Saturday, March 20.

SECOND DIVISION.

[Lord Dewar, Ordinary.

AKTIESELSKABET DAMPSKIBET FORTO *v.* ORKNEY HARBOUR COMMISSIONERS.

Harbour—Reparation—Ship—Negligence—Buoy—Vessel in Natural Harbour in Charge of Non-compulsory Pilot Stranded Owing to Buoy being Displaced.

The owners of a natural harbour marked a shoal in the passage to the pier by means of a buoy which in their knowledge was occasionally displaced by drifters, and the position of which was accordingly checked by the harbour-master every morning. It was the practice of the port for vessels to enter during the night, and a vessel in doing so was injured by grounding on this shoal through the buoy having been displaced during the day. In an action of damages at the instance of the owners of the vessel against the owners of the harbour, *held* (1) that the owners of the harbour, having chosen to mark the shoal by a buoy, had not exercised reasonable care to see that it was sufficient for its purpose, and were therefore liable in damages; (2) that a notice put up by them on one of their piers—"Notice is hereby given that any masters of vessels and others making use of the buoys and moorings laid down by the Commissioners . . . do so at their own risk, and the Commissioners will undertake no liability therefor"—applied only to buoys and moorings which vessels made use of by attaching themselves thereto, and did not therefore exempt the defenders from liability—*Opinion per curiam* that the notice would not in any event relieve the defenders as in a question with the owner of a ship who was not familiar with its terms, even although the local pilot whom he employed was in knowledge of it; and (3) that the non-compulsory pilot employed to take the ship into harbour had not been negligent in trusting to the buoy as indicating the shoal without testing its position by natural marks — *Opinion per curiam* that shipowners would be liable for the negligent navigation of their ships by a non-compulsory local pilot employed by them.

Aktieselskabet Dampskibet Forto, Christiania, Norway, registered owners of the steamship "Forto" of Christiania, *pursuers*, and Boyd, Jameson, & Young, W.S., Leith, their mandatories, brought an action against the Orkney Harbour Commissioners, incorporated by the Orkney Harbours Act 1887 (50 and 51 Vict. cap. clxii), *defenders*, for payment of £1200 for loss and damages sustained by the stranding of the "Forto" in Whitehall Harbour, Stronsay, which had come about owing to a buoy being out of its usual place.

The pursuers pleaded, *inter alia*—"(3) The defenders having negligently failed to fix said buoy efficiently, or otherwise having allowed it to become displaced, and the pursuers having thereby suffered loss and damage, decree should be pronounced in terms of the conclusions of the summons. (4) *Separatim*—The defenders having failed to warn the master and pilot of the "Forto," or either of them, that said buoy was out of its true position, and the pursuers having thereby suffered loss and damage, decree should be pronounced in terms of the conclusions of the summons."

The *facts* of the case appear from the opinion of the Lord Ordinary (DEWAR), who on 25th November 1913, after a proof, decerned against the defenders for payment to the pursuers of £562, 15s. in full of the conclusions of the summons."

Opinion.—"This is an action of damages at the instance of the owners of the s.s. 'Forto,' of Christiania, against the Orkney Harbour Commissioners for loss and damage alleged to have been sustained by the stranding of the 'Forto' in Whitehall Harbour, Stronsay, which is vested in the defenders by the Orkney Harbour Act (1887) and is under their management and control.

"The material *facts* are as follows, viz.—On the 2nd of July 1912, the 'Forto' reached Papa Sound (sometimes called Whitehall Bay) with a cargo of salt from Spain. About 12 o'clock noon she took a pilot on board—Stewart Williamson—and under his charge made for the harbour. The 'Forto' is a steel screw steamer of 1231 gross and 775 net register, 222 feet long, with slightly more than 24 feet beam. Her draught is about 10 feet when light and 16½ when loaded.

"The channel within the harbour is narrow and shallow—not more than 100 feet wide at parts—and about 18 feet deep at flood tide, and as it is the custom of drifters to lie at anchor in and near the fairway the navigation of large vessels is sometimes very difficult. It was so on 2nd July, because there were between 70 and 80 drifters, some already anchored and others dropping their anchors, along the route which the 'Forto' was following. When she reached a point where the channel is about 150 feet wide, she found the fairway so blocked with drifters that she was unable to keep her place, and went aground. She tried to get off by working her engines astern but failed. Arrangements were accordingly made to lighten her by removing part of her cargo. By midday on 3rd July a sufficient quantity of the cargo had been taken off to enable her to float. She was then taken to anchorage at a point within the harbour called 'Jack's Hole' where there is about five fathoms of water. More cargo was then taken off so as to enable her to reach the pier in safety with the night tide. The pilot consulted the harbour-master, who agreed that it would be prudent to take her in at night as the drifters are then away fishing and the fairway is clear. Accordingly she left her anchorage at 'Jack's Hole' between twelve and one in the morning of the 4th July and made for the pier.

Now there lies between 'Jack's Hole' and the pier a shoal or reef called Crampie which is undoubtedly a danger to navigation. Some years ago a representation was made to the defenders as the harbour authorities that the position of this shoal should be marked so as to warn vessels of the danger. The defenders agreed, and in the year 1906 put down three buoys—two red ones on the north side of the shoal and a black one at the south side. These buoys, although small, when they remained in position, were sufficient for the purpose, but they were attached to unusually small sinkers, and were easily displaced and frequently got out of position Unfortunately the black buoy was out of position on the morning of the 4th of July. It was about 80 feet too far to the northwards, and the result of this was that when the 'Forto' was rounding it on her way to the pier she stranded on Crampie shoal. There can be no doubt, on the evidence, that she was decoyed on to the shoal by the black buoy which is within sight of the pier —about 400 yards off. The harbour-master says it was in position on the morning of the 3rd July, but he admits that it was 80 feet out of position when the 'Forto' was rounding it and he replaced it immediately after the accident.

"The pursuers do not blame the defenders for the stranding on the 2nd of July, and they say that their vessel sustained no damage on that occasion. But they allege that she did receive damage on Crampie shoal, and they maintain that the defenders are liable therefor, on the ground that they failed in their duty of keeping the harbour reasonably safe for those whom they invited to use it. Crampie shoal, they plead, should either have been removed from the channel or adequately buoyed.

"The defenders dispute liability. They maintain that they were under no obligation to remove the shoal, and that it was adequately buoyed. They admit that the buoy was frequently displaced, but they allege that this was well known to the pilot, who ought to have disregarded it and to have brought the vessel in by the landmarks which were well known to him; or if the landmarks were not visible at the time (which they deny), then the pilot ought to have verified the position of the buoy, or to have waited till daylight. They plead that the accident was thus due to the negligence of the pilot, whose negligence must be imputed to the pursuers. Further, and in any event, they deny that the 'Forto' sustained any damage by stranding on Crampie shoal.

"There was no dispute between the parties as to the law applicable to a case of this kind. It is well settled that harbour commissioners constituted as the defenders are by statute, and which have a right to levy tolls in consideration of making or maintaining a harbour, are liable to make good to persons using it any damage caused by neglect in keeping it in a safe condition. The law imposes a duty on the commissioners to take reasonable care that those who use the harbour may do so without danger to their lives or property—*Mersey Dock and Harbour Commissioners*, 1865, L.R. (1 H.L.) p. 93; *Thomson* v. *Greenock Harbour Trustees*, 3 R. 1194; *Parker* v. *North British Railway Company*, 25 R. p. 1071. The various questions in dispute therefore are entirely matters of fact to be decided on the evidence.

"The first of these questions is, whether the defenders negligently failed in the duty of maintaining the harbour in a reasonably safe condition? I am of opinion that they did. The pursuers allege on record that Crampie shoal was formed in part by an accumulation of ballast stones thrown overboard by vessels in the harbour, and they argued that the defenders were in fault in permitting these stones to remain. It is true that on one, or perhaps two occasions, vessels *did* discharge some ballast in the harbour, but there is no evidence to show that any part of this ever reached Crampie, and I do not believe it did. Crampie is a natural shoal, composed of sand, gravel, and large stones or boulders. It is said that it ought to have been removed, whether of natural formation or not. If that were reasonably possible, it would, no doubt, be the best means of preventing danger to navigation. But the pursuers did not offer any evidence on that matter. No one stated what the approximate cost would be, or whether its removal would be reasonably possible at all. The defenders appeared to have considered it at one time and took skilled advice upon it. The minutes, dated 1st November 1911, show that Mr Hannay Thomson, C.E., Dundee, had been consulted, and he reported that the shoal consisted of large stones and rock, and that he would not recommend that it should be removed. None of the witnesses suggest that this was not sound advice. I do not think that it would be reasonable to expect the defenders to spend very large sums on this comparatively small harbour. Whitehall is now a fishing centre of some importance and appears to be growing, but the Harbour Commissioners have not command of unlimited funds. In 1904 their net revenue was £125; it has grown gradually year by year until in 1913 it reached the sum of £3328. This is a satisfactory increase, but it does not warrant unlimited expenditure, and I cannot say that the defenders were lacking in ordinary prudence in failing to embark on unknown expenditure in removing the shoal of Crampie, especially as the evidence shows the revenue from fishing vessels is very uncertain and fluctuating. A harbour may be busy and prosperous for a few years, and then the industry may suddenly cease and the harbour revenue disappear, because, I suppose, fishermen must follow the fish.

"But although the defenders were not under obligation to remove the shoal, they were undoubtedly under obligation to render it reasonably safe to those whom they invited to use the harbour. In this I think they failed. They knew very well it was a danger. In 1906 the fish-curers, fish-salesmen, and fishermen represented that fishing vessels were being damaged and delayed through lack of buoys in the channel. The

defenders undertook to remedy this. They placed three buoys to mark Crampie shoal, but they did so in a very perfunctory fashion. The buoys were small and insufficiently weighted; the largest of them, the black buoy, appears to have been borrowed from one of the Commissioners. It was attached to a stone weighing about 1 cwt., while the sinker usually attached to a buoy marking a channel is a flat metal disc weighing from 10 to 15 cwt. Of course this buoy was constantly out of place, and every time it left its position it ceased to be a guide and became a decoy. The defenders explain that the reason they used such a buoy was because it was easily recovered when it left its position. One man and a boat could do it they said. Very likely. But that appears to me to be a dangerous principle to adopt in buoying a channel, because a buoy which is easily recovered is one which is easily displaced, and the primary and essential purpose in putting it there at all was to mark the point of danger, and it ought to have been weighted in such a manner as would render it least liable to alter its position. The truth is, this buoy was worse than useless; it was a positive danger; and the defenders knew it was a danger. They were, as I have said, informed by the fishermen; they were recommended to alter it by their engineer Mr Hannay Thomson, and they were warned by their harbour-master, Chalmers. He says—'I pointed out to Captain Robertson (one of the defenders) that it was a dangerous thing to have it shifting like that; it was quite well known that the buoy had been shifted often, and I pointed that out to him.' But the defenders paid no attention to this warning. Then he is asked—'(Q) I suppose the fact of the buoy getting continuously out of place is very apt to mislead people; you would be better without a buoy than one in the wrong place?—(A) It was generally always in place when strangers were coming, and those in the locality knew it well enough.' That is to say, only those strangers who were fortunate enough to arrive when the buoy happened to be in position received any guidance from it. All others must look out for themselves. That does not appear to me to be a reasonable method of buoying a channel. The defenders say that it was displaced by some of the drifters on the 3rd of July, and they plead that they are not responsible for such interference. But there is no evidence of that. It may be true, but even then I do not think that they can escape liability, because they should have placed a buoy there which could not be shifted—at least not so easily shifted—by the drifters. After the accident they put down a buoy with a suitable weight. That is more than a year ago and the drifters have never interfered with it.

"Then it is said that even assuming the defenders' negligence in failing to buoy the channel properly, there was also negligence on the part of the pilot, and that his negligence must be imputed to the pursuers.

"So far as I am aware it has never been decided that the negligence of a pilot in such circumstances can be imputed to the owners of a vessel, and in the case of *Renney* v. *The Magistrates of Kirkcudbright*, 19 R. (H.L.) 11, where the point was raised, Lord Watson, without deciding it, said he considered it a doubtful and dangerous doctrine. It seems to me that when the master of a vessel engages a duly licensed pilot to assist him in avoiding local dangers with which he is unfamiliar, that he has done all that a prudent man can do to ensure the safety of his vessel, and it would be very hard to hold him, and through him his employers, responsible for the pilot's negligence. But I do not require to decide that question, because I am of opinion on the evidence that no negligence on the part of the pilot has been proved. On the contrary, I think he did all that could be expected of him. He consulted the harbour-master, who advised him to bring the 'Forto' in at night when the channel was clear of drifters. He ascertained the depth of the water and found that he had from six inches to a foot more than the 'Forto's' draught. Before starting from anchorage at Jack's Hole he sent his motor boat with a light to mark the black buoy which he was unable to see in the grey light. He then came on at dead slow speed. He rounded the buoy in the usual manner, and if it had been in its proper place he would have gone safely to the pier. He did nothing rashly or without due consideration. The defenders allege that he knew the buoy was frequently out of position and that he ought to have ascertained whether it was in position before starting. He says that he did not know, and I see no reason to doubt his word. He appeared to me to be a fair and reliable witness. The buoy was in point of fact shifted repeatedly, and this was known to the harbour-master and his assistants; but then, as I have said, it was within 400 yards of the pier and constantly under their observation, and it was their duty to note its position. Some other witnesses knew how unreliable it was also—but others again did not. For example, Miller, Sinclair, Leslie, Williams, and Finlayson all say that they never heard of it, and they are all familiar with the channel and navigated it constantly. I do not think there was any negligence on the part of the pilot in not verifying the position of the buoy before bringing in the vessel. It is true that buoys are liable to shift when they are in exposed positions, and the prudent mariner will verify their position when that is possible. But when a buoy is in the shelter of the harbour, within sight of the pier, and constantly under the observation of the harbour-master, it is not, I think, unreasonable to assume that it will be kept in its proper position.

"The defenders produced and founded on a handbill which they posted at the pier, notifying 'That any masters of vessels and others making use of the buoys and moorings laid down by the Commissioners . . . do so at their own risk, and the Commissioners will undertake no liability therefor.'

There appears to have been some difference of opinion among seafaring men as to whether this applied only to the hauling-off buoys near the pier, or whether it included the buoys which mark the channel. The notice was put up after the moorings of one of the hauling-off buoys had given way when being used, and this probably gave rise to the view that it was intended to apply only to them. But assuming that it was intended to apply, and did apply, to all the buoys, I do not think that it is sufficient to relieve the defenders of responsibility. Those who are responsible for the public safety cannot escape liability for their negligence by posting notices to that effect. The law requires them to exercise reasonable care, and if they fail to do so they are liable whatever intimation they may make to the contrary. A warning notice may be prudent and proper, but it is not enough. They must themselves exercise reasonable diligence. In my opinion the defenders did not do so. It was very imprudent to place this particular buoy there at all, and inexcusably negligent to permit it to remain after they had been warned that it was a public danger.

"The next point the defenders argued was that the pilot ought to have brought the vessel in by the landmarks. The simple, but I think sufficient, answer to that is that the landmarks were not visible at the time. A number of witnesses were brought to prove that it was sometimes possible to read a newspaper without artificial light at midnight in that region, and some of them said that they could see various objects at a considerable distance on the night in question. All that may be true, but it is not in the least inconsistent with the evidence, which I consider reliable, of those who were in the best position to know, viz., that the landmarks were not visible from the deck of the 'Forto.' The pilot says quite frankly that he preferred to come in by the landmarks because he had been so long accustomed to them, and that he looked for them but could not see them. The harbour-master, who was waiting on the pier, says he could see the black buoy 400 yards away. Perhaps he could, but it was certainly not visible from the 'Forto,' because it was necessary to send the motor boat on ahead with a lamp to mark the spot. Alternatively it was argued that if it were too dark to see the landmarks it was the pilot's duty to remain another twelve hours until the full tide during the day. But he had experience of navigating the channel with a large vessel during the daytime. The drifters which the defenders permitted to anchor in the fairway crowded him out of the channel, and he naturally desired to avoid a similar experience.

Moreover, he consulted the harbour-master, who is the supreme authority. Bye-law No. 4 provided—"All shipmasters, agents, and others shall take their directions with respect to mooring, unmooring, and moving vessels from the harbour-master alone.' The pilot, following this rule, took his directions from the harbour-master, and I can see no negligence in this or in anything else he did. The stranding, in my opinion, was entirely due to the fault of the defenders."

[*His Lordship then proceeded to deal with the question whether the damage was sustained on Crampie shoal or not.*]

The defenders reclaimed, and argued—1. There was no obligation on them to buoy. *Thomson* v. *Greenock Harbour Trustees*, December 10, 1875, 3 R. 1194, 13 S.L.R. 155, founded on by the pursuers, was only applicable to an *opus manufactum*, and not to natural harbours such as the present. In such cases it was unreasonable to hold that all shoals must either be removed or buoyed, and there was no authority for such a proposition—*Parker* v. *North British Railway Company*, July 1, 1898, 25 R. 1059, 35 S.L.R. 842; *Reg.* v. *Williams*, 1884, 9 A.C. 418. Where a buoy was put down its purpose must be construed by the intention of the parties—*Buchanan* v. *Trustees of the Clyde Lighthouses*, February 6, 1884, 11 R. 531, 21 S.L.R. 374. The fact that the buoy in question was capable of being used to the detriment of a vessel would not make the defenders liable if it was intended to be used in conjunction with a chart. In any event the notice put up by the defenders absolved them from liability, and the words "making use of" were wide enough to cover the present case—*British Motor Syndicate, Limited* v. *Taylor & Son*, [1900] 1 Ch. 577, at p. 583, *per* Stirling, J.; *Cannell* v. *Corporation of Trinity House, London, and Lowther, Latta, & Company*, [1914] 3 K.B. 1135. The defenders had not invited the pursuers to bring their ship in, but had, on the contrary, warned them of the risk they ran—*The "Moorcock,"* 1889, 14 P.D. 64; *The "Calliope,"* 1889, 14 P.D. 138, [1891] A.C. 11; *The "Bearn,"* [1906] P. 48. 2. In any event the ship had been negligently navigated by the pilot, and he was the servant of the owners *pro hac vice*, so as to disentitle them to claim against the defenders for the damage thus resulting — the *"Maria,"* 1839, 1 W. Rob. 95. In *Renney* v. *Magistrates of Kirkcudbright*, March 31, 1892, 19 R. (H.L.) 11, 30 S.L.R. 8, founded on by the Lord Ordinary for the contrary view, the so-called pilots were not pilots in the proper sense of the term—*Norman* v. *Great Western Railway Company*, [1915] 1 K.B. 584. 3. Further, the damage sustained resulted from the unauthorised acts of third parties, for which the defenders were not liable—*M'Dowall* v. *Great Western Railway Company*, [1903] 2 K.B. 331; *Cory & Son, Limited* v. *France, Fenwick, & Company, Limited*, [1911] 1 K.B. 114; Beven on Negligence, i, 51, 77; Pollock on Torts, pp. 471, 473, 476.

Argued for the pursuers—1. It was in virtue of their right to receive tolls, and not because the harbour was an *opus manutum*, that the defenders were liable—*The Mersey Dock Trustees* v. *Penhallow*, 1861, 7 H. & M. 329; *The Mersey Dock Trustees* v. *Gibbs*, 1866, L.R., 1 (H.L.) 93. In the present case there was a general invitation to enter the harbour to vessels of a given draught. There might be no obligation to buoy, but the defenders did buoy and they ought to have done so sufficiently—*Thomson* v. *Greenock Harbour Trustees* (*cit.*

sup.); *Parker* v. *North British Railway Company* (*cit. sup.*); *Buchanan* v. *Trustees of the Clyde Lighthouses* (*cit. sup.*), *per* the Lord Justice-Clerk at p. 534; *Owners of s.s. "Toward"* v. *Owners of s. "Turkestan,"* December 16, 1885, 13 R. 342; *The "Gustafsberg,"* [1905] P. 10; *The "Christabel,"* Maritime Notes and Queries, 1878, vol. iv, p. 65. The duty of keeping the buoy in its proper place was one incumbent on the defenders and they could not delegate it to anyone else. 2. In any event the fault of the pilot, if it existed, could not be attributed to the pursuers, and his knowledge was not such as to show that he voluntarily ran the risk—*Thomson* v. *North-Eastern Railway Company*, 1860, 2 B. & S. 106, *per* Cockburn, C.-J., at p. 113, and Hill, J., at p. 116; *Clayands* v. *Dethick*, 1848, 12 Q.B. (A. & E. n.s.) 439, 76 R. R. 305; *Thomas* v. *Quartermaine*, 1887, 18 Q.B.D. 685; *Radley* v. *London and North-Western Railway Company*, 1876, 1 A.C. 754; *Renney* v. *Magistrates of Kirkcudbright* (*cit. sup.*). 3. The fact that third parties had interfered would not absolve the defenders from liability—Orkney Harbours Act 1887 (50 and 51 Vict. cap. clxii), sec. 4; Harbours, Docks, and Piers Clauses Act 1847 (10 and 11 Vict. cap. 27), secs. 42, 53.

At advising—

LORD SALVESEN—The leading facts in this case, which are happily not in controversy, are first that the s.s. "Forto," when attempting to enter the small harbour of Whitehall, passed on the south side of a buoy which marked a shoal close to the fairway locally known as Crampie and stranded on the shoal; second, that the buoy in question, which is painted black, was at the time 80 feet or thereby to the north of the position which it ordinarily occupied; and third, that if the buoy had been in its proper position and the vessel had passed it on the same side and at the same distance the accident could not have happened. The three questions which we have to determine are—(1) whether the defenders are responsible for the buoy being out of position; and if this question be answered in the affirmative, (2) whether the accident was materially contributed to by the negligence of the pilot in charge; and (3) whether the pursuers have proved that the damage for which the Lord Ordinary has awarded them compensation was sustained in consequence. These are mainly questions of fact, but they are none the less difficult on that account; and I do not remember any case where my opinion has fluctuated so much as in the course of the long and able argument which was submitted to us. In the end, however, I have come to the conclusion upon each of these questions which is satisfactory to my own mind; but I think it is due to the parties that I should state in some detail the reasons on which I have formed my opinion.

The harbour of Whitehall is a natural harbour situated on the island of Stronsay. The only artificial works consist of two piers which are protected from the sea by the small island of Papa-Stronsay, lying immediately to the north. The entrance to the harbour is by a passage some 300 yards in width between the two islands; and the proper course for vessels to take is indicated by two beacons on shore, the line of which runs approximately north and south. This line intersects a line of two landmarks, one of which is the corner of Huip House, and the other a cairn on the small skerry called the Holm of Huip to the west. At the point of intersection the point of a ship bound for Whitehall should be altered so that it may proceed on the line of these two landmarks; and the vessel should continue on this course until other two landmarks, namely, a lamp-post on the old pier and Feastown House, are in line, when the course should be altered and set along this line. The main use of the landmarks is to enable vessels to avoid the submerged shoal of Crampie, which is only about 150 yards from the shore and forms a serious obstruction to navigation. At the point of intersection of these two lines the defenders in 1906 placed a small buoy painted black to aid vessels in making the harbour. Any vessel passing on the south side of this buoy and then making a straight course for the pier runs no risk of grounding on the shoal, and assuming that her draught of water is not more than the depth in the channel she will have no difficulty in reaching the pier in safety. The buoy was so placed in consequence of there being complaints of fishing vessels stranding on Crampie owing to the entrance to the harbour being insufficiently marked.

The buoy in question was held in place by a chain attached to a stone weighing about one cwt. It had never been displaced by mere stress of weather, but it was the practice of the harbour authorities to lift it at the end of the fishing season (during which time only is the port much frequented) and to replace it at the commencement of the following season. Its small size made this a simple operation; and I think it is proved that if the sinker had been five times or ten times as heavy (which the pursuers maintain it should have been) there were no steam appliances under the control of the Harbour Commissioners with which this operation, if it were necessary at all, could be performed. It had, however, come to the knowledge of the harbour-master, Mr Chalmers, that from time to time the buoy was in fact displaced by drifters getting round it and inadvertently or negligently dragging the sinker from its position, and as Whitehall had become a centre of the fishing industry, this had been for some years a matter of anxiety to him. He recognised that if it happened to be out of place when drifters were entering the harbour it would in such circumstances constitute a source of danger by inducing them to take a course which would lead to their stranding on Crampie, and he had brought this under the notice of the Commissioners. In order to obviate this risk he was himself in the practice of checking the position of the buoy every morning, which he could readily do from a

selected position but not from the pier itself. As soon as in this way he ascertained that the buoy was out of position it was his practice to have it shifted back at once, so that it might not mislead vessels which were making for the harbour.

On the morning of 3rd July Mr Chalmers checked the position of the buoy and found it in place. A very large number of drifters, however, came in that day, and unknown to him the buoy was displaced by one or more of them, and was observed to be out of position by the master of an outward-bound steamer early in the afternoon. The "Forto" was ordered by the consignee to come in by the night tide, which was full at 1 or 1·30 a.m., but the harbour-master was not informed of this until 11 o'clock p.m. He made no objection, as he was unaware that the buoy was not in its proper position, and considered the draught of water in the fairway to be sufficient to float the "Forto." The only dark hours at that time of the year are between 11 and 1; and the pilot of the "Forto," having in view that he might not be able to see the landmarks, directed that a light should be exhibited from a boat anchored just outside the buoy. The "Forto" rounded the buoy on its proper side, and if the pilot was entitled to assume that the buoy was in its proper place and to have taken the ship in by night, no fault can be found with the navigation. The stranding of the steamer on Crampie, which immediately thereafter took place, was undoubtedly due to the misleading position of the buoy. Does then the fact of the buoy being out of position in the circumstances above mentioned infer responsibility against the Harbour Commissioners? In my opinion it does.

We had a full discussion as to the duty which the law imposes upon harbour trustees, and a large number of authorities were cited. I think the only general duty which is imposed upon them is that of making their harbour reasonably safe for such vessels as they invite to it. If the entrance to a natural harbour is difficult, I do not think there is any legal duty upon them to improve it, provided it is one which can be navigated by a person who knows the locality and exercises reasonable care. The suggestion which the pursuers make that it was the duty of the defenders to have removed all danger from Crampie by bodily removing the shoal itself is, I think, out of the question. It is, of course, in the interest of those who manage a particular harbour that it shall be made easily accessible to shipping, and that the navigation to it shall be as free from risk as the funds under their control permit. But the owners of a harbour which is difficult of approach do not, in my opinion, incur responsibility because they do not take steps which may involve expense entirely out of proportion to the means at their disposal for improving the natural accesses, nor are they under any obligation to indicate the navigable channel by means of buoys even in cases where the absence of such marks makes it difficult for a vessel to find its way in. The penalty that the harbour trustees incur is that their port will not be frequented if it cannot be entered without danger. If, however, they do take steps to buoy the channel I think it is their duty to use reasonable care that the buoys which they have placed for the purpose of aiding navigation shall not be allowed to get out of position so as to be misleading and a source of danger.

The question as to what constitutes reasonable care is necessarily always a question of circumstances. In this particular case I think the defenders failed in their duty. When they discovered that the attachment of the buoy was not sufficient to prevent it from being occasionally dragged out of position, I think it was their duty either to have used a buoy with a much heavier sinker—as they have now done—or to have checked its position before every tide. Had either of these precautions been adopted this accident could not have happened. The heavier buoy which is now there and remains throughout the whole year has a sinker weighing 5 cwts., and it has never once been displaced except by the moorings of a dredger which the defenders themselves employed. There was really no reason why this heavier sinker should not have been put out years before the "Forto" entered the harbour. It is true that it could not have been conveniently lifted during the winter season, but it is by no means obvious why this practice was resorted to in the case of the smaller buoy unless it was thought that it would be liable to be displaced by stress of weather, and no inconvenience of any kind is suggested as resulting from the buoy being permanently in its position. The defenders were of course under no obligation to provide a buoy of any given dimensions, but if they chose to put out a buoy to mark the shoal, it was their duty to see that it served its purpose at any time when ships might lawfully enter the harbour. In the case of the "Forto," while I do not agree with the Lord Ordinary in holding it proved that the harbour-master directed that she should be brought in at night, I think that was an operation which was not merely legitimate but was in accordance with the practice of the port. It, moreover, obviated one of the risks from which the "Forto" had already suffered on 2nd July in attempting to make the harbour by day, namely, the risk of finding the channel obstructed by steam drifters whose fishing was apparently generally prosecuted in the night time.

It is true that the displacement of the buoy was not approximately due to negligence on the part of the harbour authorities, but to the careless or wrongful acts of one or more steam drifters, and if this was a contingency which could not reasonably have been foreseen or guarded against, the defenders would, in my opinion, not be liable for the consequences. They themselves, however, say in their defences that the buoy had on many occasions been dragged from its position by fishing vessels, yet they apparently took no steps to prevent a recurrence by prosecuting the delinquents. It thereupon became their duty to

guard incoming shipping from this recurring risk, and to take effective measures to this end. A daily check in the morning before high water would obviously not effect this purpose if vessels were to be permitted to enter the harbour at night. I have accordingly no difficulty in reaching the conclusion that if the stranding of the "Forto" was due, as I hold it was, directly to the buoy being out of place, the defenders are *prima facie* responsible.

The defenders, however, further maintained that they have relieved themselves from responsibility by exhibiting on Whitehall pier since 1909 a notice in the following terms:— "Orkney Harbour Act 1887. Notice is hereby given that any masters of vessels and others making use of the buoys and moorings laid down by the Commissioners under the above Act at Whitehall harbour, do so at their own risk, and the Commissioners will undertake no liability therefor." Even if the notice applied, I doubt whether it would relieve the defenders as in a question with the owner of a ship who was not familiar with its terms, even although the local pilot whom he employed was in knowledge of it. To have this effect in law it would require to be pleaded as a condition of the invitation which the harbour authorities impliedly issue to all vessels having occasion to use the harbour, and such a condition could not be imported in the case of a person who was not made aware of it. The pilot was not the servant of the shipowner in the sense of making his knowledge on such a subject the shipowner's knowledge. He was a mere agent for the limited purpose of navigating the entrance to the harbour. The conclusive answer, however, seems to me to be (as indeed the history of the notice shows) that it applies only to buoys and moorings which vessels make use of by attaching themselves to them. Vessels which avail themselves of the navigation buoys which are placed to indicate the limit of a channel or to warn them of an obstruction in it do not make use of such buoys within the meaning of the notice. In any case I do not see how by such a notice the harbour authorities can relieve themselves of the primary duty of reasonable care, or exclude an action based upon their failure of duty.

The next question is whether the pilot contributed to the accident by negligence in the conduct of the navigation. On this point I do not agree with the passage in the Lord Ordinary's opinion in which he says— "It seems to me that when the master of a vessel engages a duly licensed pilot to assist him in avoiding local dangers with which he is unfamiliar, that he has done all that a prudent man can do to ensure the safety of his vessel, and it would be very hard to hold him, and through him his employers, responsible for the pilot's negligence." Hard though it may be, the Courts have always acted on the contrary assumption except in the case of a compulsory pilot. But it entails no greater hardship than to make the shipowner responsible for the negligence of a duly qualified master to whom he entrusts the navigation of his ship because he cannot himself be on the spot or has not himself the required knowledge and skill. The dictum of Lord Watson on which the Lord Ordinary relies had reference to a totally different kind of case, that, namely, of a ship which was being navigated in accordance with the directions of the harbour-master, whose orders those in charge of the ship were bound to obey unless they were of such a kind as to lead the vessel into obvious and imminent peril. Accordingly here, if the pilot was to blame, and but for his fault the accident would not have happened, the pursuers must take the consequences of a mistake made by their agent in the course of executing a duty with which they entrusted him. Thus if the pilot had known, or ought to have known, that the buoy was out of position on the night in question, and had nevertheless navigated his ship in close proximity to it, the defenders would have escaped liability for their own breach of duty, for the proximate cause of the accident would then have been the negligence of the navigator and not the fault of the harbour trustees. With the Lord Ordinary I am quite satisfied on the evidence that the pilot did not know that the buoy was out of position. On no other assumption can I explain his conduct in taking steps to secure that the position of the buoy should be indicated by a light. Even on this assumption it is said that he ought to have known that the buoy was liable to be out of its place, and therefore ought not to have placed reliance on it as marking an obstruction of the channel. The simple answer that he makes is that he was totally unaware that it had ever been out of place, and this ignorance was shared by six other local witnesses who were examined for the pursuers, and also by one or more witnesses examined by the defenders. The Lord Ordinary believes the pilot's evidence on this point, and I see no reason for disbelieving it, although if it had been as common as the defenders in some passages of their evidence say for the buoy to be out of place I should have found it hard to credit that a local pilot in so small a place as Whitehall should have been ignorant of the fact. The truth is, however, that when the evidence is examined in detail it comes to no more than this, that on two or three occasions annually the buoy had been displaced by the unauthorised action of steam drifters, but that this was rectified in every instance by the harbour-master as soon as discovered. Unless the buoy was intended as an aid to navigation, it would have been far better not to have put it out at all, and I hold that even if the pilot had known that it had been occasionally displaced, he was entitled to rely on the harbour authorities having replaced it, as they had previously been in the habit of doing, and as they had ample time to do before the "Forto" entered the harbour. It was further maintained that the pilot was to blame for attempting to

enter the harbour at night, or, alternatively, for failing by means of the landmarks to check the position of the buoy if he were able to see them, as they say he was. I cannot impute negligence to the pilot on either head. It was the recognised practice of pilots who brought in vessels at night to Whitehall to indicate the position of the buoy by a light placed upon it or by a light exhibited in a boat close by, and this was approved of by the harbour-master. This practice could only have grown up on the footing that the buoy constituted a reliable guide to navigation. It may be that the pilot might have discovered that the buoy was not in place by using the landmarks, but he says that he was unable to see them at the time, and the contrary is not proved. In any case if he was entitled to rely on the buoy being in position I could not hold it to be negligence on his part not to have also made use of the landmarks, for the very object of placing the buoy there was to make such a precaution unnecessary. It is perhaps true that if he had waited half-an-hour before bringing in the ship there would have been sufficient light for him to navigate by the landmarks alone, as he says he always preferred to do when these were visible, but he had a perfect right to take in the ship as soon as there was sufficient depth of water in the channel to enable her to enter. I am unable therefore to attribute any blame to the pilot, who I think acted exactly as a prudent and skilful navigator would have done in the circumstances, and who would undoubtedly have brought the vessel safe into port but for the initial fault of the defenders.

[*His Lordship then proceeded to deal with the question whether the damage was sustained on Crampie shoal or not.*]

LORD GUTHRIE — I am of the same opinion.

LORD DUNDAS—I am authorised to intimate the LORD JUSTICE-CLERK'S concurrence in the proposed judgment. I did not hear the case.

The Court adhered.

Counsel for the Pursuers and Respondents—Horne, K.C.—Normand. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders and Reclaimers—Murray, K.C.—Carmont. Agents—Beveridge, Sutherland, & Smith, S.S.C.

HOUSE OF LORDS.

Friday, March 12.

(Before Earl Loreburn, Lord Kinnear, Lord Dunedin, Lord Atkinson, Lord Parker, and Lord Sumner.)

REID'S TRUSTEES *v.* DAWSON.

Succession — Legacy — Construction — "Prefer"—Fund Demonstrative or Taxative.

A testator directed—"Recognising as I do the necessity, in the event of my death, of making some provision for Miss Christina Dawson and her son Robert, I hereby instruct you to pay to her on the first of each month after my death the sum of twelve pounds ten shillings, being at the rate of £150 a-year. But in lieu of this I would prefer that as soon as you conveniently can that the sum of £3000, say three thousand pounds, should be taken from my life insurance funds and paid over to her through her law adviser Mr Maitland, or her brother Mr William Dawson, London, the latter of whom I wish to nominate trustee for same if he will accept. I trust this arrangement can be carried out without any friction. I had hoped to make this bequest from another source, but have found it impracticable."

Held (1) that the bequest was of the capital sum, to be paid as soon as conveniently could be, the word "prefer" conferring no discretion on the trustees, and (2) that it was of the full amount of £3000, the reference to the insurance fund being only demonstrative and not taxative.

Henry Reid, manufacturer, Dunfermline, and others, trustees acting under the trust-disposition and settlement of the late Robert Reid, manufacturer, Dunfermline, dated 5th November 1907 and registered 8th March 1911, *first parties;* Miss Christina Dawson, residing at 66 Braid Road, Edinburgh, to whom a bequest was made, *second party;* and Robert Reid, her son, *third party,* presented a Special Case to determine the nature of the bequest to the second party.

The Case stated—"2. Mr Reid addressed to the said James Young, one of the trustees under his will, and also his law agent, a holograph letter, dated 6th December 1910, which was in the following terms:—

'13 *Corrennie Gardens, Edinburgh, 6th December* 1910.

'James Young, W.S.,
55 Constitution Street, Leith.

[. . . *quoted supra in rubric.* . . .]

'Yours very truly, (Signed) ROBERT REID.' This letter, which was in a closed envelope addressed to Mr Young, had been handed by Mr Reid to Miss Dawson, and was in her possession at the time of his death. It was handed to Mr Young by Miss Dawson's said law agent, Mr R. A. Maitland, solicitor, Edinburgh, on 2nd March 1911.

"3. Mr Reid had a policy of insurance on his life for £5000 effected with the Scottish Amicable Life Assurance Society, the capi-