of contract, and not, as I think, to the law of *quasi* delict, I should still have to inquire what is the stipulation of the contract by which the Lord Ordinary holds that the pursuer is bound to call all the trustees into the field or none? Lord M'Laren has pointed out that a beneficiary is not himself a party to the contract, if there be one, between the truster and the trustees, but then he may be entitled to press against the trustees a *jus quæsitum tertio* which will be measured by the contract, and therefore he might be bound, if we could find any ground for it, by a stipulation which so tied all the trustees together as co-obligants that he was bound by contract to bring them all into the field or none. But it is impossible to find, so far as I can see, any such implied stipulation in the relation created by the truster when he puts his money in trust. If the action is laid upon contract, then, as Lord Justice-Clerk Inglis pointed out in the case of *Douglas*, 1860, 22 D. at p. 476, the contract itself will by its own terms fix whether the liability is conjoint or several or conjoint and several. If the action is one for reparation for a wrong or for *quasi* delict, then the ground of complaint is not referred to any particular stipulation. The action is founded upon the conduct of the person complained of, and the question therefore really must always be whether the action is founded upon the stipulation of the contract which he says has not been performed, or upon what he alleges to be wrong conduct upon the part of the defender. I agree that the particular complaint in this case does not involve any wrong so grave as to be properly called a delict, but then the term "*quasi* delict" is a very wide term, and it will cover any degree of imprudence or neglect on the part of a trustee, by which trust property, which it was his duty to preserve, is lost. On the form of this action I cannot say I have any hesitation in saying that it is an action founded upon *quasi* delict, and not upon breach of contract. The liability of the trustees and the corresponding rights of the pursuer are not to be measured by any express stipulations between them, or between the truster and trustees, by which they are to benefit, but upon the duties arising upon the fiduciary relation which was established by the trust.

The action, therefore, in my opinion must be allowed to go on, and I think the final and conclusive answer to the difficulty raised by the Lord Ordinary is the one your Lordship has given. One trustee may have committed an imprudence, or may have been guilty of fault, for which the other cannot be liable. One trustee may be liable to replace funds, because they may be in his hands, or because he has misapplied them, and another trustee may be altogether free from any such liability. I agree also, and I think it is important to notice, that a decision that the action may go on against one trustee without calling upon the other by no means trenches upon the question whether the trustee who has been called and who may be ultimately found liable to make good the loss to the trust, is entitled to contribution for his relief from the other trustees or not. That is settled by the case of *Croskery*, or at least by the case of *Palmer*, where it was pointed out in the House of Lords that *Croskery's* case, while it allowed an action to be brought against one trustee, did not prejudice any right that may have been in him to obtain relief against his co-trustees. The doctrine is laid down very distinctly by Lord Watson in the House of Lords, and was stated with great distinctness in this Court by Lord Shand in the case of *Croskery*.

LORD PEARSON concurred.

The Court recalled the Lord Ordinary's interlocutor; repelled the pleas "the action as laid is incompetent" and "all parties not called;" and remitted the cause to the Lord Ordinary to order intimation thereof to Mrs Everard in order that she might sist herself with the pursuer in the action if so advised, and to proceed as accords.

Counsel for Pursuer (Reclaimer)—Cooper, K.C.—Hon. W. Watson. Agent—F. J. Martin, W.S.

Counsel for Defender Bennett (Respondent)—M'Lennan, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defender Young (Respondent)—Crabb Watt, K.C.—Chree. Agent—Alexander Ross, S.S.C.

Friday, March 5.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

MAIR AND OTHERS *v.* ABERDEEN HARBOUR COMMISSIONERS.

Harbour—Ship—Injury to Ship in Harbour—Responsibility of Harbour Authorities—Ship Torn from Moorings by Descent of Ice—Reparation—Culpa.

The "Trustful," a fishing vessel, was laid up for the winter in the harbour of Aberdeen, moored along with other fishing vessels to a wharf at the mouth of the Dee. While she was so moored a large accumulation of ice came down the river tearing her from her moorings and causing damage.

Her owners brought an action against the harbour authorities alleging negligence on their part in respect that they had failed (*a*) to provide her with a safe berth; (*b*) to warn her owners of the risk from ice; and (*c*) to remove her to a place of safety when the ice came down.

Held that as the harbour authorities had taken all reasonable means to provide a safe berth for the "Trustful," and as no fault or negligence on their part had been established, they were not liable in damages, and must be *assoilzied*.

Observations, per Lord M'Laren, on the duties of harbour authorities.

George Mair and others, fishermen, Portknockie, brought an action against the Aberdeen Harbour Commissioners, in which they sought decree for £100 damages for injuries to their vessel the "Trustful" which they alleged had been torn from her moorings and damaged owing to the negligence of the defenders.

The *facts* as stated in the interlocutor (*infra*) of the First Divison were as follows —On the 8th of December 1906 the pursuers applied for and obtained from the harbour-master at Aberdeen a berth in the open water of the Dee for their steam fishing vessel the 'Trustful,' where it was intended that the said vessel should lie during the early part of the winter when fishing is suspended. During the first three weeks or thereby the engineer of the 'Trustful' remained on board to make or superintend repairs, and thereafter the 'Trustful' was left unguarded, and was so on 5th January 1907, when the damage was sustained. The berth assigned to the 'Trustful' was a safe and sufficient berth of its class, being a mooring alongside the river wharf called Tilbury Wharf, which was a wharf properly constructed and properly equipped for the mooring of the vessels that were placed near it, and was a suitable berth for a steam fishing vessel of the class represented by the 'Trustful.' After ten o'clock on the night of 5th January a great quantity of ice was carried down the stream of the Dee, and came into collision with the 'Trustful,' and other fishing craft moored at Tilbury Wharf, whereby the 'Trustful' was carried away from her moorings and sustained damage to the extent of £74, 19s. 2d."

With regard to the alleged negligence the pursuers averred—"The injury sustained by the 'Trustful' as above condescended on was due entirely to the fault and negligence of the defenders or those for whom they are responsible. The defenders, though they knew, or ought to have known, the liability of such an accident happening as did in point of fact happen, took no measures to provide against such accidents, as it was their duty to do. . . . For several hours before the 'Trustful' was torn from her moorings it was known, or ought to have been known, to the defenders, if they had used reasonable care, that the pack ice was moving and was bearing down on the fishing vessels, including the 'Trustful,' in such a way and with such force that serious injury would necessarily result to the said vessels, including the 'Trustful,' if allowed to remain where they were. It was the duty of the defenders when the danger became manifest to have the 'Trustful' removed to a place of safety, which could quite easily have been done by taking her to another part of the harbour out of the course of the river Dee and the floating ice. This, however, they culpably and negligently failed to do. In any event, it was the duty of the defenders in the circumstances to warn the pursuers of the danger to which their vessel was exposed by being moored where they had directed her to be moored, so that the pursuers might themselves have their vessel removed to a place of safety. They, however, culpably and negligently failed to give them any warning. Had the defenders removed the 'Trustful' themselves, or given the pursers any intimation of the danger she was in, as they should have done, the injury which the 'Trustful' sustained would have been averted. The defenders took no steps to avert the injury to the pursuers' vessel after it became, or ought to have become, manifest to them that such injury was imminent. The injury was thus due entirely to the fault and negligence of the defenders or those for whom they are responsible. The explanations in answer are denied. There was no duty on the pursuers to have their vessel manned or watched. On the contrary, it is the custom, as was well known to the defenders, that vessels in the position of the 'Trustful' at the time of the accident are neither manned nor watched, unless directions to that effect are given by the dockmaster or captain pilot. The defenders were well aware that, in accordance with this practice, neither the 'Trustful' nor the other vessels moored alongside her had any persons on board to man or watch these vessels, nor did the defenders ever suggest to the pursuers or the owners of the other vessels that they wished anyone to be kept on board their vessels."

In answer the defenders stated—"Denied. Explained that the occurrence in question was of an extraordinary and unprecedented character. Until a late hour on the night of the accident there was no ice in the neighbourhood of Tilbury Wharf. There had previously been a spell of severe winter weather, and it would appear that an unusual amount of ice and frozen snow had formed in the upper part of the river. Towards midnight on the night in question, owing to a thaw, or other causes unknown to the defenders, which they were quite unable to anticipate, and under no duty to guard against, the ice and frozen snow which had accumulated in the upper part of the river came down the river suddenly in a huge pack and blocked the river channel opposite and above Tilbury Wharf. The pressure of the ice and current combined tore away the pursuers' vessel from its moorings, along with many other vessels including the said steam hopper belonging to the defenders. The berth in question was a safe one in ordinary circumstances. The defenders had no knowledge that ice had accumulated in the upper part of the river to such an unusual extent, and no reason to apprehend that it would come down so suddenly and in such unusual quantity. The pursuers had the same opportunities of information in regard to danger from ice as the defenders. The occurrence was in fact due to *vis major*, and not to negligence on the part of the defenders. The steam drifters in question, including the pursuer's vessel, were left by their respective owners unmanned and unwatched, or at least without sufficient hands to handle the craft or assist in removing her in the event of any sudden

emergency. It was the duty of the pursuers to have taken these or the like precautions. This, however, they failed to do, and their said failure the defenders believe and aver materially contributed to the accident and the resultant damage to the vessel."

The defenders pleaded, *inter alia*—"(2) The loss and damage condescended on not having been caused by the negligence or fault of the defenders they should be assoilzied. (3) The accident in question having been caused, or at least materially contributed to, by the pursuers' fault or negligence, the defenders should be assoilzied. (4) The accident in question having been due to *vis major* or inevitable accident, the defenders should be assoilzied."

On 6th April 1908 the Sheriff-Substitute (HENDERSON BEGG) found that the accident and consequent damage were due to the fault and negligence of the defenders in failing to provide a reasonably safe wintering berth for the "Trustful," or to warn the pursuers of the risk from ice and frozen snow, and decerned against them for payment of £74, 19s. 2d.

Note.—"I think there is no doubt as to the law applicable to a case of this kind. The defenders were bound to provide a reasonably safe berth for the wintering of the pursuers' vessel, or to warn them of any risks known by the defenders but not known by the pursuers, incident to the berth provided — *Thomson* v. *Greenock Harbour Trustees*, December 10, 1875, 3 R. 1194; *Renney* v. *The Magistrates of Kirkcudbright*, March 31, 1892, 19 R. (H.L.) 11; *Niven* v. *Ayr Harbour Commissioners*, June 4, 1897, 24 R. 883, *affd.* May 13, 1898, 25 R. (H.L.) 42; *Mackenzie* v. *Stornoway Harbour Trustees*, 1907, S.C. 435, and the English cases therein referred to. It is to be borne in mind that a wharf which is reasonably safe for the ordinary uses of a wharf may not be reasonably safe for the wintering of vessels; and that when Tilbury Wharf was constructed its suitability for wintering was not considered. Irrespective of the accident, Tilbury Wharf is, I think, proved to be an unsafe place for wintering drifters. Mr Nicol, the defenders' engineer, candidly admits this in the case which actually occurred, of the drifters being unattended. The only reason for assigning that wharf to wintering drifters was that by the time it was completed—April 30, 1905 — Aberdeen Harbour had become so congested on account of the enormous increase of steam trawlers that there was no room for drifters elsewhere. There can thus, I think, be no doubt that the defenders should have warned the pursuers of the risk, admitted in the defences, from ice and frozen snow. According to the evidence of the skipper of the "Trustful," Captain Bowden actually assured him that the vessel would be safe at Tilbury Wharf if she had good moorings ahead; and this evidence stands uncontradicted. For the purposes of this case, however, it seems sufficient to say that no warning was given. But the defenders plead that the pursuers were guilty of contributory negligence in leaving the vessel unattended and unwatched. I think, however, that this plea is sufficiently met by the fact that the defenders accepted the vessel on that footing, pursuers being ignorant of the risk involved. There remains to be considered the defender's fourth plea-in-law, viz., that 'the accident in question having been due to *vis major*, or inevitable accident, the defenders should be assoilzied.' This plea is founded on the fact that the quantity of pack ice and frozen snow which floated down the river during the night of 5th January 1907, was very great, and had the unprecedented effect of filling the river with ice from side to side below the Victoria Bridge. The photographs taken on the following day show quite an Arctic scene, and suggest that the ice and frozen snow had come down in a solid field. They however represent the accumulations of at least twelve hours; and the fact that the ice and snow got through the arches of the Victoria Bridge shows that they did not come down in a solid field. The question is, what caused the block of the river's mouth on the occasion in question, and the pursuers' answer is that it was caused by obstructions, permanent and temporary, made by the defenders themselves. It is thus necessary to inquire into the history of the river since the year 1873, when the river was diverted into its present artificial channel. . . . Be this as it may, it is plain that the defenders ought not to have obstructed the flow of the stream between the two walls by mooring the steam-drifters four abreast, and so reducing the width of clear water by 25 yards. On the night of the accident there was, I think, a sort of trap for ice.

"At the buoys were moored several fishing vessels, a large barge, and a steam-drifter. At Tilbury Wharf were moored the twenty-three steam drifters above mentioned, and a large steam hopper, while on the Torry side there was moored, just opposite the twenty-three drifters, another drifter, narrowing the width of the clear water by 18 or 19 feet additional.

"In these circumstances I am unable to sustain the defenders' plea of *vis major*. The accident was of a nature that might have been anticipated by reasonable men acquainted with the river, though it was unprecedented as regards its effects. I cannot regard as a *damnum fatale* such a state of matters as is likely to recur every ten or twelve years, even when it occurs in a very aggravated form. It is impossible in the present case to say that the pursuers' vessel would have escaped injury if the form had been less aggravated. Besides, there is ground for holding that the catastrophe was due as much to the well-meaning acts of the defenders as to the operations of nature.

"In the view that I take of this case I find it unnecessary to decide whether any of the defenders' officials were guilty of fault or negligence in doing nothing in the afternoon of January 5th 1907, when the thaw had fairly begun, or in failing to

render assistance to the vessels immediately after the ice and frozen snow had begun to come down."

The defenders appealed, and argued—The appellants were not in fault in failing to warn the respondents that ice might come down the river, for that was as obvious to the respondents as to them. The respondents must be held to have taken the risk incident to such a harbour as the mouth of a tidal river. No negligence on the appellants' part had been proved. Their duty was to take reasonable care of the vessels in the harbour, and they had done so. That being so, they were not liable in damages—*Thomson* v. *Greenock Harbour Trustees*, December 10, 1875, 3 R. 1194, 13 S.L.R. 155; *Niven* v. *Ayr Harbour Trustees*, June 4, 1897, 24 R. 883, at p. 891, 34 S.L.R. 660, *affd.* May 13, 1898, 25 R. (H.L.) 42, 35 S.L.R. 688; *Mackenzie* v. *Stornoway Pier and Harbour Commission*, January 21, 1907, 1907 S.C. 435, 44 S.L.R. 350. The case of *Renney* v. *Magistrates of Kirkcudbright*, March 31, 1892, 19 R. (H.L.) 11, 30 S.L.R. 8, was distinguishable, for there a direct order was given by the harbourmaster. The case of the "*Moorcock*," 1889, L.R., 14 P.D. 64, was also distinguishable, for there the construction of the harbour was defective. The case of the *East London Harbour Board* v. *Caledonia Landing, Shipping and Salvage Co., Limited*, [1908] A.C. 271, was equally inapplicable, for there the harbour authority had removed the vessels to a dangerous berth. There was no duty on the appellants to look after the vessels. They had fulfilled their duty in providing as good a berth as was available. The respondents were themselves negligent in leaving their vessel unattended. In any event, there was no duty on the appellants to warn the respondents of what was really an exceptional phenomenon.

Argued for respondents—The defenders duty was to provide a safe berth—*Mersey Docks Trustees* v. *Gibbs*, L.R., 1 Eng. and Ir. App. 93, *per* Lord Blackburn at p. 109—and this the appellants had failed to do. The appellants were in fault (*a*) in placing too many drifters abreast, thereby unduly narrowing the river; (*b*) in adopting a faulty system of mooring; and (*c*) in leaving the vessels unattended while aware of the danger from ice. There was no negligence on the respondents' part, for they were bound to obey the directions of the harbour authorities. A shipowner who had paid rates for harbour accommodation was entitled to the exercise of reasonable care—*Thompson and Others* v. *North-Eastern Railway Co.*, 31 L.J., Q.B. 194; *The "Moorcock"* (*cit. supra*); *East London Harbour Board* (*cit. supra*). The evidence showed that the loss of the vessels was due to the appellants so mooring them as to catch the ice. There was a duty on the appellants to warn the respondents, who did not know the river, of the danger from ice. At all events, they ought not to have given the respondents an assurance that the berth was a safe one. Moreover, the appellants were also in fault in failing to remove the vessels to a place of safety when the ice began to come down. It was irrelevant to say that the respondents should have left some-one in charge, for they were not aware of the danger. This was not a case of *vis major*, for the appellants had previous experience of the danger from ice, and had also received reports from their own engineers on the subject.

At advising—

LORD M'LAREN—This is an appeal by the Aberdeen Harbour Commissioners against the interlocutor of the Sheriff-Substitute in an action at the instance of the owners of the "Trustful," a fishing vessel of the class known as steam-drifters. In this action the owners claim for damages, to the extent of £100, sustained by their vessel when driven from its moorings by floating ice on 5th January 1907. The Sheriff found that the Harbour Commissioners were responsible as for fault, and assessed the damages at £74, 19s. 2d., which as he states the parties admitted to be the actual cost of repairing the damage done by the floating ice. The defenders dispute liability, and this is the only question raised by the appeal.

The harbour of Aberdeen, like other seaport harbours, consists chiefly of basins or docks for ships coming there to load and unload, but I gather from the evidence that the accommodation is scarcely sufficient for all the ships which frequent the port. At all events there are times when the demand for space exceeds the supply. To relieve the pressure the Commissioners, about two years before the cause of action, constructed a wharf called the Tilbury Wharf, on the left bank of the river Dee. This, as I understand, was designed chiefly for the accommodation of fishing vessels, to enable them to land their cargoes and proceed to sea without loss of time. But the wharf was also taken advantage of by the fishing trade as a place for wintering their vessels during a part of the winter when the fishing was not prosecuted. Another wharf on the south or right bank of the Dee, which had been reconstructed a few years earlier, was also used as a wintering place. It appears to be the practice not to leave a crew or even a watchman on board the fishing craft when they are wintered at a harbour, and the vessels are arranged in tiers along the wharf, the innermost ship being secured by chains or hawsers to the wharf, the next in the tier secured to it, and so on. To the uninstructed observer it would seem almost self-evident that this kind of mooring in an open river, exposed to gales from the sea and occasional floods from the river, was a not very secure form of harbourage, especially in view of there being no person on board to move any of the vessels in case of an emergency. But the fact that large numbers of fishing vessels are wintered in this fashion is evidence either that the owners do not consider the risk to be serious, or that they are content to take the risk, being covered by insurance. It was while moored in this fashion that on the night of 5th January a large

accumulation of ice swept down the river carrying the "Trustful" and other craft from their moorings, and causing damage.

I am not sure that I am fully in possession of the Sheriff-Substitute's opinion as to the ground of liability. His finding is—"That the accident and consequent damage were due to the fault and negligence of the defenders, or those for whom they are responsible, in failing to provide a reasonably safe wintering berth for the 'Trustful,' or to warn the pursuers of the risk from ice and frozen snow." This might mean that the Harbour Authority would have been free of liability if they had warned the pursuers, but I rather infer from the note that the supposed ground of liability is unsafe harbourage, and that the omission to warn the "Trustful's" owners was to be regarded as an aggravation of the original fault. But this is of less consequence, as your Lordships are not of opinion that the Harbour Authority failed in any duty which they owed to the pursuers, and I proceed accordingly to consider what their duties were and how they were performed.

The duty alleged by the pursuers is that the Harbour Authority is bound to provide safe harbourage, or a safe berth for the ship. This proposition is only true when stated with the necessary limitations. The safety of a ship in harbour depends to a large extent on conditions which are beyond the control of the Harbour Authorities. There are harbours with closed docks which are secure against storms, and there are others which by their geographical position never can be safe against storms. The law does not lay upon harbour authorities the duty, irrespective of cost, of providing docks in which vessels which resort to the place can be absolutely safe.

In the case of *Niven* v. *Ayr Harbour Trustees*, 25 R. (H.L.) 42, the duty was stated by the Lord Chancellor to be that "reasonable care should be taken in providing, as far as it is possible, safe berths for the vessels." In the present case it must be kept in view that the harbour contained docks or basins in which ships were completely sheltered; but there is no evidence that the Harbour Authority could have provided accommodation in the docks for the numerous fishing vessels that desired to lay up for the winter months, consistently with their primary duty of providing dock accommodation for sea-going ships which come to load or unload at Aberdeen. Further, there is no evidence that the pursuers demanded dock accommodation, or that they would have been willing to pay the high rates which would have been charged for it. I must credit the master of a steam fishing vessel with some professional knowledge, and he would certainly know the difference in point of safety between having his vessel berthed in a dock and having it berthed in an open tidal river near the sea, where it would necessarily be exposed to the action of gales and river floods. As he was content to take a berth alongside the wharf in the river, I must assume that this was the kind of harbourage which he desired and was willing to pay for. In that case the duty of the harbour authority would seem to be to give him a safe berth of its class, a berth free from obstructions, a wharf securely built, and rings or pawls suitable for the moorings of his ship, and the like.

But then it is said that there was a special danger incident to the berth assigned to the pursuers, which was known to the harbour-master and was not known to the master of the "Trustful," viz., the danger of river-borne ice; that it was the duty of the harbour-master to warn the pursuers, or the master of their vessel, of this danger, and that this duty was neglected.

Now it is not proved that the risk of damage to shipping from river-borne ice was a risk peculiar to the Dee, or even greater there than in other north-country rivers. It is matter of common knowledge that the ice which is formed in the upper reaches of a stream—I mean in the latitude of the northern counties—is apt to break up suddenly, and to come down in considerable volume. But I find nothing special in the case of the Dee. It is only proved that on one previous occasion, in the year 1895, the river ice had come down in mass and temporarily obstructed the egress from the harbour, but the witness Duncan, who speaks to this, does not say that any damage was done to the fishing boats or other vessels in the river.

I think it must be taken (1) that there was no real apprehension of danger from ice in the Dee, other than such slight damage as might occur in other northern rivers from the same cause; (2) that this danger, great or small as it might be, was one of the ordinary incidents of navigation which the master of the vessel knew or was bound to know just as well as the harbour-master; and (3) that the facts do not raise any special duty on the part of the harbour-master or Harbour Authority to warn the fishermen of danger from ice when they arranged to leave their vessels moored, but unguarded, at the Tilbury Wharf.

These considerations appear to me to be sufficient for the disposal of the case, but it may be satisfactory to the parties that I should notice some of the other topics considered in the Sheriff-Substitute's judgment, and in the arguments that were addressed to us. The Sheriff-Substitute, judging from the space which he devotes to this topic in his note, has evidently formed a strong opinion that the Harbour Authority is responsible for the ice-casualty, because their works above the harbour had, as he says, the effect of narrowing the channel and causing the ice to come down in greater quantity, or with greater momentum.

I am afraid my knowledge of that very stiff science hydro-dynamics is insufficient to enable me to come to a definite conclusion as to the physical question. But as a lawyer I must demur to the relevancy of the inquiry. The defenders are a body corporate empowered by Act of Parliament to perform certain operations on the bed of

the Dee, and while doubtless they would be liable in terms of the Lands Clauses Act to make compensation to owners and other persons who were injuriously affected by these works, yet as regards all other damage it is perfectly clear that they are indemnified by their Act of Parliament for the consequences of what they have done in the execution of their powers. I think, therefore, that this suggested ground of liability entirely fails.

In the arguments addressed to us our attention was directed very closely to the evidence relating to the actual approach of the ice, with the view of showing that it was known or ought to have been known to the Harbour Authority in sufficient time to enable them to take measures for protecting the fishing vessels. It so happened that the master of the "Trustful" came to Aberdeen on business on the day of the accident. He saw nothing unusual, and left Aberdeen at 3·40 that day.

The defenders have a dredging inspector in their employment, who walks up and down the river bank two or three times a day. From Victoria Bridge he can see right up to the Suspension Bridge, and on the evening in question he went into town, crossing Victoria Bridge about six o'clock and saw no ice. He adds that he got home that night a little after ten o'clock, and as he crossed the bridge on his way home he again looked at the river and saw no sign of ice or flood then. If there had been an inspector for the benefit of the fishing vessels he would have seen no more, because the ice did not come down until after ten o'clock at night.

It is evident that when the ice came down at that late hour it would not be possible for the Harbour Authority to procure the services of twenty crews to put in charge of the twenty fishing vessels that were lying at the Tilbury Wharf in time to prevent them from being carried away by the ice from their moorings. Therefore it cannot be said that the damage was caused or was aggravated by neglect on the part of the Harbour Authority to take measures for safeguarding these vessels when the risk of ice-damage became known.

In all the circumstances, I am of opinion that no fault has been brought home to the defenders. I may add that it is not suggested that any other or better harbour accommodation was available for the fishing vessels that desired to winter at Aberdeen. The harbour-master might have declined to give a berth because he had none that he could guarantee as absolutely safe. But such risks as were incident to the laying of these vessels at Tilbury Wharf were, as I think, just as well known to the masters of the vessels as to the harbour-master. They were risks not consequent on any fault or negligence of the Harbour Authority, but were the result of the exposed situation of the wharf, which was the only available resting-place for vessels of that class. The defenders did not undertake, as matter of contract, to idemnify the pursuers against damage arising from natural causes which were beyond their control. In my opinion the pursuers accepted the risks incident to the position assigned to their vessel, and it would have made no difference if they had been told that there was a remote possibility of ice coming down some day and interfering with their moorings, although for the reasons stated I do not think there was any duty to give warning of this somewhat remote possibility of danger.

I think the interlocutor appealed from ought to be recalled, and the defenders assoilzied from the action.

LORD KINNEAR—I am of the same opinion for the reasons stated by your Lordship and have nothing to add.

LORD PEARSON—I also agree.

The LORD PRESIDENT, who was present at the advising, gave no opinion, not having heard the case.

The Court pronounced this interlocutor—

"Sustain the appeal, recal the interlocutor of the Sheriff-Substitute dated 6th April 1908: Find in fact" . . . (the findings are given *supra*) . . . Find in fact and law that it was not a term, express or implied, of the contract between the pursuers and the defenders the harbour authority, that the defenders should indemnify the pursuers against damage resulting from natural causes, such as the influx of river ice, and find that the defenders are not chargeable with failure in, or negligent performance of, any duty incumbent on them towards the pursuers, whether arising out of contract or out of the relation of owners of the harbour in which the pursuers' vessel had obtained a berth: Therefore assoilzie the defenders from the conclusions of the action, and decern."

Counsel for Pursuers (Respondents) — Hunter, K.C. — Hon. W. Watson — Lippe. Agents—Alex. Morison & Company, W.S.

Counsel for Defenders (Appellants) — Dean of Faculty (Scott Dickson, K.C.) — Murray — Sandeman. Agents — Morton, Smart, Macdonald, & Prosser, W.S.