Tuesday, January 18.

SECOND DIVISION.

MAIN *v.* THE NORTH OF SCOTLAND AND ORKNEY & SHETLAND STEAM NAVIGATION COMPANY.

Reparation—Shipping Law—Foul Berth.

A trawler was anchored in an open roadstead by means of a wire-rope which was at other times used in trawling. The rope was fastened to a winch in the stern of the vessel, was taken along the deck, passing the steering gear, and so over the bulwarks at the bows. A cargo steamer came in to the roadstead for the purpose of unshipping her cargo, and anchored in such a manner as to give, in the event of a change of wind, which actually occurred, a "foul berth" to the trawler, and her propeller fouled the trawler's cable. The result was that her propeller broke the trawler's rope, which in its turn injured the steering gear, in consequence of which, notwithstanding the efforts of her crew, she went upon the rocks and sustained damage. *Held* (1) that the steamer was in fault in anchoring so as to give the trawler a "foul berth;" (2) that it was not proved that the trawler had failed to take proper measures for escaping drifting on the rocks, and *therefore* that the steamer was liable in damages both for the loss of the trawler's rope and anchor and the damage she sustained by going on the rocks.

This was an action of damages for injuries done to the trawler "Palmerston" through the alleged fault of the s.s. "St Nicholas" belonging to the North of Scotland and Orkney and Shetland Steam Navigation Company.

The facts were that the trawler was on 17th March 1885 anchored in Wick Bay; she was anchored by a wire-rope brought along the deck from the winch astern, and passed over the bulwarks at the bow with a kedge anchor attached thereto. She possessed a chain cable and anchor, which latter she did not let down, but the way in which she was anchored was an ordinary way of anchoring a trawler. The result of it, however, is that the wire-rope rises higher in the water than a chain cable.

While she was so lying in a strong W.N.W. the "St Nicholas" came into the bay to unload cargo for Wick by the usual means of anchoring in the bay for some hours, and sending cargo on shore by boats. The "Palmerston" was lying at or close to the usual stopping place of the "St Nicholas," which therefore anchored a little to the north of her, in such a position that though at the time the "Palmerston" was left a clear berth, there would be, in the event of the wind changing to the north, too great proximity between the vessels as they swung at anchor. During the time the steamers so lay the wind changed more to the north-east, and the "St Nicholas" swung round so that the vessels lay in a line, the bow of the "Palmerston" being in a line with the stern of the "St Nicholas. The result was that when, about midnight, the "St Nicholas" got under weigh her propeller was lying over the wire-rope of the "Palmerston," and caught it and broke it, and in consequence the steering gear was injured as well as the vessel's moorings snapped. The "Palmerston" began to drift. She did not then let down her anchor, the captain and crew endeavouring to avoid the danger by starting her, as she had her steam up at the time, and endeavouring to keep her off the rocks, but notwithstanding the efforts of the crew she got on the rocks and sustained considerable damage.

This action was raised by the owner of the "Palmerston" for £250 as the damage so caused, made up of (1) the value of the rope and anchor lost, (2) the cost of repairs, (3) depreciation in the vessel's value, and (4) loss of time and fishing in consequence of having to lie up for repairs. This last head of damage was stated at £60.

He averred that the damage was owing to the fault of the "St Nicholas" in having anchored so near the "Palmerston" as to deprive her of a clear and safe berth.

The defenders alleged that after the wind changed there was still ample room for safety between the vessels, had the trawler been moored in the usual and proper way by anchor and cable, that the captain of the "St Nicholas" was not aware she was moored with a wire-rope, which mode of securing her he averred to be contrary to the usual practice and highly improper. They therefore attributed the accident to the pursuer's own fault, or at least maintained it had been contributed to by the pursuer's fault.

The Sheriff-Substitute (W. A. BROWN) found that the "St Nicholas" had given a foul berth to the trawler, and that the damage was the result of the fault of that vessel. He assessed the damage at £116, 16s., made up of £56, 16s. for repairs and replacing of the lost anchor, &c., and £60 on the two heads of depreciation and loss of fishing.

On appeal the Sheriff (GUTHRIE SMITH) found that both vessels were to blame, and were equally responsible for the damage which he had assessed at £57. He therefore decerned for £25, 10s. He was of opinion that the trawler ought to have been fastened by her anchor and not by the wire-rope, as above described.

The pursuers appealed and argued—The trawler was anchored where she was by the desire of the harbour-master; she was anchored in the ordinary and usual way for trawlers to be anchored. When the "St Nicholas" came into the bay she did not require the trawler to change her anchorage, but by the way she anchored close to the "Palmerston," she gave the latter a foul berth, and was liable for any damages that might result from that fault—"*The Maggie Armstrong*" v. "*The Blue Bell*," November 8, 1865, 14 L.T. 340; "*The Egyptian*" v. *Bibbie & Boissevain*, March 3, 1863, 1 Moore's P.C. Rep. (New Series) 373; "*The Annapolis*," November 15, 1861, 5 L.T. 326. The crew of the trawler had done everything that was their duty, and as the captain of the "St Nicholas" knew, or should have known, that the stern of his vessel was over the cable of the "Palmerston" he ought to have seen that all was clear before he started his vessel.

The respondent argued—The trawler ought to have allowed the "St Nicholas" to take up her usual berth, as the latter was in the bay for a comparatively short time, and for the purpose of discharg-

ing her cargo. There was no original fault in the "St Nicholas," because she was entitled to take up the position she did. Assuming that she was in fault in that, she was only liable for the loss of the wire rope, because all the other damage was the fault of the trawler's crew, (1) because they kept no watch; (2) on account of the way in which the rope was fastened, viz., to a winch in the stern of the vessel, and brought forward to the the bows, so that when the rope was broken it put the steering gear out of order.

At advising—

Lord Justice-Clerk—In this case, which has demanded anxious consideration partly from the discrepancies which appear in the evidence, my opinion is that the judgment of the Sheriff-Substitute is right. First, I think the "St Nicholas" was wrong in taking up the place she did. It was hazardous as regarded the two vessels, and I think it was rightly called a foul berth, because when the wind changed in the course of the night the position of the "St Nicholas" became such that her propeller became foul of the cable of the trawler. That is the first step and it is almost conclusive. Secondly, there was nothing wrong in the trawler using her wire rope to anchor by, and there was nothing wrong in bringing the rope over the bows in anchoring—indeed, one of the defenders' own witnesses, Holmes, says so in so many words. Thirdly, it is said the wind changed and made what had been a safe position into a dangerous one. That may be true, but in taking up her position the "St Nicholas" was bound to consider the fact that the wind might change, and if it did so her position would become dangerous. Up to time the "St Nicholas" started the crew of the "St Nicholas" were aware that the propeller of their vessel was over the cable of the trawler, but they say they did not know that when the propeller was put in motion it would foul the cable and thought they might get clear. But they did not, for when the propeller began to move the cable tightened and then broke.

Up to that time we have nothing but the direct consequence of the wrong conduct of the "St Nicholas." But then it is said that the captain of the trawler could have avoided the further danger of drifting on to the rocks if he had let down his anchor. That would be a relevant answer if it could be proved. It is easy to suggest what might have been done after the occurrence is over, but I would look for very clear evidence as to what should have been the course of conduct before I could think that that answer had been proved. But that is not so here. The captain of the trawler's account of what passed is a very distinct one—"At the time additional cable was put out I was on deck. So was the mate, John Wright. We were also both on deck when the 'St Nicholas,' started. When the steamboat was getting under way I discovered that her propeller had got foul of our cable. I called to them. I did so three times. The last time I cried out the captain in the boat or someone gave orders to go ahead. The steamboat started at once. I had my hand on the cable at the time the steamboat started. The cable broke close to my hand. I think the 'Palmerston' was dragged a little bit after the 'St Nicholas.' The stanchions of the 'Palmerston' were also broken, and her steering gear was dismantled. The winch drum was also broken. The anchor was lost altogether. The timberhead was broken, and the rail and bulwarks were broken. In consequence of what happened, the 'Palmerston' went on the rocks near the breakwater. We had steam up at the time. I started my vessel at once. At the time that the cable broke our helm was hard a-starboard. At the time the chain broke we were about half a length of the vessel from the shore. I then gave orders for the port engine to go ahead to bring the vessel out clear of the pier. I found that the vessel went off before the wind. I had then to stop the port engine and back it. I found that my steering gear was all dismantled and would not work, and the effect of that was that the vessel backed on the rocks."

It seems to me that in the scurry of a very unexpected event the captain dealt with the affair as he thought best. Even though it might be proved that the best thing to do would have been to let down the anchor, the accident was still entirely the fault of the "St Nicholas"—but it is not so proved. The question of time is important. The people on board the trawler say that she took only one to two minutes to drift on to the rocks after her cable was broken, while the captain and mate of the "St Nicholas" say it must have been fifteen or twenty minutes. That is a great divergence of opinion, and I am not prepared to adopt the statement of the people on board the "St Nicholas." I think that the ground on which the Sheriff-Principal differs from his Sheriff-Substitute is not borne out by the evidence, and I think we should revert to the judgment of the Sheriff-Substitute.

Lord Young—That is my opinion also. Two faults are imputed to the "St Nicholas." They come to be one, but they are under two heads. The first is that the "St Nicholas" anchored so near the trawler as to give her a foul berth, and the second is that she did, in fact, foul her cable with her propeller. In consequence of this the cable broke, and the trawler suffered damage, including that received by drifting on the rocks. I think the "St Nicholas" was in fault in mooring so near the trawler as not to give her a clear berth. I think that was clearly a fault for the ordinary consequence of which the "St Nicholas" is liable. There is no doubt the "St Nicholas" fouled and broke the cable of the "Palmerston," and it is impossible to doubt that that was her fault. It was not the fault of the trawler that she did not avoid letting her cable foul the propeller of the steamer. The "St Nicholas" came last into the harbour, and moored after the trawler was moored, and she was bound to avoid fouling the cable of the trawler. There was a fault committed, and the vessel went on shore and got damage in consequence.

Then came the argument, which is not one of contributory negligence, but whether the consequence of the fault might not have been prevented or diminished if the crew of the innocent vessel had done certain things. I feel the force of the argument that the crew of the trawler might have so managed their vessel as to avoid getting on shore. But it is an unfavourable plea. Although the simile may appear rather a fanciful one, I would compare it to a plea of *malum regimen*, with which we are acquainted in criminal jurisprudence; but when a party is in the wrong,

and has by his misconduct put his neighbour in a perilous position, it is always an unfavourable position to take up. But I do not think this is a good case of the kind, where the party injured is honestly striving to do his best to avoid the consequences of another's fault. Here it is certain that all the crew of the trawler were on deck before the cable actually snapped, doing their best to save the vessel according to the best of their ability. And if something was done which was not quite the best thing that could have been done, I do not think that it will be allowed to the wrongdoer to say that the injured parties have barred themselves from claiming damages because they culpably refrained from doing something. They did not culpably refrain; I do not say they made a mistake or not in not letting down the anchor; there is a conflict of evidence about that, and I do not think it necessary to decide that point. I think we should adhere to the judgment of the Sheriff-Substitute.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

This interlocutor was pronounced—

"Find in fact (1) that on entering Wick Bay on the occasion libelled the defenders' steamer 'St Nicholas' anchored so near to the pursuers' trawler 'Palmerston' as not to leave a clear berth for the latter in the event of the wind changing; (2) that the wind did change, and the two vessels were consequently brought into dangerous proximity; (3) that while they were so situated the 'St Nicholas' left her moorings, starting her propeller, which caught and broke the cable of the 'Palmerston,' in consequence of which that vessel drifted on rocks and was damaged notwithstanding the efforts of the captain and crew to avoid the collision; (4) that the damage thus sustained was caused by fault of the defenders in not leaving a clear berth for the 'Palmerston' as aforesaid, and was not caused by fault of the pursuer: Find in law that the defenders are liable in compensation to the pursuer for the said damage: Therefore sustain the appeal, recal the judgment of the Sheriff appealed against, and affirm the judgment of the Sheriff-Substitute: Of new assess the damage at £116, 16s.," &c.

Counsel for Pursuer — Comrie Thomson —Orr. Agents—Winchester & Nicolson, S.S.C.

Counsel for Defenders — D.-F. Mackintosh, Q.C. — Jameson. Agents — Henry & Scott, S.S.C.

Wednesday, January 19.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

HARVIE *v.* ROSS.

(*Ante*, p. 58.)

Process — Interdict — Breach of Interdict—Sentence.

In a petition and complaint for breach of an interdict granted against the infringement of letters-patent, the Court, after proof, *found* the respondents guilty of breach of interdict, and in respect that there had been no intention upon their part to set at nought wilfully the orders of the Court, fixed the penalty at a sum of £5.

William Harvie, lampmaker, Broomielaw, Glasgow, had acquired exclusive right to two patents granted for an improved valve to prevent waste of water in water-closets, urinals, &c.

In April 1886 Harvie brought a suspension and interdict against William Ross, brassfounder, for alleged infringement of the said letters-patent, and on 25th May interim interdict was granted by the Lord Ordinary.

Upon 18th October a petition and complaint was presented by Harvie for breach of interdict against William Ross and his son Thomas Ross. This petition craved the Court to find the respondents guilty of contempt of Court and breach of interdict, and in respect thereof to inflict upon them such punishment by way of fine or imprisonment as should seem proper.

On 13th November [*vide supra*, p. 58] their Lordships of the First Division allowed the complainer and the respondent William Ross a proof of their averments, the respondent Thomas Ross a proof of a certain part of his averments, but not of certain other averments made by him.

The proof was taken by Lord Kinnear, who on 31st December reported the cause to the First Division. The material portions of the proof are contained in his Lordship's note.

"*Note.*—The Lord Ordinary has thought it right to report this case because the only operative conclusion of the petition is a prayer for the punishment of the respondents by fine or imprisonment.

"The question is whether the manufacture and sale by the respondents of certain valves for regulating supplies of water involves an infringement of the patent set forth in the petition, and therefore a breach of interdict. The interdict which is said to have been broken is an interim interdict pronounced in the Bill Chamber in respect of the respondents' failure to find caution. There has been thus no judgment upon the construction and scope of the patents, and the parties are at issue on the question whether they include such apparatus as the respondents have manufactured since the date of the interdict.

"The patents are two in number, and were granted one in 1877 and the other in 1880 to the respondent William Ross, by whom they have been assigned to the complainer. The Lord Ordinary having considered the evidence and examined the models produced, with the advantage of the assessor Professor Armstrong's advice, is