Counsel for Pursuer — Trayner — Lorimer. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Defenders—Mackintosh—A. Mitchell — Guthrie. Agents — Macandrew, Wright, Ellis, & Blyth, W.S.

Friday, July 4.

SECOND DIVISION.

A. B. *v.* C. B.

(*Ante*, p. 598.)

Process — Appeal to House of Lords — Execution pending Appeal—Husband and Wife.

The Court of Session having in an action for nullity of marriage by a wife against her husband found and declared the pretended marriage to be null, given expenses to the pursuer, and ordained the defender to pay her the taxed amount thereof, and the defender having appealed to the House of Lords, the pursuer presented a petition for interim execution pending appeal, to the effect of enabling her to recover payment of the expenses. The Court *allowed* interim execution to that effect, and refused to ordain her to find caution for repetition in the event of the judgment being reversed.

The defender (C. B.) having appealed to the House of Lords against the judgment of the Second Division (*ante*, p. 598) of 4th June finding his marriage with the pursuer to be null and void, and also against a subsequent interlocutor of 13th June approving of the Auditor's report on the pursuer's account of expenses, and ordaining the defender to pay to her the taxed amount thereof, £319, 12s. 10d., the pursuer presented this petition for interim execution of these decrees, "to the effect of enabling the petitioner to recover payment of the said expenses." The defender did not object to the prayer of the petition being granted, but moved the Court to qualify it by ordaining the pursuer to find caution to repeat the amount of the expenses in the event of the judgment being reversed.

The pursuer objected to the qualification, on the ground that if the defender succeeded in the appeal the pursuer would be declared to be still his wife.

The defender argued—Meantime the marriage was declared null, and the order should therefore be granted. Besides, the wife had separate estate, which was liable for her expenses.

Lord Justice-Clerk—I think we should act here, not as if the matter were settled, but on the footing that it is still in dependence. That is the true footing.

Lord Young, Lord Craighill, and Lord Rutherfurd Clark concurred.

The Court authorised extract of the decrees of 4th and 13th June, and allowed execution to proceed thereon to the effect of enabling the pursuer to recover payment of the expenses decerned for in her favour by the decree of 13th June, and dispensed with reading in the minute-book.

Counsel for Pursuer—D.-F. Macdonald, Q.C.—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defender — Trayner — Armour. Agents—Beveridge, Sutherland, & Smith, S.S.C.

HOUSE OF LORDS.

Monday, June 23.

(Before Lord Chancellor, Lords Blackburn, Watson, and Fitzgerald.)

MACLAREN AND OTHERS *v.* THE COMPAGNIE FRANCAISE DE NAVIGATION À VAPEUR, *et e contra.*

(In Court of Session, December 5, 1883, *ante* p. 177.)

Ship—Shipping Law—Liability for Collision.

Circumstances in which it was *held* (*reversing* judgment of Second Division) that for a collision happening on a clear night where the lights of the vessels were mutually seen, both vessels were to blame.

Maclaren and others, owners of the "Thames," appealed.

At delivering judgment—

Lord Chancellor—My Lords, in this case I agree generally with the reasons which have led the Second Division of the Court of Session to the conclusion that the "Thames" cannot be exonerated from blame for the collision which happened, and I do not think it necessary to repeat those reasons.

But the question remains, whether the "Lutetia" was free from blame? It does not follow because there was not a proper look-out on board the "Thames," that there was a good look-out on board the "Lutetia," or that credit should be given to all the statements of the witnesses for that vessel. I find it very difficult to satisfy myself where the real truth lies as to the relative courses of the two vessels from the time when they first saw each other down to that of the collision, and as to the precise length of that interval of time; but there is one point on which the burden of justifying her conduct seems to me to be cast upon the "Lutetia" by facts which are beyond serious question. The 18th sailing rule under the Order in Council of the 14th August 1879, agreed to by France and all the other nations mentioned in the second schedule to that Order, is that "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary." Did or did not the "Lutetia" comply with the rule? If she did not, was her omission to do so a contributory cause of the collision or of the damage which followed?

It is proved to my satisfaction that on board the "Thames" at all events the danger of collision was perceived in sufficient time to enable the engineer to receive and act upon the necessary orders to reverse the engines and stop the ship, and that the "Thames" was actually stopped before the collision took place. Cameron, her first mate says, "When I saw the 'Lutetia's' green light opening to us, I saw that it was impossible to avoid a collision then, and I sang out at once to put the engines full speed astern to avoid being struck amidships. That was sung out to the officer on the bridge, the second mate. To the best of my knowledge that order was carried out, because the vessel was stopped." Gordon

(the look-out man), Dawson (the cook), M'Millan (the chief engineer), and Anderson (the helmsman) all confirm this statement. M'Millan says that when the "Thames" was struck she was going full speed astern; that if it had not been so, they would all have been scalded with water from the boilers; that "her headway was just stopped and no more." The entry in his log agrees substantially with that statement, being that they "were going astern for about a minute and a half."

As to the "Lutetia," Cameron says that she struck the "Thames" at nearly right angles, on the port bow; that she "nearly went right through;" he "could not say whether she slackened her speed, but by the appearance of the shock she could not have slackened." Gordon says "she (the 'Lutetia') must have been going a good speed; half or whole, I could not say which; she must have been going half speed whatever more, according to her way and the shock she gave us." M'Millan thus describes the injury—"She (the 'Thames') was cut right through and through. Her plates were cracked right on the other side of the ship. "She was cut from deck to keel, from port to starboard." These statements are confirmed by other unimpeachable evidence.

A sketch in section verified by the witness Wallace was produced to the House showing the position of the gap in the vessel (the 'Thames'), and the relative size of it. Mr Hardy, a foreman shipwright of Glasgow of long experience, examined that ship when brought in for repair. In reply to the question "From the appearance of the blow which the 'Thames' had received, do you think she could have been going at a high rate of speed when the collision occurred, or could you tell what rate of speed?" he said, "I could not tell or form any opinion upon the subject, but I do not think she could have been, from the damage she sustained, going fast. She must have been going very slow. The 'Lutetia' which struck her must have been going at a considerable speed. From the position of the blow the vessels had struck each other nearly at right angles into the port bow." Being asked by the Court, "You say that the 'Thames' must have been going slow when she was struck, what leads you to form that opinion?" he answered, "From the incision in the 'Thames;' we found she was cut through right to the starboard side," adding his reasons for thinking that the appearances would have been very different and that the damage would have been much greater and would have extended further aft on the port side if the "Thames" had been going faster (the other conditions being the same).

I believe this evidence, and I cannot but draw the same conclusion from Mr Wallace's sketch, although Granello (the boatswain of the "Lutetia") said that the "Thames" was going faster than the "Lutetia" at the time of the collision—she was going at any rate six or seven knots, if she was not going more.

When the statements made at different times by the witnesses for the "Lutetia" are examined, inconsistencies are found in them which make it very difficult to believe that there was such a look-out on board that vessel as there ought to have been. In the log of the "Lutetia" there is no mention of the time when the "Thames" was first sighted or when either her green or her red light was seen before the collision. The only entry on the subject is this—"About 9 o'clock at night finding myself about two miles from the port of Oran, I was run into by an English steamer which had made a false manœuvre." That entry must necessarily have been made after both ships had come into port. A report is also mentioned in the log as having been then made out and signed by the captain and all his crew, but that report was not produced in the cause. In the depositions before the Tribunal of Commerce at Oran, made soon afterwards, Captain Garrique said that the "Thames," shewing a "green light in the wake of the starboard cat-head as well as a white light," was first seen about 9 p.m., when about two miles distant from Oran harbour light," and he added that the collision took place about ten minutes afterwards, and Rouquet (mate of the "Lutetia") placed an interval of not more than fifteen minutes between the time when he first saw the green and white lights and the appearance of the red light, when (he says) "the collision took place almost instantaneously." The answers for the "Lutetia" on the present record are both as to time and as to distance to the same effect. In his evidence at the trial Captain Garrique fixed the distance of the "Thames," when her green light was first seen, at four or five miles, adding (as did his other witnesses) that she was about two miles from Oran when the collision took place. Granello (the boatswain) represented the time when the green and white masthead lights of the "Thames" were first seen as "a few minutes" after he came on watch at 8 p.m. which would be about an hour before the time of the collision as stated in the log. The evidence of Luigi (the helmsman) was to the same effect, and the collision according to him took place in less than half an hour afterwards. This as to the time of the collision agrees substantially with the statements in the log of the "Thames" and of the witnesses for that ship. I cannot reconcile the statements contemporaneously made in the log of the "Lutetia" with this evidence at the trial.

With respect to the conduct of the "Lutetia" when the collision had become imminent, the statement made at Oran by Moreau (the chief engineer of the "Lutetia") differs altogether from his own and the other evidence at the trial. Moreau then said that "the speed of the 'Lutetia's' engines had been reduced, and the dampers almost closed, six or seven minutes before the collision. They were stopped and reversed, and they were going astern before the collision." But at the trial he said—"After I went on duty the first order I received was to ease the steam. That was between eight and nine o'clock. I obeyed that order. The next order was to stop, and immediately after stop I got an order to go full speed astern. I obeyed these orders as soon as they were given. The collision took place nearly at the same time as the order to go astern, a moment after"; and Captain Garrique said—"When the red light of the 'Thames' was shown we were so close that the collision took place instantaneously; I stopped the engines and turned her astern, but she had not commenced to go astern before the collision; the headway was not off her." He had at that time neither time or opportunity for executing any manœuvres by which he could have saved the collision. The vessel had not had time to answer her helm when the collision took

place. "She was going about three knots at the moment of the collision."

Looking at these and some other varying statements of the witnesses for the "Lutetia" (in a case in which the evidence as to the lights seen from each ship is so contradictory as to make the discovery of the truth more than usually difficult), to the statements of her log as to time and distance, and its silence on the most material points, to the now production of the contemporaneous report made at Oran, to the statement of the witness Granello as to the speed of the "Thames" at the moment of collision, which agrees with the pleading in the record, and to the fact that the damage done to the "Lutetia" by the "Thames" (which reversed her engines and stopped before the ships came into contact) was small, while that done to the "Thames" by the "Lutetia" (which did not stop or reverse though she may at the time have been going at less than full speed) was so much more extensive and serious—I am unable to come to the conclusion that the plea of unavoidable necessity alleged by Captian Garrique for his non-compliance with the 18th sailing rule, has been satisfactorily made out; on the contrary, I think the first conclusion from the evidence as a whole is that there was fault on both sides contributing to the damage and loss which has been suffered; and I move your Lordships so to declare, and with that declaration to remit the case to the Court below, giving no costs of the appeal.

Lord Blackburn—My Lords, I am of the same opinion. The question depends entirely upon what is to be believed to be the truth as to facts upon which there is very contradictory and very confused evidence. Early in the case I had come to the conclusion that the decision of the Lord Ordinary, that the "Thames" was free from blame could not be supported; and so far there was no difficulty in my mind in saying that the decision of the Court of Session was right; I had more difficulty a good deal in making up my mind upon the point, whether upon the result of the whole evidence taken together it was to be considered that the French ship the "Lutetia" was free from blame or not. Upon that I do not intend to go into the details, for they have been stated at considerable length by the Lord Chancellor, and will be stated by the noble and learned Lord who will follow me, and whose printed opinion I have had the advantage of reading. I come entirely to the same result, namely, that there is made out a case for blame to the "Lutetia" also. The consequence is that the damage must be apportioned between the two ships; and of course under those circumstances there will be no costs of the appeal.

Lord Watson—My Lords, I am unable to take the same view of the facts of this case as the learned Lord Ordinary in whose presence the leading witnesses were examined. His Lordship came to the conclusion that at that time, when their side lights became visible, both vessels were heading towards the coast, "so that their courses would cross each other obliquely at an angle of at least two and a half points." In that position the green light of the "Lutetia" was opposed to the red light of the "Thames," and his Lordship held that the "Lutetia" was alone to blame for the collision, because she ought to have observed the red light of the "Thames," and ought in consequence to have put her head to starboard and passed to seaward of the "Thames." Had I been able to accept the Lord Ordinary's view of the facts, I should have held that there was no look-out, or at all events an insufficient look-out kept by either vessel, because according to that view the red light of the "Thames" was visible to the witnesses from the "Lutetia," whereas they all say that they only saw a green light, and those on board the "Thames" could only see the green lights of the "Lutetia" and yet they all state that her red light alone was visible.

I am of opinion that the Judges of the Second Division did right in rejecting the theory by which the Lord Ordinary accounts for the collision; and I also agree with them that the evidence is sufficient to fix liability upon the owners of the "Thames." Having regard to the condition of the vessel and the occupation of her crew before the collision occurred, I think it is a matter of reasonable inference that due care and vigilance were not observed by those who were navigating her. I do not lay any stress upon the alleged intoxication of the Captain—indeed I doubt whether it is proved he was the worse of liquor, — but whether he was intoxicated or not, the fact remains that he went down to his cabin and stayed there during a critical period, whilst his somewhat short-handed crew were so fully occupied in endeavouring to get the vessel into proper trim as to have little leisure for attending to her navigation. Cameron, the first mate, no doubt says that he was in command after the captain left the deck, but I infer from his evidence that he did not know when that duty devolved upon him. What he does say is that "the captain must have gone down to his tea at the time we stopped," and from an answer given by him to the Court it appeared that when the vessel was about to start after her stoppage he was informed by Cleary, the second mate, that the captain had gone down to his tea. Cleary at that time knew that the captain was below, but he states that he did not know "when he went away or where he went to;" but if Anderson, the man at the wheel, is to be relied on, the captain must have left the deck at least a quarter of an hour before her stoppage. The first mate, who was in command after the stoppage, was never upon the bridge, and although he does say that he kept an eye upon the "Lutetia" after she was first observed, he was on the forecastle attending either to the shipping or to the lashing of the anchors down to the time of the collision. I am willing to assume that the anchors had been shipped for an appreciable time before the collision took place, but in considering whether a proper look-out was kept it is impossible to disregard the fact that after they were taken in there were, including the look-out man, only four seamen on the forecastle to do the ordinary work of five. These circumstances are not calculated to afford any presumption that a proper look-out was kept. On the contrary, I think the reasonable conclusion to be derived from the evidence is, that owing partly to their having started without taking their anchors on board, and partly to the captain leaving his post at the time he did, the officers of the "Thames" were unable to give or did not give

to the navigation of the vessel that degree of attention which might probably have prevented the collision.

Whilst I concur with the Judges of the Second Division in holding that blame attaches to the "Thames," I am not prepared to assent to their judgment in so far as it acquits the "Lutetia" of contributory fault. I think there are sufficient grounds for coming to the conclusion that the "Lutetia" either failed to keep a good look-out, or neglected to take proper precautions for averting or diminishing the force of the collision.

The statements which the respondents make in their record, after setting forth that the vessels were approaching green to green when the "Thames" suddenly opened her red light, thus proceeds—"Seeing the 'Thames' thus crossing the bow of the 'Lutetia,' the captain of the latter vessel at once starboarded her helm, stopped her engines, and reversed them full speed, and did everything he could to avoid, or at least to diminish, the effect of any collision. The 'Thames' when she shifted her helm as aforesaid was going at too great a speed, and in breach of the rules and regulations aforesaid; she did not slacken her speed, nor did she stop and reverse her engines, and the two ships came into collision, the port bow of the 'Thames' striking the starboard bow of the 'Lutetia.'"

Now, for my own part I cannot regard these averments as other than the deliberate statement of the parties wno are responsible for the navigation of the "Lutetia," or as of less importance than if they had occurred in the log of the vessel, or in particulars delivered in the Court of Admiralty. To admit the suggestion that they ought to be treated as an erroneous account given by the professional advisers of the party would, in my opinion, be to destroy the usefulness of a Scotch record in all cases of collision at sea. In the present case I cannot discover in the respondents' evidence any indications of an intention to abandon or to discredit these allegations in respect to the speed of the "Thames" at the moment of collision. Granello, the boatswain of the "Lutetia," who was officer of the watch at the time of the collision, and the only witness for the respondents who speaks to the speed of the "Thames," "says the 'Thames' was going faster than the 'Lutetia' at the time of the collision—she was going at any rate 6 or 7 knots an hour.

If it had been proved that, as the respondents allege, the "Thames" was going through the water at considerable speed when the collision occurred, I should probably have come to the conclusion that she was alone responsible for the disaster. But I am satisfied that the account given by the respondents on record is untrue, and that is a circumstance which I cannot but regard as unfavourable to the "Lutetia." I believe the testimony of the "Thames" witnesses, which is to the effect that at the moment of the collision the engines of their vessel had previously been stopped and reversed, and that as the witness Gordon expresses it, her headway was "just about off." They are not directly contradicted upon this point by any of the "Lutetia's" witnesses except Grannello, and they are in my opinion corroborated by the real evidence afforded by the condition of the "Thames" after the collision, which is thus described by Harvey, a witness above suspicion — "She was cut through right to the starboard side. The stem was raked to the starboard side to 14 inches, and at the foot the lower part of the stem 4 inches, and the lower part of the keel at where the collision took place was twisted and bent, and the clamped plate on the starboard side broken." To my mind the nature of the injury thus described points very strongly to the inference that whilst there was considerable way on the "Lutetia," the "Thames" must have stopped or nearly so. The "Lutetia" had, like the "Thames," been steaming at half speed—that is, from three to four knots an hour—before the collision—and I have doubts as to the reliability of the evidence given by the witnesses from the "Lutetia" as to the stopping and reversing of her engines. To the statements of Granello, the officer of the watch, I attach no weight whatever, for he not only says that at the time of the collision the "Thames" was steaming ahead at a rapid rate, but that after the collision her engines were still going, and she was "dragging us with her." Of course one would expect the most accurate evidence as to the actual stopping and reversing of her engines from the engineer of the "Lutetia," and he does state that he got and at once obeyed the successive orders, "stop" and "full speed astern," and that the collision took place at nearly the same time as the order to go astern—a moment after—a statement which is unfortunately not very consistent with the deposition which he emitted at Oran. But accepting the evidence given on this point by the witnesses from the "Lutetia" before the Lord Ordinary, it is obvious that the two vessels were at very close quarters before the orders to stop and reverse were given, and that hardly any of her way could have been taken off the "Lutetia" before they collided.

In that state of facts I think it is a matter for serious consideration how the "Lutetia" came to maintain her speed almost till the moment of the collision, whilst the "Thames" had slowed until she had nearly ceased to move forward. I have already indicated the reasons for which in my opinion the "Thames" cannot be acquitted of contributory fault, but it does not follow that the "Lutetia" must therefore have been free from blame. Assuming that the "Thames" was improperly steered, it is perfectly plain that she did something to avoid the collision. I can suggest no conceivable reason for her stopping and reversing, except that those on board of her had observed that the two vessels were approaching each other in such manner as to involve risk of collision for an appreciable period of time before it actually took place. No matter how the two vessels were brought into that position of danger, if it were observable from the "Thames," it must have been equally patent to those on board the "Lutetia" if they were keeping a proper look-out. I am unable to resist the conclusion that they either neglected to keep a proper look-out, or that they failed to observe the provisions of rule 18. Had the "Lutetia" stopped and reversed her engines at the time when the risk of collision must have been apparent, even if the collision had not been avoided, I do not believe she would have cut through a vessel which had practically ceased to move.

The evidence on both sides (as too often hap-

pens in such cases) is very unsatisfactory, but the result of the best consideration which I have been able to give to it is, that I am unable to acquit either vessel of contributory fault. In my opinion, therefore, the interlocutor under appeal ought to be reversed, and the two actions remitted with a declaration that the collision was due to the fault of both vessels, and that neither of the parties should have their costs either in this House or in the Courts below.

Lord Fitzgerald—My Lords, the question is entirely one of controverted facts and contradictory evidence. The case has been so exhaustively treated by your Lordships that I can add nothing which would be valuable. I confine myself therefore to expressing my entire concurrence.

Interlocutor appealed from reversed, actions remitted with a declaration that the collision was due to the fault of both vessels, and that neither of the parties should have their costs in the Court below.

Counsel for Appellants—Webster, Q.C.—Bucknill. Agents—Lowles, Nelson, Jones & Thomas —J. & J. Ross, W.S.

Counsel for Respondents—Phillimore, Q.C.—Stubbs. Agents—Stokes, Saunders & Stokes—Melville & Lindesay, W.S.

COURT OF SESSION.

Saturday, July 5.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EARL OF MANSFIELD *v.* CAIRD.

Lease — Landlord and Tenant — Manufactory Buildings—Obligation to Repair—Expiry of Lease.

A lease was granted for 99 years of subjects extending to 66 acres, where there was considerable water-power. The lease set forth that the tenant proposed to erect mills for the purposes of manufacture, and he bound himself, his heirs and assignees, within three years from the date of entry, "to erect works on the grounds hereby sett to the extent and value of £500 sterling: And further, the said W. M. binds and obliges him, and his heirs, executors, and successors, that whatever buildings and water-wheels of every kind which may be erected on the premises, with the aqueducts or dams that may be made thereon, shall at the expiry of this lease be left in complete repair in every respect, it being understood that the said W. M. and his foresaids are to be at liberty to take down any buildings, water-wheels, dams, and aqueducts which he may erect on the premises upon replacing them by others of equal value upon the ground sett." On the expiry of the lease the successor of the landlord brought an action against the assignee of the original tenant to have him ordained to put into complete repair the whole buildings of every description that were on the ground, to which the tenant's defence was that he was only bound to leave in complete repair buildings worth £500. *Held* that the tenant was bound on the expiry of the lease to leave the whole buildings and works then occupied and used for manufacturing purposes in a complete state of repair.

On 1st March 1785 Thomas Graham of Balgowan, afterwards Lord Lynedoch, proprietor of the subjects after mentioned, entered into a tack with William MacAlpine, merchant in Glasgow, the narrative of which was as follows—"Whereas the said William MacAlpine having made proposals of leasing from the said Thomas Graham, for a term of ninety-nine years, part of his lands of Craigengall and Bridgetown of Almond, lying upon the water of Almond, in the shire of Perth, for erecting mills for the purposes of manufacture, of which proposals the said Thomas Graham has accepted, and in order that the said William MacAlpine might be secured in a right to the water on the other side of said river, the said Thomas Graham did enter into a contract with David Smyth of Methven, of date the day of , by which the said David Smyth has granted him a right to the water on the other side of said river of Almond in manner therein specified." By the tack Graham let to MacAlpine, his heirs and assignees, for 99 years from Candlemas 1785, 4 acres of the lands of Craigengall, and about 62 acres of the lands of Bridgetown of Almond, at the rent of £46, 10s. for the first twelve years, and £93 for the remaining eighty-seven years. The tack contained the following clauses—"As also, the said William MacAlpine binds and obliges him and his foresaids, betwixt and the term of Candlemas 1788, to erect works on the grounds hereby sett to the extent and value of £500 sterling: And further, the said William MacAlpine binds and obliges him, and his heirs, executors, and successors, that whatever buildings and water-wheels of every kind which may be erected on the premises, with the aqueducts or dams that may be made thereon, shall at the expiry of this lease be left in complete repair in every respect, it being understood that the said William MacAlpine and his foresaids are to be at liberty to take down any buildings, water-wheels, dams, and aqueducts which he may erect on the premises upon replacing them by others of equal value upon the ground sett."

This action was raised in 1884 by the Earl of Mansfield, then in right of Lord Lynedoch, under the said tack, as proprietor of the estate of which the subjects let formed part, against Edward Caird of Finnart, who had acquired MacAlpine's right in a portion of the subjects let. The conclusions of the action were for declarator that the defender was bound to fulfil the obligations of the lease, so far as the same had reference to the lands which he had occupied, and so far as yet unfulfilled, and for decree that "the defender ought and should be decerned and ordained, by decree foresaid, forthwith to put into complete repair in every respect the whole buildings, water-wheels, aqueducts, dams, fences, dykes, and enclosures, in and upon the said lands, and that at the sight of a person to be appointed by our said Lords in the process to follow hereon: Or otherwise, the defender ought and should be