decree of the First Division, the injuries sustained by the "Easdale" were not owing to any movement of the "Dunlossit"; they were wholly occasioned by an act of the "Dunlossit's" crew, not done in the course of her navigation, but for the purpose of removing an obstacle which prevented her from starting on her voyage.

I am therefore of opinion that, upon the second of these grounds, the interlocutor appealed from ought to be affirmed.

LORD HERSCHELL—The question raised by the appeal is whether the appellant is entitled to a maritime lien upon the vessel "Dunlossit" (or her proceeds) of which the original respondent M'Knight was the mortgagee.

In November 1893 the vessels "Dunlossit" and "Easdale" were lying alongside one another at Port Askaig Pier, Islay. A heavy gale was raging, which the "Easdale" was unable or unwilling to face; the master of the "Dunlossit" being anxious to put to sea, and being unable to induce the master of the "Easdale" to let go his moorings, cut them and sent her adrift. The result was that the "Easdale" drifted ashore and was damaged. The owner of the "Easdale," having obtained judgment against the owners of the "Dunlossit" for the amount of the damage thus sustained, sought by the present proceedings to maintain a maritime lien on the "Dunlossit" in respect of the damage done to the "Easdale" owing to the act of the master of the "Dunlossit." I entirely agree with the Court below in thinking that no such lien can be sustained.

In the Admiralty Court in England a maritime lien has frequently been enforced in cases of collision against the vessel which was in fault, but no case could be cited which was at all similar to the present one. In all the cases referred to the damage had been caused either by a collision with the vessel which was to blame or by that vessel having driven the other into collision with some third vessel or other object. The doctrine was originally asserted in cases of damage by collision with the vessel which was declared subject to the lien. It has since been applied in cases in which the damage did not result from a collision with the vessel in fault, but in which owing to the negligent navigation of that vessel, the injured ship was driven into collision with some other vessel or object. Whether the circumstances have always warranted the conclusions arrived at it is not necessary to inquire. I express no opinion upon it, but the ground of the decision was in all cases this, that the vessel on which the lien was enforced had in maritime language done the damage. Here the "Dunlossit" did no damage. It was not by reason of the negligent navigation of that vessel that the disaster occurred. It arose simply from the wrongful act of the master in cutting the "Easdale" adrift. I am not prepared to extend the doctrine of maritime lien to such a case.

In the Court below three of the learned Judges held that the doctrine of maritime lien which exists in England in cases of collision is unknown in the law of Scotland. I entirely agree with the late Lord President Inglis that much as the law of Scotland differs from that of England in many respects, the Admiralty law is the same in the two countries. The courts of Scotland are, of course, not bound by the decision of an English Admiralty Court in any new case that arises. But taking it to be established that the Admiralty law of the two countries is the same, they would no doubt hesitate to differ from a long course of decision by English Admiralty Courts of high authority. I think it right to add, as the matter is of much practical importance, that in my opinion the doctrine of maritime lien in cases of collision is, within the limits to which I have adverted, too well established to be now questioned.

LORD MORRIS — I am also of opinion that the interlocutor appealed from should be affirmed, for the reasons that have been assigned by my noble and learned friend Lord Watson in his judgment, which I have had the advantage of reading.

LORD SHAND — After what has been said by your Lordships, it is unnecessary to recapitulate the facts which gave rise to the claim of damages on the part of the owner of the steamer "Easdale" against the owners of the "Dunlossit," which is the basis of the claim of lien maintained in this action. In a former action between these respective owners it seems to have been held by the Sheriff-Substitute that in the position in which the "Dunlossit" was, lying moored to the quay at Port Askaig, on the 17th November 1893, when a gale of exceptional violence occurred, causing serious peril of considerable damage, those on board of her were entitled to require the persons in charge of the "Easdale" to remove the moorings of that vessel so as to allow the "Dunlossit" to go out to sea, and that, as the request to do that was refused, the crew of the "Dunlossit" were entitled to cut these moorings, and that the owners of the "Dunlossit" were not liable for the damage resulting to the "Easdale." The judgment was reversed by the First Division of the Court of Session, by whom it was held that the owners of the "Dunlossit" were responsible for the act of the captain in cutting the moorings of the "Easdale," and for the damage which resulted to that vessel, which was subsequently ascertained to amount to £407, 4s. 6d. No appeal was taken against this judgment, and this Court is not therefore called on, or indeed in a position, to express any opinion on the question thus decided. The appellant holds a final decree against the owners of the "Dunlossit," and the question raised is whether in the circumstances he has, in virtue of this decree, a lien against the proceeds of sale of the ship which entitles him to be ranked preferably to the mortgagee.

On that question I agree with your Lordships in thinking the appellant has failed to establish any such right of lien. For the reasons fully stated by my noble and learned friend Lord Watson, and having regard to the authorities in the law of Scotland referred to by him, the maritime law to be applied in questions like the present—Admiralty questions—is, I think, the same in Scotland as in this country. I do not say that the Courts in Scotland are bound to accept a decision not of this House but given in other Courts in this country as binding on them, or to give effect to these decisions, unless they agree in thinking they are based upon sound and conclusive reasoning, but the greatest weight ought certainly to be given to a course of decisions in the Admiralty Courts in England which has established a principle or rule of frequent application for reasons which have commended themselves to many different Judges. Thus if the lien here claimed had arisen because of a collision occasioned by the fault of those navigating the "Dunlossit" in the course of navigation, I should say that the English authorities, and the rule which these have so long established, should be conclusive in a case occurring in Scotland, and that the evil referred to by the Lord President in the case of *Boettcher*, of having conflicting rules applied in two different parts of the kingdom in maritime matters, and in circumstances of frequent occurrence, should be avoided. If, then, this had been a case of collision caused by the fault exclusively of the "Dunlossit" as the offending ship, I should have had no difficulty in holding that the lien contended for existed. The learned Sheriff-Substitute (Mr Balfour) in his judgment has clearly and ably stated every consideration to support the view that the principle which has been applied in cases of collision ought to support the lien here claimed; but it seems to me, though I think the question is one not free from difficulty, that the act of the master in cutting the mooring ropes of the "Easdale," and so sending her adrift, does not make the "Dunlossit" an offending ship in the course of navigation, or the instrument which caused the damage, which seems to have been the test applied in all the cases which have hitherto occurred.

The House dismissed the appeal.

Counsel for the Appellant — Joseph Walton, Q.C.—A. S. D. Thomson. Agents —Thomas Cooper & Co., for Morton, Smart, & Macdonald, W.S.

Counsel for the Respondents—The Lord Advocate (Graham Murray, Q.C.)—Sir W. Phillimore, Q.C. Agents—Grahames, Currey, & Spens, for Webster, Will, & Ritchie, S.S.C.