

conclusion in order either to give effect to it or grant absolvitor from it. But I do not dissent from what I gather is the opinion of your Lordships that in the circumstances, the lease being bad in respect of the section in the Piers and Harbours Act, it is unnecessary to dispose of that conclusion.

Now as the summons is framed the second and reductive conclusion looks as if it were merely ancillary to the first or declaratory conclusion. The pursuers either did or did not know of the section of the Piers and Harbours Act incorporated in the Special Act which prohibits leases of more than three years' duration. If they did know of it they ought to have inserted after the first conclusion the usual words "and whether it be so declared or not" and then proceeded with the reductive conclusion; and they ought to have quoted the section in their condescendence and framed a separate plea-in-law referring to it. If they did not, they are really winning this case on a plea discovered for them in this House. This disentitles them to costs.

I am therefore of opinion that the interlocutors so far as appealed against should be reversed, and that the case should be remitted to the Court of Session with instructions to pronounce a decree of reduction in terms of the second conclusion of the summons, and to find it unnecessary to dispose of the declaratory conclusion, and to find no expenses due to either party. I think there should be no costs awarded in this appeal.

LORD ATKINSON—I have had the pleasure and advantage of seeing beforehand the judgment of the Lord Chancellor which has just been read. I so fully concur with it that I have nothing to add.

VISCOUNT FINLAY—I am authorised to say that my noble and learned friend Lord Shaw concurs in the judgment I have delivered.

Their Lordships ordered that the interlocutor appealed from be reversed, and that the cause be remitted back to the Court of Session with instructions to pronounce a decree of reduction in terms of the second conclusion of the summons, to find it unnecessary to dispose of the first declaratory conclusion, and to find no expenses due to either party, and ordered further that each party do bear and pay their costs of the appeal to this House.

Counsel for Appellants—Sandeman, K.C. —Gentles. Agents—Patten & Prentice, Greenock—Hugh Patten, W.S., Edinburgh—Ward, Bowie, & Company, London.

Counsel for Respondents—Sir John Simon, K.C. —Macmillan, K.C. —Mackay, K.C. Agents—Neill, Clark, & Murray, Greenock—William B. Rainnie, S.S.C., Edinburgh—Beveridge & Company, Westminster.

## COURT OF SESSION.

Friday, March 18.

### FIRST DIVISION.

[Lord Blackburn, Ordinary.

ANCHOR LINE (HENDERSON BROTHERS), LIMITED (S.S. "CIRCASSIA") v. TRUSTEES OF HARBOUR OF DUNDEE.

*Ship—Collision with Sunken Wreck—Liability—Whether Collision Due to Faulty Navigation or to Fault of Harbour Trustees—Proximate Cause—Misleading Use of Buoys—Absence of Pilots from Station—Duty of Harbour Trustees as Pilotage Authority.*

A vessel sailing under Government requisition, and which had been ordered to proceed to Dundee, arrived in March 1919 off the estuary of the Tay. Neither the master nor anyone on board had any personal knowledge of the estuary, and the latest sources of information in the master's possession regarding it were a chart dated 1915, a copy of the North Sea Pilot dated 1914, then the most recently published edition, and a collection of Notices to Mariners, the latest of which was dated 1st December 1918. In these he found a warning to strangers to be cautious in entering the estuary, and a recommendation to take a pilot obtainable from a pilot cutter stationed in the immediate vicinity of the buoy marking the entrance to the channel and known as the Fairway Buoy. This buoy was described as a light-and-bell buoy exhibiting a white light occulting every ten seconds, surmounted by a top mark, and painted in black and red horizontal stripes. In the Notices to Mariners there was also an intimation that lights which had been prohibited during war conditions were to be re-exhibited. With this information the master about 6.30 a.m. on 9th March shaped his course by compass-bearing and dead reckoning for the Fairway Buoy in order to obtain a pilot. The weather was clear above, with low lying mist, and became more hazy as the vessel proceeded. When near what he estimated to be the position of the Fairway Buoy the master reduced the speed of the vessel to slow. Shortly afterwards he sighted a large dumb buoy without light or top mark which he at first thought might be the Fairway Buoy but which, as no pilot cutter was visible and as the buoy did not appear, when examined by the naked eye and through glasses, to correspond with the Fairway Buoy described in his chart, he concluded was not the Fairway Buoy, and passed without a more thorough inspection. Shortly afterwards he saw the white light of a buoy, occulting every ten seconds, and concluding that this was the Fairway Buoy

proceeded towards it, and at 7:33 a.m. collided with a sunken wreck near the entrance to the fairway, which had been there since 1917 and was not marked on the chart. The dumb buoy which the master had passed was the Fairway Buoy. It had been placed in position during war time after the buoy which had originally been in position there, and which was the buoy described in the master's chart as the Fairway Buoy, had broken away. It had "Fairway" painted on it in large letters which the master did not see, but would have seen if he had examined it at close quarters. The lighted buoy towards which the master was proceeding when he struck the wreck, and which corresponded with the description of the Fairway Buoy in his chart, was at the date of the chart used as the Fairway Buoy. After breaking away it had been recovered and placed along with a smaller lighted buoy to mark the sunken wreck. The master did not see the smaller lighted buoy until immediately before the collision. The pilot cutter was not at her station, the pilots having for some time previously been in the habit of anchoring inside the entrance to the river, a practice which the Harbour Trustees (the pilotage authority) though aware of it had taken no measures to stop. The Harbour Trustees had on the previous day received intimation of the time when the vessel would arrive.

*Held (diss.* the Lord President and *rev.* the judgment of Lord Blackburn, Ordinary) that the collision was due to the master's fault, (*per* Lord Mackenzie) in passing in hazy weather the dumb buoy without making a thorough investigation of it and ascertaining what it was, and (*per* Lord Skerrington) in entering after he had sighted the white light the fairway of the channel without a pilot when he knew on reaching the dumb buoy that he was close to the pilot station. *Held further* that the Harbour Trustees were in fault in using the old Fairway Buoy to mark the wreck without altering its light to green, but (*diss.* the Lord President and *rev.* the judgment of the Lord Ordinary) that the fault of the Harbour Trustees was not the proximate cause of the collision, and defenders absolved.

*Opinion per* the Lord President that the Harbour Trustees were in fault not merely in respect of the misleading position of the buoys, but also in failing to ensure that the pilots kept their station; that they (the trustees) owed a special duty to the ship in consequence of their knowledge of her expected arrival; and that the collision was a reasonable and natural consequence of the pilot cutter's absence.

*Opinion per* Lord Mackenzie that it was not proved that the system of pilotage was faulty and amounted to negligence on the part of the Harbour Trustees.

The Anchor Line (Henderson Brothers), Limited, owners of the s.s. "Circassia," brought an action against the Trustees of the Harbour of Dundee, concluding for payment of £87,000 damages in respect of the collision of the "Circassia" with the wreck of the s.s. "Clan Shaw" in the estuary of the Tay.

The facts of the case as narrated in the opinion (*infra*) of the Lord President were as follows:—"Like the 'City of Naples' v. Dundee Harbour Trustees, which was recently before us, this case is concerned with a shipping disaster occurring outside the entrance of the river Tay. The s.s. 'Circassia' (usually employed by her owners on the run between Glasgow or Liverpool and Bombay) was under Government requisition, and destinations and routes were assigned to her from time to time and from point to point by Government instructions communicated through naval officers. Having completed a voyage from Liverpool to Calcutta she was there instructed to proceed to Dundee. It was this destination, then given her for the first time, which unexpectedly brought her to the scene of her mishap. She arrived off the May Island during the night of 8-9th March 1919 and awaited daylight. Neither the master nor any of his officers, nor the pilot who had brought the vessel from the Downs to Yarmouth and assisted the master from thence northwards, had any personal experience of navigation in the Tay. The master had found on consulting his sailing instructions (North Sea Pilot, 1914, then the most recently published edition, p. 233) that 'Strangers should be exceedingly cautious in entering the river Tay, and are strongly recommended to take a pilot.' He accordingly determined not to attempt to enter the river but to utilise the Tay pilotage service, for the maintenance of which the defenders are responsible (Dundee Harbour Act 1911, section 107 *et seq.*) From the same source (North Sea Pilot, 1914, p. 217) he ascertained that the station kept by the defenders' pilots was in the immediate vicinity of what is known as the Fairway Buoy. 'The Tay pilot vessel unless driven in by stress of weather is always at anchor or under weigh near the Fairway Buoy.' This Fairway Buoy was described in the master's sailing directions (North Sea Pilot, 1914, pp. 216-217), and shown on the master's chart as a light-and-bell buoy exhibiting a white light occulting every ten seconds, surmounted by a top mark, painted in black and red horizontal stripes, and as being laid at sea outside and in front of the river entrance formed by the bar which extends between the Gaa Spit and the Abertay Spit. The site of the moorings of this buoy is charted at a point one sea mile to seaward of the bar or river entrance, and nearly three-quarters of a sea mile to seaward of the furthest seaward pair of red and black buoys, which pair of buoys defines the commencement of the buoyed fairway. For the locality of the pilot station thus identified between 8 and 9 sea miles distant the master shaped his course when dawn came in. He took his position by compass-bearing on the Bell Rock—from which

he judged himself to be 2 miles away—and steered N. 54 W. The tide, which was flowing, causes a strong set to the S.S.W., but the master set this course as one which should bring him as near as might be to the charted site of the Fairway Buoy, and consequently within the ambit of the pilot station. The weather in the early morning was cloudy and clear, but as the locality of the pilot station was approached, while remaining clear overhead, it became increasingly hazy. After a time the Bell Rock was lost to view and the thickness was sufficient to make landmarks unavailable. The master describes the conditions near to the entrance of the river thus—'It was a morning mist, and it was lying very low. It was clear overhead. It was a patchy mist.' After running between 7 and 8 sea miles the master reckoned that he was in near proximity to the pilot station. But as neither the pilot cutter nor the Fairway Buoy had been sighted, and as visibility had become far from perfect the master reduced the speed of his vessel to half and then to slow, making only 3 to 3½ knots over the ground. The quartermaster was stationed in the chains with the lead. Some minutes later the look-out observed a buoy bearing 1½ to 2 points on the port bow, and distant when first observed through the haze 4 to 5 cables away. This buoy was watched by the observers on the bridge (the master, the pilot, and the chief officer) in order to ascertain if it was the Fairway Buoy. It was examined both by the eye and with glasses as the vessel slowly proceeded towards and abreast of it, at which latter moment the buoy was distant from 1 to 1½ cables. It was seen to be a dumb buoy, carrying neither the usual structure for a lamp, nor bell, nor top mark; nor did it show any light, either 'white light occulting every ten seconds' or other kind of light. So far as the observers on the 'Circassia' could see it displayed no black and red horizontal stripes; but the prevailing thickness no doubt diminished colour values. The master says it was 'a sort of dirty colour,' not distinctive; the pilot says it was 'a red buoy,' but 'more neutral than anything'; the chief officer says it had the appearance of a dirty buoy with bird's lime on the upper part of it. In short, it presented to the observers on the 'Circassia' none of the characteristics of form and equipment with which the Fairway Buoy was identified in the sailing directions and on the chart. Very shortly after the 'Circassia' passed abreast of this buoy the light of a buoy showing the colour and occultation distinctive of the Fairway Buoy (white occulting every ten seconds) was observed a point on the port bow, at a distance reckoned as 800 yards or 4 cables away. Believing this light to be the light of the light-and-bell buoy described and charted as the Fairway Buoy, the master altered his course a point to the northward, making it N. 44 W., so as to bring the buoy clear. Thereafter in rapid succession the most seaward of the red buoys, about 4 cables on the starboard bow, and another

buoy bearing broad on the port bow, were seen, and in a few seconds the vessel struck the submerged wreck of the 'Clan Shaw,' which was not shown on the master's chart, and of the existence of which he had no previous knowledge."

The pleadings of the parties sufficiently appear from the opinion of the Lord Ordinary (BLACKBURN), who on 24th December 1920 pronounced an interlocutor finding that the accident was due to the fault of the defenders.

*Opinion.*—[After narrating the facts]—"This then being the position of matters, I now give the sequence of events as narrated by the master and members of the crew of the 'Circassia.' The master says he started at 6:17 a.m. to look for the Fairway Buoy in the expectation of finding the pilot cutter in its vicinity. It was then daylight, the weather was clear, the sea calm, and only a light breeze was blowing, but no land lights or leading marks were visible. He started slow-ahead from a point which he calculated to be 2 miles S.S.W. of the Bell Rock, and at 6:30 gave the order 'half-ahead' and at 6:35 'full-ahead.' About 7 o'clock the weather became hazy and the master reduced to half-speed. At 7:12, having calculated his distance from the Bell Rock by dead reckoning, and estimating that he was getting to the neighbourhood of the Fairway Buoy where he would find a pilot he reduced to slow. In fact he had steered an absolutely accurate course, and was at that time just about one mile short of the charted position of the Fairway Buoy. Having reduced to slow, which represents a speed of about 3½ knots an hour, the master continued his course. He had with him on the bridge the pilot Robey, the first officer Erskine, the fourth officer and a cadet, who were not called as witnesses, and a quartermaster at the wheel. There was another quartermaster in the chains with the lead and two hands on the look-out forward. The first thing sighted was at 7:20, when a buoy was picked up at a distance of four or five cables on the port bow. The master and Robey seem to have made out this buoy at about the same moment, and it was also reported by the look-out. The master at first thought that it might be the Fairway Buoy, as indeed it was. On getting closer, however, he made out its shape and saw that 'it had no light or bell,' and thereafter 'he really did not take any more notice of that buoy.' They passed it at what I think must have been between one and two cables, at which distance the shape of the buoy was distinguishable but not its colouring. Proceeding on a little further the white occulting light on the westernmost wreck-marking buoy suddenly came into sight at 7:25, and was observed almost simultaneously by the master, Robey, and Erskine, and they all exclaimed 'That is the bell buoy.' The distance at which this light was seen was estimated to be about 800 yards, and although the light was visible the body of the buoy was not. The master altered the course 10 degrees to the northward to keep a little clearer of the buoy and more into the channel of an ascending ship,

hoping at any moment to pick up a pilot. As they drew nearer to the buoy they made out its shape, and about this time both the master and Erskine observed No. 1 red conical buoy marking the north side of the channel at a distance which the master did not estimate at the time, but which Erskine says he thought to be four or five cables. At 7:33 the ship struck the wreck and stopped. The collision was so gentle that no shock was perceptible. Just before she struck the master observed a buoy broad on the port bow, but at the moment could not say what it was although it appeared to be two or three hundred feet off. He also seems to have observed at about the same time that the buoy on which he was steering was painted green. He was rather uncertain as to the time which elapsed between these observations and the stoppage of the ship. Robey says that he only saw the colour of the west wreck-marking buoy a few seconds before the ship struck. The buoy seen broad on the port bow was, of course, the eastern wreck-marking buoy. This is proved by the witness Brydon to have been slightly south of its charted position on that morning, but only by one-quarter of a cable. Erskine, who saw this buoy shortly after the captain did and when it was on the port beam, says that it was  $1\frac{1}{2}$  to 2 cables off. Robey says it was a point before the beam when he first saw it, but only adds that he did not notice a light on it. On record it is stated, in accordance with the master's evidence, that this buoy was first observed 200 to 300 feet on the port bow. Now whichever of these statements is to be preferred—and I think the pursuers must be taken bound by their record—I do not think that the buoy was observed in time to enable the master to do anything to save the situation. Having identified the westernmost buoy by its light and general appearance as the Fairway Buoy shown on his chart he was looking for a pilot and not for a wreck in its vicinity, and it would have required a good deal more time than he had at his disposal to solve the enigma suddenly presented to him by its new colour and the discovery of another green buoy close to it. He says that if he had seen them in time and had had the advantage of a wreck symbol on his chart he would have understood that he should keep to the south of the buoys, but that without the wreck symbol he would have assumed that the buoys marked the ends of the wreck and that the course he was on was perfectly safe. After the ship stopped the master put her full speed astern and in three minutes was clear of the wreck. He then manœuvred her astern and anchored abreast of the dumb Fairway Buoy to wait for a pilot. The pilot cutter did not appear till after eleven o'clock, more than three hours later, and eventually the 'Circassia' was got up to Dundee with difficulty on the afternoon tide. All her injuries were on the port side.

"Now I am satisfied that the story told by the pursuers' witnesses is true. I saw no reason to doubt the evidence of the master or Robey or Erskine, and the master in particular impressed me as being a capable

and reliable man and an honest and straightforward witness. It is obvious that on a clear morning the events which occurred could not have taken place, and the condition of the weather therefore assumes great importance. It is described generally by the pursuers' witnesses as being hazy. This is a somewhat indefinite word, but the master adds in explanation that there was a 'morning mist lying very low. It was clear overhead. It was a patchy mist.' The pilot Robey describes it as a bad low-lying haze, but thought 'it was safe to go on in a haze like that because objects stood above it.' Erskine only says the weather was 'a little hazy—misty.' The expert witnesses for the defenders say that such a condition of weather was highly improbable, and that if it existed it should be described as a fog into which the master ought not to have entered. I prefer the evidence of the witnesses, who speak to what they saw and whom I believe, to the speculations of experts. If the dumb Fairway Buoy and the seaward starboard Channel Buoy were both picked up at about four cables distance the general conditions of the weather do not appear to me to have been such as to have required the master to anchor before reaching the point where he expected to find a pilot. That there may have been a patch of mist in the vicinity of the wreck so dense that the master would not have been justified in entering it blindly is, I think, probable, but there is no reason to conclude that he would have done so had he not picked up the light which he took to be and which was the light of the Fairway Buoy as described in the North Sea Pilot and his chart. That the light of this buoy and its superstructure may have been visible to observers who themselves must have been 30 feet above the water, while the body of the buoy and the whole of the nearer wreck buoy and its light remained invisible, appears to me to be quite consistent with the description given of the atmospheric conditions.

"The defenders' expert witnesses (Captain Ewing, Captain Ruthven, and Commander Jones) say that under no circumstances should the master have passed the dumb Fairway Buoy without investigating it more closely and finding out its purpose. To have brought the ship nearer to it might have led to disastrous results if it had happened to be marking a wreck, and accordingly they insist that he should have anchored and lowered a boat to examine the buoy. I cannot see that there was any necessity for him to discover the purpose of the buoy which he had satisfied himself was not the light-and-bell buoy for which he was looking. The alternative which he adopted of going on a little further to see if he could find the buoy he was expecting to find does not appear to me to be unreasonable—the misfortune is that he found it so soon.

"In my judgment the value of the criticisms by the defenders' expert witnesses on the conduct of the master in navigating the ship is much discounted by the fact that they proceed on assumptions as to the master's knowledge or want of knowledge of the position of his ship which I do not

think are justified by the evidence. In the first place they were asked to assume that at 7.12 when the master put the ship to 'slow' he thought that he had reached the charted position of the Fairway Buoy. This it is said is admitted on record, the averment founded on being in condescendence 4, which reads—'At 7.12 a.m., there being no sign of the pilot boat, and the vessel being then in the neighbourhood of the normal and proper position of the Fairway Buoy, the engines were put to slow.' The meaning of this passage depends entirely on the construction to be placed on the words 'in the neighbourhood of,' which in my judgment admits of considerable latitude. When the passage was first put to the master and he was asked 'Do you see that?' he answers 'Yes, that may mean that you are getting into the normal or anything within a mile of it.' A few lines further on he says—'The neighbourhood of the normal means any distance off.' He was asked directly afterwards—'(Q) Did you expect to see the buoy then?—(A) I was expecting to see the light. (Q) On the buoy?—(A) Yes. The next thing I saw was an unlighted buoy on the port bow.' Sometime later in his very lengthy cross-examination there occurs the following passage—'(Q) You admitted that you ran the best part of a mile from what you had thought was the normal position of the buoy?—(A) I have never said that. (Q) It is said for you?—(A) A sailor may say that; it may be a mile or half-a-mile.' I confess I cannot see anything either in the averment on the record or in this evidence to justify the assumption that at 7.12 the master believed he had reached the charted position of the Fairway Buoy. I think that after steaming eight miles towards the Fairway Buoy it is perfectly legitimate to talk of a point one mile short of the buoy as being in its neighbourhood, and that such a point would be an appropriate place to slow down on the chance of the pilot cutter being under weigh to seaward of the buoy.

"Next, the expert witnesses for the defenders were asked to assume that the master could not have calculated the distance he had come from the Bell Rock to the point he reached at 7.12 because he had admitted that he had not streamed a patent log. In chief the master said he calculated the distance by dead reckoning and no mention was made of streaming a log. The only passage in his evidence in which the streaming of a log is referred to is when he was being cross-examined as to how he had calculated the distance between the point he had reached at 7.12 and the point where he sighted the dumb Fairway Buoy, and his answer is by dead reckoning. Then comes the following—'(Q) Was your patent log streamed?—(A) No. I had taken it in. (Q) Where?—(A) I took it in between the Bell Rock and where I was making for. (Q) What material had you for ascertaining the distance you had run?—(A) The speed I was going through the water and expecting to pick up the light at any moment.' I think it is quite clear that the witness was only speaking to the period after 7.12 when he

says he was not streaming a log, and the inference from his answer is that he had streamed a log for some time after he started and before he came down to slow. I so understood him at the time, but apparently counsel cross-examining did not realise what he had said. The next questions, which are somewhat confused, appear to jump back to the period before 7.12, and to assume that no log was streamed during that period, and then a little further on the witness is asked—'And having no correct dead reckoning, had you any means whatever of ascertaining the approximate position of your ship as she entered the estuary of the Tay?' and he answers—'Experience in a ship entering the Tay I had none; it was only my general experience I could go by.' This evidence does not appear to me to afford any foundation for the assumption on which the defenders' experts were asked to base their opinions that no log had been streamed between the Bell Rock and the Tay. Nowhere was the witness asked the direct question whether he had done so, as in my opinion he should have been in view of his statement that he had taken the log in somewhere after leaving the Bell Rock and before 7.12. Pursuers' counsel left the evidence as it stood, and none of the other ship's witnesses were asked about the streaming of a log.

"Finally, the defenders' experts were asked to assume that the master concluded that the dumb buoy could not be the Fairway Buoy because he did not see a light burning on it. Now there is all the difference in the world between a buoy with no light and a buoy with a light which is not burning, though both may be referred to loosely as not lighted. An instance of this looseness of expression appears in the master's cross-examination, where he says he thought the buoy was not the Fairway Buoy 'because it had no light—it was a dummy buoy,' and four lines further on he says—'I assumed it was not the Fairway Buoy because it was not lighted.' In chief he had said that the buoy 'had no light and no bell,' and I have no doubt whatever that it was for that reason and not because no light was burning that the master assumed that the dumb buoy could not be the Fairway Buoy for which he was looking.

"I have dealt with these points at some length because the defenders' expert witnesses were asked to criticise the navigation of the ship on the footing that the master had completely lost his way before he went to slow, that at 7.12 he believed that he had reached the charted position of the Fairway Buoy, and that thereafter he went on blindly for about a mile and a half before he ran into the wreck, passing in the meantime the Fairway Buoy for no better reason than that it exhibited no lighted lamp and without taking the trouble to find out whether the light had not been accidentally extinguished. Under these circumstances criticism of the navigation would be easy, but it is not criticism which in my judgment is applicable to the facts of this case.

"In my judgment the ship was under the circumstances navigated with great skill

and care, and I cannot hold that the master's management of her was in any way to blame for what occurred. With nothing but the Bell Rock light and his chart to guide him he steered her on a course which after eight miles brought her within two cables of the charted position of the Fairway Buoy on a course nearly parallel to the line of leading lights. The point at which he slowed down seems to me to have been an appropriate distance from the point he was making for to ensure that he should not pass either the pilot cutter or the Fairway Buoy without observing them. A good look-out was being kept, and the dumb Fairway Buoy was reported by the look-out almost at the same moment as it was observed from the bridge. The lead was kept going as a precaution against the shifting of the sandbanks, as to which there is a caution both on the chart and in the 'North Sea Pilot,' and it seems to me absurd to suggest that soundings should have been taken and used for the purpose of locating the Fairway Buoy. In my judgment, when he saw that the buoy which he thought would be the Fairway Buoy was a dumb buoy it was natural and reasonable for the master to assume that he had overestimated the distance he had come, and that he was justified in continuing a little further to see if he could find the light-and-bell buoy with a top mark which he was looking for. The misfortune, as I have said, is that he found it so soon, but having found it I do not think he could possibly be expected to assume that in the position where it was it marked a wreck and not the fairway.

"This I think disposes of all the grounds of fault alleged against the master with the exception that he was proceeding without an up-to-date chart. This is a matter which I shall deal with hereafter, and meantime I turn to the pursuers' averments as to fault.

"The first two faults on the part of the defenders to which the pursuers attribute the accident are connected with the failure of the pilots to be at their advertised station in the vicinity of the Fairway Buoy. The question of the defenders' duties with regard to the refusal of the pilots to keep their station was considered in the '*City of Naples*' case, and the grounds on which it was disposed of negative any suggestion of liability on the part of the defenders for the pilots' absence from their station on the night in question in this case. But the facts in this case differ from those in the '*City of Naples*' to this extent, that it is not averred that the weather conditions were such as to justify the pilots in withdrawing to a position further up the river. The excuse tendered on record is that their withdrawal was due to mine-sweeping operations, but no evidence was led to support this averment. Further, I think that had they been at their station the accident would not have occurred, as the pilot cutter would have been met before the wreck was arrived at. Differing from the conclusion I reached in the former case, I should have held that in this case the accident was a natural and reasonable result of the failure of the pilots to keep station.

"Another ground of fault which is disposed of by the decision in the '*City of Naples*' case is that the defenders failed to mark the position of the wreck properly. Apart from the use made of the Fairway Buoy as one of the wreck buoys, which is founded on as a separate ground of fault, I do not think that any question as to the proper method of marking a wreck really arises in this case. If it did I do not doubt that the two large lighted buoys in position on 9th March 1919 were a more effective method of marking a wreck than the single small dumb buoy which was substituted for them at a later date, and which was held to be a proper method of marking in the '*City of Naples*' case. Evidence on the subject was, however, led, and in my opinion it is proved by the evidence of witnesses for the defenders (Meldrum, Swaddell, Ewing) who have knowledge of the local conditions, which I prefer to the evidence of witnesses for the pursuers who admit to having no such knowledge, that a lightship could not with safety be anchored permanently to mark the wreck of the '*Clan Shaw*.' It is, however, also proved that the steam tug Gilroy was used as a lightship to mark the wreck temporarily for two nights in November 1919 (Hannay Thompson). The evidence of Captain Metcalfe, which is illustrated by some instructive charts of wrecks in the navigable channel of the Mersey, shows that it is feasible to mark a wreck in a navigable channel by two buoys so as to indicate the position of the wreck to incoming ships. This witness also stated that wrecks in the Mersey which are a source of danger to navigation are never charted, and consequently are never indicated to mariners except by surface marks. They are dispersed as soon as possible, and until this is done they are buoyed so as to warn incoming vessels. On the other hand, wrecks which from their position are not regarded as a danger to navigation are marked on the Admiralty charts by the usual wreck symbol but are not buoyed. There are several wrecks similarly marked on the charts of the river Tay. This explains my former statement in the '*City of Naples*' case that a wreck symbol by itself does not indicate a danger to navigation. I may add in this connection that the wreck symbol indicated by a circle of dotted lines is never used on Admiralty charts.

"The remaining ground of fault is that the defenders moved the Fairway Buoy to mark the wreck, providing in its place an unlighted buoy which possessed no definite significance in the maritime world and was not recognisable as a safety buoy. So far as the second part of this complaint is concerned, I think the pursuers have failed to prove that there is any recognised form of buoy used as a fairway buoy. On the contrary the evidence establishes that fairway buoys in other places vary in size and in shape, and are sometimes lighted buoys and sometimes dumb (Dick Peddie). As a matter of fact the dumb buoy which was marking the fairway on 9th March had been used for the same purpose for some years prior to 1910, when the defenders purchased the light-

and-bell buoy to take its place. While I do not doubt that a light-and-bell buoy is a more satisfactory form of buoy to mark the entrance of the fairway to the Tay, I could not hold that the use of a dumb buoy for the purpose necessarily amounted to fault. Nor so far as the first part of the complaint is concerned could I hold that a light-and-bell buoy was in itself an inappropriate form of buoy to use for wreck-marking purposes. But in my judgment the removal of the light-and-bell buoy from its position marking the fairway to the position which it occupied on 9th March without so altering its appearance as to ensure that under no circumstances would a navigator be justified in assuming that it still marked the fairway, constitutes a failure in the discharge of their duties which amounts to fault. The defenders did so far alter the appearance of the light-and-bell buoy that they changed its colour to that which by convention signifies a wreck. But because there is no conventional light appropriate to a wreck-marking buoy they did not alter the light but allowed it to remain occulting every ten seconds as it did when it marked the fairway although it was only half-a-mile from its former position and practically on the same line. Had the colour or the occultation of the light been changed, either of which alterations could have been easily made (Metcalfe), no one would have been justified in mistaking it for the Fairway Buoy. Nor would any navigator, whether he possessed a chart showing the two lighted wreck buoys or not, have been justified in assuming that the light-and-bell buoy was the Fairway Buoy so long as the light of the other wreck-marking buoy was visible. But the defenders have proved conclusively that the lights on buoys are apt to go out and that no reliance can be placed on their remaining alight. It is also proved that the light on a buoy may become invisible owing to the heeling of the buoy (Metcalfe). Accordingly I think it must be assumed that up to 9th March 1919 the defenders were aware that it was always possible that the first lighted buoy which might catch the eye of a navigator approaching the Tay either at night or under conditions in which the bodies of buoys might be indistinguishable would be the light on the very light-and-bell buoy which was advertised as marking the fairway in all charts and notices available to the mariner up to 25th January 1919. This is what happened in this case, and the light instead of being a warning acted as a bait which attracted the 'Circassia' to the wreck. But for the defenders' fault in removing the light-and-bell buoy without altering the appearance of the light this accident in my opinion would never have taken place. It is said that the master ought to have been aware that during the war all lights had been extinguished and that he was not entitled to assume that by 9th March the Tay fairway light had been relit. The order to restore lights was communicated to the defenders on 23rd November 1918 by telegram, which suggests that it was to be attended to promptly. It is proved that in some places

in Scotland it was found impossible to restore pre-war lights for some months (Dick Peddie), but the only obstacle to restoring the fairway light on the Tay was the fact that it was being used half-a-mile away to mark the wreck (Hannay Thompson). I think the light-and-bell buoy ought to have been replaced at once in its position marking the fairway, and if, as has been held in the 'City of Naples' case, a single dumb buoy was sufficient to mark the wreck there was no reason why this should not have been done. The approval of the Senior Naval Officer at Dundee to the use of a single buoy to mark the wreck was intimated to the defenders on 18th December 1918, and I do not think it is proved that it was impossible to carry out the change between that date and 9th March, or indeed that any serious attempt was made to do so.

"There remains the question whether it was fault on the part of the pursuers that the ship was not furnished with the most recent charts and notices to mariners obtainable in this country at the date of the accident. The most recent information available would not have disclosed the actual surface marks then in position, but the latest chart available when the ship left Liverpool would have disclosed the wreck marked by two lighted buoys with the same occulting lights as shown by the Fairway Buoy half-a-mile distant. The notice to mariners and corrected chart issued in January and February 1919 would have indicated that the fairway was no longer marked with a lighted but with a dumb buoy. I do not doubt that if the captain had possessed either of these pieces of information the accident might not and probably would not have occurred. The defenders argue that they are only bound to consider ships provided with all the most recent information, and in normal times I do not doubt that this is so. But the defenders plead the abnormal condition of the times for some months after the armistice in defence of their own actings, as I think they are fully entitled to do. I do not, however, think that they were entitled to overlook that for some months after the armistice there might be vessels arriving at the Fairway Buoy in quest of a pilot which experiencing difficulties similar to their own had failed to obtain the most recent information, and in particular the information published at the end of January 1919 that the fairway was now marked with a dumb buoy. I think the master had done all that he could reasonably be expected to do to obtain the most recent information, and that even if he had succeeded in obtaining a chart showing the three buoys within half-a-mile of each other with lights occulting every ten seconds, the most seaward one being described as a light-and-bell buoy, he would still in my opinion have been justified in believing that the light which he first observed indicated the Fairway Buoy.

"The only port of call where he could have obtained the information published in January 1919 was at Port Said, and apparently it had not reached there at the

date of his call. The averment by the defenders on record of fault with reference to the chart is contained in answer 7, where they say the accident was due to the *negligence of the master* 'in passing the Fairway Buoy and proceeding towards Dundee without an up-to-date chart and sailing directions and in disregard of the notices issued by the Board of Trade and the Admiralty warning mariners of the presence and position of the wreck.' I have already indicated that in my opinion the master exhibited the utmost caution and care in approaching the Tay, and I think that this was in part due to the age of his chart. He admits that he was not happy about it. The defenders' witness Captain Ruthven when asked—'If in point of fact his chart was four years old does that make any difference to the master's duty?' answers—'It would only engender more caution.' He of course condemns the master for want of sufficient caution, but in view of this evidence and of the fact that in my judgment the master exercised the utmost caution I cannot hold that in attempting to find the Fairway Buoy with an old chart he was in fault. But the defenders' witnesses gave evidence that it was the duty of the owners of the 'Circassia' as soon as they learned that the destination of the ship had been altered to have sent out all the latest information to meet the ship before she reached the Tay. This they say could have been sent to Port Said or the Downs. I refer particularly to the evidence of Captain Ruthven as to the practice of the Orient Line. He also refers to section 457 of the Merchant Shipping Act and to an Order of the Board of Trade as requiring that this should be done, but these regulations appear to me to refer only to the supply of charts, &c., when the ship starts on her voyage. It is quite clear that it is the owner's duty to supply and the master's duty to see that he is supplied with all the most recent charts required on the voyage upon which the ship is embarking. But I cannot hold that there was fault or neglect in failing to supply charts of the Tay to a ship starting from Liverpool to Calcutta on a round voyage to London or Glasgow. If it was the owner's duty to send such charts to meet the ship after they knew that her destination had been altered, then I think it ought to have been averred on record and put specifically to the pursuers' witnesses. Neither of these courses was adopted, and accordingly in my opinion the defenders have neither proved this duty on the part of the owners nor had they done so would they have been entitled to found on it.

"The result is that I find that the accident in this case did not arise out of any fault on the part of the pursuers, but was directly due to the defenders' fault in removing the light-and-bell buoy from its charted position and using it to mark a wreck in the immediate vicinity without making any alteration in the light shown by the buoy. I accordingly find the pursuers entitled to decree."

The defenders reclaimed, and the case was heard before the First Division on 18th and 22nd to 25th February and on 1st and 2nd March 1921.

Argued for reclaimers—(1) The collision was due (a) to the owners' fault in failing to furnish the master with an up-to-date chart, and (b) to the master's faulty navigation. It was the duty of shipowners to see that their vessels had up-to-date charts (Notice to Mariners for "Foreign-going Ships," 1st March 1919), and although one had not been obtainable from Admiralty sources it could have been supplied at the Downs. Such a chart would have shown the wreck, and it was admitted by the master that if he had had one the collision would not have taken place. Having no local knowledge and no up-to-date sailing directions the master was in fault in passing the dumb buoy without a thorough inspection. He had inferred, as he was not entitled to do, that the dumb buoy was not and that the lighted buoy was the Fairway Buoy. If it was misty he was all the more negligent in passing the dumb buoy, and if it was clear and he was keeping a proper look-out he must have seen the smaller wreck-marking buoy. Further, if he had used his lead properly he would have known from the depth that the dumb buoy was the Fairway Buoy. The account given by the master was unreliable. (2) There was no trap in the arrangement of the buoys. If the master was misled it was by his own fault in assuming that the Fairway Buoy corresponded with the description in his out-of-date chart. The Fairway Buoy was in its proper position. No question arose as to the method of buoying the wreck. It was adopted under orders of the Admiralty which the defenders were bound to obey. (3) The defenders were not to blame for the absence of the pilot cutter from station. As pilotage authority the defenders were merely licensors. In any event the absence of the pilots from their station did not infer liability on the part of the defenders. It was not proved that they knew of or acquiesced in the pilots' neglect of duty. The fact that the defenders were aware that the vessel was due imposed no special duty upon them. It was not proved that they knew that the pilot cutter was absent from her station.

Argued for the respondents—(1) Neither the owners nor the master were in fault in regard to the charts. The vessel was under Government requisition and the owners were not consulted about her destination. The master had applied for charts in accordance with the instructions he had received from the Admiralty. (2) There was no faulty navigation. If the master had known that the dumb buoy was the Fairway Buoy there would have been no fault in what he did. He was looking for a pilot and was in the proper position to obtain one. There was no case of failure to keep a proper look-out. The master's evidence was believed by the Lord Ordinary and there was no good ground for challenging his credibility. (3) The cause of the collision was the defenders' neglect of their duties in regard to buoyage and pilotage. The buoyage should have been adequate and correct (Dundee Harbour and Tay Ferries Act 1911, sections 92 and 94) but was not so. It gave no indication of the posi-



tion of the wreck and was misleading owing to the use of the charted Fairway Buoy, without effective distinction to mark the sunken wreck—*Owners of s.s. "Forto" v. Orkney Harbour Commissioners, 1915 S.C. 743, 52 S.L.R. 537*. Its light should have been changed to green. The Admiralty's orders did not necessitate the use of the former Fairway Buoy as a wreck-marking buoy. Further, no alteration in the description of the Fairway Buoy in the charts having been made during war time, the defenders were bound to anticipate vessels coming in with incorrect charts and should have rearranged the buoys after the Armistice. The buoyage together with the absence of the pilot cutter from station created a trap. The absence of the pilot cutter was due to the defenders' neglect of their duty to maintain an efficient service of pilots—*Ellerman Lines, Limited (s.s. "City of Naples") v. Trustees of Harbour of Dundee, ante p. 186, per the Lord President at p. 198*. There was no excuse in this case for its absence. Further, the knowledge of the defenders of the vessel's arrival, of the slackness of the pilots, and of the state of the buoyage, created a special duty on them to see that the pilot cutter was at her station.

At advising—

LORD PRESIDENT—[*After the narrative quoted above*]—... The pursuers' case is that the Harbour Trustees' arrangement of the buoys and lights as existing on the morning of 9th March 1919 was faulty and misleading and was the cause of the "Circassia" being brought into contact with the wreck. The pursuers further and separately hold the Trustees responsible for the accident on account of the absence of the pilot cutter from her advertised station. When the accident to the "City of Naples" occurred the conditions of visibility left nothing to be desired, and the question of the lights shown on the buoys employed to mark both the charted site of the Fairway Buoy and the position of the wreck was of no practical importance. But owing to the low visibility which prevailed in the present case especially on the immediate surface of the water, the question of the lights on the buoys and the character and colour of those lights is material. The actual arrangement of the buoys (lighted and unlighted) as laid on the morning of the 9th March 1919 is not shown on any chart in process, but it can be revealed to the eye by making the following corrections on No. 4 of the bound volume of *Excerpts from Charts*. (*First*) At the charted site of the Fairway Buoy the dumb buoy already referred to had been substituted for the light-and-bell buoy shown on No. 4. (*Second*) The surveyed position of the submerged wreck of the "Clan Shaw" is marked by the red figure; accordingly the charted wreck-symbol (horizontal line with three diagonals above it) must be disregarded. (*Third*) Of the two green wreck-marking buoys shown on No. 4, the one charted between the Fairway Buoy and the wreck had been moved to the position indicated by the blue circle, that is,

to the southward of the wreck; therefore the original site of this buoy as charted must be disregarded. (*Fourth*) The red circle shown between the blue circle and the wreck represents another position, to which this buoy was again moved after the accident to the "Circassia," and must also be disregarded. (*Fifth*) The other wreck-marking buoy shown on No. 4, fully a cable westward of the stern of the wreck, was at its charted site on the morning of the 9th March; but the important fact must be observed that it was in truth the very light and bell buoy (white occulting every ten seconds) originally laid at the charted site of the Fairway Buoy and shown in that position on the master's chart. It had been moved from that site, and was being temporarily used as a wreck-marking buoy.

The explanation of this arrangement, so far as the history of the thing goes, is as follows:—When war began the Admiralty ordered the extinction of all navigation lights, and the white occulting light of the Fairway Buoy was put out on 7th September 1914 until further Admiralty orders. During the war the port of Dundee was sometimes closed altogether by the Admiralty, and when open the Admiralty provided against the dangers to which traffic was exposed by the absence of lights by the following three measures—(1) they made pilotage compulsory, in the first instance by notice dated 30th September 1915, and then by order under the Defence of the Realm Regulations, paragraphs 36, 37, and 39, dated 17th November 1917; (2) their armed yacht which was on constant guard at the entrance to the river attended on incoming vessels and led them in when the defenders' pilot cutter was not on station; and (3) they provided a steam drifter to enable the defenders' pilots to keep station even when stress of weather might prevent them from doing so by means of the cutter. While this régime was in force the "Clan Shaw" went down (in January 1917) at the position shown by the wreck-symbol (horizontal line and three diagonals) on No. 4. By the early months of 1919 the shifting sand had carried the wreck in a south-south-westerly direction to the position shown by the red figure. The responsibility for buoying the wreck lay with the defenders, but the Admiralty being in control of the use of the port and of all navigation in the river, prescribed the method of wreck-buoyage they wished to be adopted. It consisted of two buoys laid at the sites of the green buoys charted on No. 4. This mode of marking the wreck (on the principle of an isosceles triangle) was referred to in the "City of Naples" case. It was unprecedented in the practice of the mercantile marine, of the Northern Lighthouse Commissioners, and of lighthouse authorities generally; and no witness in this case, or in the "City of Naples" case either, has had a word to say in its favour. But the Admiralty, whose requirements—looking to the navigation arrangements they had made—it was alone necessary to consider, no doubt had their own reasons for it. Some months before the wreck of the "Clan Shaw" occurred the Fairway

Buoy broke adrift. It was recovered and recharged with carbide in dock. But instead of replacing it on its charted side so as to be ready for relighting on restoration of peace, the Trustees on their own responsibility utilised it in March 1917 as one of the wreck-marking buoys for the "Clan Shaw." About the same time they laid a dumb buoy at the charted site of the Fairway Buoy. This dumb buoy was in fact an old discarded fairway buoy which had been used before the adoption of lighted buoys. In this way the proper (light and bell) Fairway Buoy became, so to speak, *acting* wreck-buoy for the remainder of the duration of the war, and the white occulting light distinctive in peace time of the Fairway Buoy became one of the lights marking a wreck only five cables or so distant from its proper and charted site. The other wreck-marking buoy, which was smaller in size and was also lighted but with a less powerful lamp, exhibited the same colour and occultation, while what I may call the *acting* Fairway Buoy showed no light at all.

So long as the war lasted and the Admiralty control of the river navigation was maintained, the facilities for mistake and confusion on the part of an incoming mariner which this arrangement created were ineffective. But when peace conditions were restored and the Admiralty régime ceased the situation was entirely changed. It was on the 23rd November 1918 that the Admiralty issued instructions for the restoration of all navigation lights as in peace time, and the Trustees telegraphed that the river lights would be restored as soon as possible. These instructions, and the consequently expected immediate restoration of the regular navigation lights which were familiar in peace time, were published to mariners by the Admiralty as the Trustees must or ought to have known. The Trustees were aware, moreover, that the charts obtainable at this time continued to show the Fairway Buoy as a light-and-bell buoy (white occulting every ten seconds), for they had been expressly forbidden to make intimation of the extinction of the peace-time lights or to authorise any change on the river charts. They were further aware that after the armistice the armed yacht was no longer in attendance at the entrance to the river, that compulsory pilotage was no longer enforced, and that as the Admiralty had intimated the steam drifter would be shortly withdrawn. In these circumstances the existing arrangement of the buoys, coupled with the peculiarly dangerous situation of the wreck, exposed life and property at sea to the greatest hazard. The wreck lay not far from the charted site of the Fairway Buoy—right in front of the entrance into the river—and within the ambit of the pilot station, while the buoy exhibiting the white occulting light, which constituted the distinctive mark for the identification of the pilot station, now showed its light—unaltered in character, occultation, or colour—close to a submerged wreck, with another buoy sometimes lighted and showing a similar light and sometimes unlighted not far from it. In these circumstances a re-

arrangement of the buoyage at the earliest moment after the restoration of peace and of freedom of navigation—such as would unmistakably distinguish the Fairway Buoy as such, and prevent confusion of it with the wreck-marking buoys, or either of them—was in my opinion a duty on the part of the Trustees of the highest urgency.

The Trustees did not, however, replace the peace-time light at the charted site of the Fairway Buoy until four months (31st March 1919) after receipt of the Admiralty instructions, that is, until three weeks after the accident to the "Circassia," and in the meantime they did nothing whatever to distinguish the light of the wreck-marking buoy or buoys from the light of the peace-time Fairway Buoy until a fortnight later still, when (after several disasters had occurred) they at length adopted the simple expedient of putting a green shade on the light of the wreck-marking buoy. This device was as effectual as it was obvious, for green is the recognised wreck colour, and it would have made confusion between the Fairway Buoy and the wreck-marking buoy impossible.

The Trustees allege reasons why the light of the Fairway Buoy was not earlier replaced, and I shall examine these in a moment. But they allege none—and I think there is none except neglect of duty—for their failure to colour the light of the wreck-marking buoy or buoys green. It is true that in maritime practice many wreck-marking buoys are unlighted, and many wreck-marking buoys that are lighted exhibit a white light. But the question of colour is one of circumstances, and in the evidence there is only one opinion expressed as to the necessity for adopting a distinctive green colour for the light of wreck-marking buoys in a case where confusion between wreck marks and other marks is possible. It is enough to refer to Mr Peddie's evidence both in the "City of Naples" case (imported into the proof in the present case) and to his statements in this case. The risk of confusion, and the consequent necessity for adopting the distinctive colour, were increased, not diminished, by the circumstance that the occulting white light characteristic of the Fairway Buoy had been moved to the site of the wreck, while the buoy laid at the charted site of the Fairway Buoy displayed no light at all. The putting of a green shade on the light of the wreck-marking buoy involved neither time, trouble, nor expense. But so little do the Trustees appear to have applied their minds to the matter that it was never thought of until in the month of April 1919 the Senior Naval Officer at Dundee volunteered the suggestion to them. No member of the Board was put into the witness-box, but the general manager who appeared for them frankly says that "the Harbour Trustees as Harbour Trustees have taken no concern in the buoying of the 'Clan Shaw'; that has been entirely done by me in accordance with the instructions or approval or sanction of the Admiralty"; and I am left to conclude that even after the Admiralty control of the river navigation ceased, and

after the Admiralty instructions to restore the navigation lights as in peace time were received, the Trustees maintained the same attitude of indifference.

With regard to the restoration of the light and bell buoy, showing a white light occulting every ten seconds, to the charted site of the Fairway Buoy the position is much the same. If the Trustees concerned themselves with the matter at all—and the evidence leaves on my mind the impression that they took no interest in it—there was a complete absence of that promptitude in action which the perils of the situation clamantly demanded. For three weeks nothing at all appears to have been done. Then they ask the Northern Lights Commissioners for the loan of a couple of buoys, and when the Northern Lights Commissioners make the suggestion that one buoy is enough to mark the wreck they ask the Senior Naval Officer at Dundee if he approves. The matter is allowed to drift for a month until 19th January 1919, when the Senior Naval Officer writes that the proposal is approved. Even then nothing is done for three weeks more—precious weeks in view of the risks that were being run. On 7th February for the first time the defenders' staff is instructed. Only two visits to the locality are made during February, and as the result of further visits on the 6th, 7th, and 8th of March the position of one of the wreck-marking buoys had been altered, but nothing had been done in the way of replacing the proper light at the Fairway Buoy. The men employed speak to unfavourable weather conditions, but I am unable to hold it proved that from, say, 20th January (to take even that late date) until 9th March the weather was so continuously adverse that the work of moving the buoys from one mooring to another if taken in hand with any due sense of its urgency could not have been performed.

I cannot resist the conclusion that the arrangement of the buoys existing on the morning of the 9th March was faulty and calculated to mislead an incoming mariner in two respects. The Fairway Buoy should have had its proper peace-time light-and-bell buoy (white occulting every ten seconds) restored to it, and at any rate the wreck-marking light or lights should have been coloured green. If either of these things had been done on or before that morning the accident to the "Circassia" could not have occurred. That neither of them was done on or before that date was attributable solely to neglect of duty on the part of the Trustees.

As has been seen, the "Circassia" was at the time of the disaster seeking to pick up the Fairway Buoy only as a means to an end; namely, to meet the defenders' pilot cutter at her advertised station and take a pilot on board. In point of fact the pilot cutter was not at her station, nor had she been near it at any time during the preceding night. She was lying at anchor up the river between 4 and 5 sea miles away near No. 5 black buoy. The defenders have put neither their pilot-master (who was also harbour-master) nor any of their pilots into

the box, but the circumstance just mentioned appears from the pilot cutter's log. Both parties' counsel referred to this document in the course of the debate, although it does not appear to have been technically made part of the proof, and I think therefore I am entitled to look at it. It also appears from the log of the pilot cutter that no stress of weather accounted for the failure of the pilots to be on station, nor is there any attempt to prove anything of the kind. Moreover, the owners of the "Circassia" had given the harbour-master (who was also pilot-master) written notice on 4th March that she was due at Dundee on Saturday the 8th with jute and a large number of passengers and their luggage. This intimation was probably made with a view to berthage, but it apprised the defenders through their pilot-master of the expected arrival of the vessel on Saturday or very soon after, and the defenders were well aware, or ought to have been, of the peril which lay hidden under water within the ambit of the pilot station. Moreover, they knew, or ought to have known if the preceding part of this opinion is well founded, that the restoration of the peace-time Fairway Buoy light was long overdue, and that the existing arrangement of the buoys at the charted site of the Fairway Buoy and at the wreck was capable of misleading mariners who were on the look-out for the pilot cutter, especially if they did not have local information with regard to the presence of the wreck. Not only was nothing done to secure that the pilot cutter should be at the entrance to the river (see Bye-Laws for Pilots, published by the defenders, paragraph 62) in order to attend on the "Circassia," but the Trustees were at the time fully aware of a practice on the part of pilots of deserting station, which practice they had acquiesced in and made no attempt—up to the 9th of March at least—to check. The special difficulties in keeping station which had arisen during the war from submarines and mines were no longer serious. With those special difficulties there had also disappeared the special facilities which the Admiralty had provided in the shape of the armed yacht and the steam drifter. The pilots, no doubt, thought themselves inadequately remunerated owing to the small amount of traffic using the port, but the fact that they habitually preferred a comfortable anchorage up-river to strenuous attendance at an exposed station was well known to the Trustees. Beyond a pious expression of hope for the restoration of pre-war persistence in duty in their minute of 8th January 1919, there is no evidence of any attempt by the Trustees to see that their responsibilities to the seafaring public in this particular were fulfilled. The explanation given is that the Trustees considered they had no responsibility except as a licensing authority, and no duty to see that the pilotage service of the port and river was efficiently performed. Mr Hannay Thompson makes this clear, and in his evidence in the "City of Naples" (imported into the proof in this case) he repudiated any delegated responsibility on his own part. As to

the position of the Trustees, I venture to refer to the opinion I expressed in the "*City of Naples*" case. I think that in the circumstances of this case the Trustees were in breach of their duty as pilotage authority in regard to the "*Circassia*." I think that collision with a wreck known to the Trustees to lie in or on the outskirts of their pilot station was a reasonable and natural consequence of the absence from the station of the pilot cutter in accordance with a practice known to and acquiesced in by the Trustees. Further, and over and above that, I think they owed a special duty to the "*Circassia*" in consequence of the knowledge they had of her expected arrival at a time when their buoyage arrangements presented special dangers. The Lord Ordinary is mistaken in thinking that anything said in the "*City of Naples*" case on the subject of pilotage stands in the way of the conclusion I have just expressed. In that case not only was it impossible to hold the mishap which occurred a natural consequence of the absence of the pilot cutter, but it was proved that a week or ten days before the disaster to the "*City of Naples*" the Trustees had awakened to a sense of their responsibilities in consequence of the "*Circassia's*" accident a month earlier, and had taken effectual steps to enforce the by-law with regard to keeping station. It was for that reason that I thought the Trustees could not be held at the date of the disaster to the "*City of Naples*" (15th April 1919) to be acquiescing in the habitual desertion of the station by the pilots.

My opinion accordingly is that the pursuer's case is made out both as regards the faulty and misleading buoyage arrangements and as regards the neglect by the Trustees of their duties as pilotage authority. I now turn to the case for the Trustees. It is twofold. In the first place the Trustees say that the whole story told by the "*Circassia*" is false in fact, and in the second place they contend that the master caused the accident, or at least materially contributed to its occurrence, by his own negligence.

If the Trustees are right on the first point there is an end of the case. The point is expounded on their behalf by their witness Captain Ewing, who thus explains what he thinks really occurred—"I think that when the master came in and picked up the dumb buoy he at once recognised that to be the Fairway Buoy; he continued on his course N. 54° W. to get that dumb buoy bearing about S.E., then he hauled up on the recognised N.W. course for the two lights in line, and he saw neither buoy nor anything else until he was close up, and then he put his helm hard a-starboard and struck the wreck on his quarter." In cross-examination the witness endeavours to clothe this effort of imagination with reality by explaining that he meant "port" when he said "starboard," and by adducing a number of other considerations which bring no conviction to my mind. I do not think much remains of the theory which he builds on the suggested falsehood of the master's testimony when his cross-examination is

finished. A much more palpable point is made by the witnesses adduced by the Trustees out of the fact that *notwithstanding* the density of the atmosphere the master was able to pick up (a) the dumb buoy at 4 to 5 cables' distance, (b) the light of the furthest distant wreck-buoy at a similar distance, and (c) the most seaward of the red conical (Gaa) buoys at about 4 cables, while *in consequence* of the density of the atmosphere he was prevented from seeing the body of the furthest wreck-buoy, and both the light and body of the nearest wreck-buoy, until a few seconds before the vessel touched the wreck. This certainly strikes one as remarkable. But the light of the furthest wreck-buoy, besides being of greater power than that of the nearest wreck-buoy, was 6 feet higher (about 16 feet above the water), and the master's point of view was from the elevation of the bridge, some 14 feet higher still (about 30 feet above the water), while the densest parts of the mist, besides being "patchy" or localised, lay so low on the water that when the pilot cutter came on the scene two or three hours later her sails were seen through the upper and lighter air long before her hull was discernible at all. The effects of mist in obscuring visibility are notoriously uncertain, and the witnesses for the Trustees other than Captain Ewing do not go further than to say that while the circumstances appear to them to be improbable they are not impossible. The Lord Ordinary saw the "*Circassia's*" witnesses and heard their evidence, and formed a favourable opinion of the master in particular as a credible and straightforward witness. I think I am bound to accept his and their accounts of what they saw and did as substantially accurate.

The Trustees maintain that the master was in fault in not having in his possession an up-to-date chart of the river Tay. He had of course no chart of the Tay on board when he sailed from Liverpool in December 1918, because, as has been explained, it was then unknown what his return port of destination might be. The edition of the Tay chart which was in his possession he obtained at Calcutta on learning that he was to proceed to Dundee. It was dated 30th April 1915. It showed the Fairway Buoy as a light-and-bell buoy (white occulting every ten seconds), but it did not of course disclose the presence within the ambit of the pilot station of the wreck of the "*Clan Shaw*" which occurred in January 1917. The first and only edition of the chart which showed the wreck is dated 1st February 1918 (this is No. 4 of the bound Excerpts from Charts—of course without the red and blue markings), but there were later issues of that edition produced, I think, in February 1919 showing what are called "small corrections"—Nos. 2 and 3 of the bound Excerpts. It is said truly that if the master had had a 1918 chart he would have known to keep clear of the neighbourhood of the wreck. The vessel being under Government requisition, and her destinations being communicated to her by naval officers without consultation

with her owners, she was supplied with charts by the Admiralty. An attempt was made by the Trustees at the debate to hold the owners to blame for not themselves obtaining and supplying the master with charts of the Tay when they learned (as I assume they would) of the new destination appointed for the "Circassia" at Calcutta. The only charge made on record, however, is against the master, and in view of the unusual conditions under which the ship was being worked I need say no more about the suggested failure in duty by the owners. When the master got his instructions at Calcutta he applied to the Port Officer for a chart of the Tay, and was told to apply to the Admiralty sub-agents in Calcutta for the sale of charts and other maritime information. This was in accordance with the Admiralty notice to mariners (No. 2 of 1918) of which the master had been furnished with a copy when he left Liverpool. The chart which he got from them was the latest they had. He applied again in presence of the Naval Officer at Port Said for the whole route charts of the North Sea, but was not supplied with any later chart of the Tay. Being instructed at Port Said to proceed to the Downs for further instructions there, he was told at the Downs that everything was clear north of the Tyne, except that there might be some floating mines off Fife Ness. My opinion is that in these circumstances fault cannot be attributed to the master for not having in his possession a more up-to-date chart than the only one which, on application to the sources pointed out to him by the Admiralty, he was able to obtain.

But the Trustees used the absence of an up-to-date chart as one of a number of circumstances from which they sought to make the master responsible for the accident to his ship. Their main argument was that he was negligent in passing beyond the dumb buoy at all without having identified it.

They pointed out truly that if he had stopped at that point, lowered a boat, and examined the dumb buoy at closer quarters he could have discovered that although it had not been painted for at least two years it did have black and red horizontal stripes on its surface, and did have the words "Tay Fairway" inscribed on it in white letters 11 inches high. While the Trustees' painter who had seen the dumb buoy from the vicinity of the wreck two days before the "Circassia's" mishap is more than doubtful of the visibility of the name and colours on the buoy at that distance, it is, I think, established that on the morning of the 9th both the colours and lettering, though not visible from the bridge of the "Circassia" through the prevailing thickness, could have been seen on examination at close quarters. I do not place much reliance on the photograph of the buoy (taken more than seven months after the 9th of March, and after it had lain in harbour for six months and a half, when apparently only a few streaks of bird's lime remained on the upper part of it) as a reproduction of the condition the buoy was in

at the conclusion of a two years' sojourn at sea outside the entrance to the river. The master was, however, fully conscious of the disadvantages to which a four years' old chart might expose him; and the thickness which obscured a clear view increased the risks of navigation and made it difficult to locate with precise accuracy his exact position in relation to the pilot station and the charted site of the Fairway Buoy. The Trustees are, I think, entitled to say that these circumstances imposed upon him the duty of special caution.

The Trustees say that he ought to have been able to identify the site of the dumb buoy with the charted site of the Fairway Buoy by accurate dead reckoning. The log was streamed when the vessel left the Bell Rock, but was taken in before the dumb buoy was observed—I suppose (but there is no exact proof about the point) when the vessel's speed was taken off. The master's reckoning that he had proceeded to a point at which the Fairway Buoy might be expected to come into view was correct, although it did not enable him in the absence of visible landmarks to verify the charted site of the Fairway Buoy so as to make identification certain between it and the dumb buoy on the one hand and the neighbouring white light (occulting every ten seconds) on the other. I do not think a charge of negligent seamanship is made out on the head of inaccurate dead reckoning.

Again, they say that he should have been able by means of soundings to recognise earlier than he did that his position had moved inshore of the ten-fathom line on (or a short way inside) which the Fairway Buoy was charted. But from the time when the ship slowed down the quartermaster (who had according to regulations been stationed in the chains at an earlier period) was casting the lead continuously, taking "a minute or so" for each cast. At 7.12, when the dumb buoy was first sighted at 4 to 5 cables' distance, "no ground" was reported, and this report was repeated at each cast until the moment of impact with the wreck, when the first report of bottom was made at  $6\frac{1}{2}$  to  $6\frac{3}{4}$  fathoms. There is conflict between the witnesses for the pursuers and for the defenders respectively as to whether a leadsman should be able to get bottom, the ship's speed being 3 to  $3\frac{1}{2}$  knots, at 10 or even 12 fathoms instead of at 6 or 7 fathoms. It must be kept in mind that when the "Circassia" approached and passed the dumb buoy it was nearly flood tide, and that consequently  $2\frac{1}{2}$  fathoms have to be added to the depths shown on the charts, and that the caution printed on all the charts with reference to the shifting character of the sands forming the sea floor in the locality prevents too minute reliance being placed on soundings as a means of ascertaining small differences of position. But unless it were proved that a leadsman of ordinary skill gets bottom at something like 10 or 12 fathoms when the ship's speed is from 3 to  $3\frac{1}{2}$  knots the substratum of the Trustees' contentions on this head is wanting, and I am unable to hold it proved that a leadsman of ordinary skill ought to have got bottom

at more than something like half that depth.

In forming a judgment on the question whether the master was negligent of the duties of good seamanship in passing beyond the dumb buoy, there are two closely connected avenues of inquiry which appear to be specially relevant and important. One is to ascertain how soon after coming abreast of the dumb buoy the white light occulting every ten seconds was picked up. The other is to ascertain what the master thought, and how and why he acted, between the time when he came abreast of the dumb buoy and the time when he changed his course on observing the white light occulting every ten seconds.

With regard to the first of these topics, the evidence is not, and probably could not be, perfectly distinct. On the assumption that the white light was approximately 800 yards or 4 cables away when first observed, the "Circassia" may have passed the dumb buoy by about 2 cables, because it will be seen from No. 4 in the volume of Excerpts from Charts that the charted site of the Fairway Buoy is distant 6 cables from the westmost wreck-marking buoy, and the difference between 800 yards and 6 cables is of course two cables. But on the assumption that the times assigned for the first observation of the dumb buoy (7.20 a.m.), and for the first sighting of the light and the alteration of course (7.25 a.m.), and for the impact with the wreck (7.33 a.m.), are also approximately accurate, the "Circassia" must have passed the dumb buoy by a much shorter distance when the white light was observed, because according to those times the distance travelled by the ship at a regular speed of 3 to 3½ knots (1) between the point where the dumb buoy was first observed and the point where the white light was first observed, and (2) between the latter point and the site of the wreck, were as 5 to 8, whereas (as will be seen from No. 4) the charted site of the Fairway Buoy is practically midway between the point where the dumb buoy was observed and the position of the wreck. Checking each of these approximations by the other, I think the fair result is that the "Circassia" had passed beyond the dumb buoy but not by much—the most by a cable's length.

With regard to the second of the topics above referred to, there are two passages in the master's evidence in which he describes the effect produced on his mind by the successive observations of the dumb buoy and the white light occulting every ten seconds. First he says—"After seeing that which I thought was the Fairway Buoy" (*i.e.*, the dumb buoy) "had no light, I thought it was something I did not know anything about, or it might have been a floating buoy, and I really did not take any more notice of that buoy. (Q) Did it occur to you that it was a substitute for the Fairway Buoy?—(A) No, not the slightest. I accordingly proceeded on, expecting to get the fairway bell buoy and get my pilot. . . . As we were still proceeding on I suddenly saw a light occulting every ten seconds, and I said—in fact we all said at the same time, the chief officer on my left and Mr Robey, the pilot, on my

right—"That is the bell buoy," and it gave me confidence and I proceeded on. I altered my course immediately after I saw that light. I made an alteration to the northward of 10°. My purpose was to steer a little bit clearer and bring it a little more on the bow, and expecting to pick up the pilot any moment." Secondly, he says—"I had ceased to take any notice of the buoy" (*i.e.*, the dumb buoy) "more or less. I put that to one side as being a buoy. That was when I saw the light. I ceased to take any notice except looking casually around. It was not interesting me, because I was enough distance off and not in any danger." As these passages were the subject of much debate I shall state as accurately as I can what I think is their fair import—(1) When the dumb buoy was first picked up the master expected from his position that it would turn out to be the Fairway Buoy he was looking for. (2) When it was seen that the buoy carried no light, and that its form presented none of the characteristics of the Fairway Buoy as these were described in the sailing directions and in the chart, the master formed the belief that he was mistaken in his expectation, and that the dumb buoy was not the Fairway Buoy he was looking for. (3) When the white light occulting every ten seconds was observed his belief was confirmed, and he became confident that it would prove to be the light of the Fairway Buoy. (4) The master accordingly considering himself at a safe distance from any obstruction which the dumb buoy might mark proceeded in his search for a pilot towards the white light, changing his course so as to keep well clear of the expected Fairway Buoy. Unfortunately the white light only lured him on to the submerged wreck.

Now the question is, whether, having regard to the shortness of the interval both of time and space which elapsed between the disappointment of the master's expectations at the dumb buoy and the restoration of his confidence at sight of the white light, it is reasonable to charge him with negligence in carrying his search for a pilot a cable or so beyond the dumb buoy without first stopping and making a close inspection of it. If not, it does not seem to me reasonable to charge him with negligence in going on a little further, while the leadsman continued to report "no bottom," in order to approach a light which exhibited all the characteristics of the Fairway light and bell buoy. The witness, who is perhaps the most experienced seaman among those adduced by the defenders, does not stand up to the rigid standard of seamanship set up by the defenders' argument. He is asked—"Assuming that these leadsmen were fairly competent, not perhaps as good as those which you were accustomed to, but fairly competent, was the captain in your view, when he got no bottom signalled, entitled to proceed cautiously?—(A) Not without identifying that buoy, and if the weather was so thick that he could not identify it I say that he should put his anchor down. (Q) Do you mean to say he is not entitled to proceed half-a-mile in water which he is sounding and getting no bottom?—(A) He

might very cautiously go half-a-mile or a quarter of a mile." He seeks to qualify this in a subsequent passage but on a mistaken assumption that the master was not using a lead at all. This opinion agrees in essentials with that of the pursuers' leading expert that if caution with regard to speed was observed—as it was—and if the lead was kept going—as it was—the master committed no negligence in seamanship in passing beyond the dumb buoy in his search for a pilot. The case would have borne a very different complexion if the master had formed the design of reaching the entrance of the river, or if he had attempted to push his way indefinitely inshore. I cannot think that to convict the master of neglect of seamanship in the circumstances which attended this mishap would be consistent with justice. It must be remembered that the *onus probandi* is on the defenders on this part of the case.

If the former part of this opinion is well-founded it was the Trustees themselves who by a faulty selection and arrangement of the buoys misled the captain into mistake and disaster. He knew before leaving Liverpool in December 1918 that the Admiralty had ordered in the preceding November all navigation lights to be restored as in peacetime. He was reminded by the notice to mariners which he had on board with him that this order was being carried out at the time he left Liverpool, and he did not reach the Tay until three months later. He was in my opinion doubly misled. He was misled to believe that the defenders' dumb buoy was not the Fairway Buoy, and he was misled to conclude that one of the defenders' wreck-marking buoys was the Fairway Buoy. I think the impressions he was thus induced to form were neither unreasonable nor unnatural nor hastily formed, and I think the Trustees are attempting a difficult task in imputing to the negligence of the master a course into which their own neglect of duty seduced him. In the "*City of Naples*" case I adopted a remark of Mr Peddie's to the effect that buoys are only aids to navigation, and the shrewdness of the remark still commends it to my mind. It is I think true that in the case of a mariner who has the misfortune to be poorly equipped with up-to-date local knowledge the main function performed by a buoy is to convey a warning. But I cannot help thinking that a harbour authority incurs some responsibility, *vis-a-vis* of even the most inadequately informed among mariners, if it so selects and arranges its buoys as to make them play the part not of warnings but of decoys.

One other point. If I am mistaken in thinking that the standard of seamanship set up by the master's critics is too rigid, and even if it were held that the master committed an error of judgment amounting to bad seamanship in passing beyond the dumb buoy without identifying it, that would not in my opinion result in absolving the defenders. The immediate or proximate cause of the accident was not that he passed the dumb buoy without identifying

it. Albeit that were held to be done negligently, it was an act not directly but only remotely connected with the accident. Apart from the Trustees' acquiescence in the desertion by the pilots of the pilot station, the immediate or proximate cause of the accident was the absence of the distinctive green (wreck) colour from the white light occulting every ten seconds. If the Trustees had taken, as I have already held it was their duty to the seafaring public to do, this simple but effectual plan of distinguishing a wreck-marking buoy, the master instead of being enticed into mistake and disaster would have been repelled by an intimation of danger. In *M'Naughton v. Caledonian Railway Company*, 1858, 21 D. 160, Lord Wood contrasted such a case as the present with one in which the faults committed by both parties are each directly or proximately causative in combination of the accident—which is the ordinary case of contributory negligence. His Lordship stated the law thus—"Now as to the matter of law it certainly cannot be said that because the party injured has been guilty of some fault or negligence he cannot recover. It is not sufficient to disentitle to damages that there has been fault on his part—that he has been doing something which strictly he ought not to have done and without which having been done the injury would not have occurred. The fault must be such as to have directly conduced to the injury suffered, and not merely remotely connected with it, for in that case it is not to be considered as contributing to the injury within the principle that fault or negligence on the part of the individual injured shall afford a good answer to a claim by him for damage against a defender who has also been guilty of fault or negligence. The fault by the injured party when only remotely connected with the accident is to be as it were discounted from the case." The more recent and still more authoritative statement of the law by Lord Selborne in *Spaight v. Tedcastle*, 1881, 6 App. Cas. 217, at p. 219, is, I venture to think, to the same effect. In my opinion these principles apply to the circumstances of the present case.

On the whole matter I think that the Lord Ordinary arrived at a sound result, and that his judgment should be affirmed.

**LORD MACKENZIE**—The facts of the case are clearly stated in the opinion of the Lord Ordinary, and in view of what his Lordship says I am unable to dispose of the case otherwise than on the assumption that Captain Osborne, the master of the "*Circassia*," is a credible witness.

Although logically the first question in the case is whether the defenders were guilty of negligence as regards buoys and pilotage, the primary question is whether the master navigated his ship on the morning in question with all due seamanlike skill and care. The onus of showing he did not is of course on the defenders.

The essential facts are that the collision occurred at 7:33 a.m. on 9th March 1919, an hour after sunrise. The weather conditions

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were extraordinary—so extraordinary that Captain Ruthven, a witness of great experience, says the condition of the atmosphere described by the master was not impossible but highly improbable. There was a light westerly breeze. The master says that there was “a morning mist lying very low. It was clear overhead. It was a patchy mist.” He says he saw on his port bow, when 800 yards away, the white occulting light on the westmost wreck-marking buoy, though owing to the haze he could not see the body of the buoy. He appears not to have seen the body of the buoy until just before he struck. He also says that owing to the haze it was not until just before he struck that he saw broad on his port bow the eastmost wreck-marking buoy which appeared to be 200 to 300 feet away. The wreck lay at the apex of an equilateral triangle approximately distant  $1\frac{1}{2}$  cables from each wreck-marking buoy. Shortly before this both the master and his first officer sighted on their starboard bow No. 1 red conical buoy, which marks the north side of the channel, at a distance which the first officer estimates at 4 to 5 cables.

The crucial question is whether in weather conditions such as the master describes, which made the visibility so bad, he was entitled to take his ship past the dumb Fairway Buoy into the estuary of the Tay without examining the buoy and satisfying himself what purpose it was serving. No. 273 of process is a representation of the Fairway Buoy. It stands 11 feet out of the water, the diameter at the top being 3 feet 6 inches, and at the water-line 7 feet 6 inches. It has black and red horizontal stripes with “Tay Fairway” in legible letters painted on it. A photograph of it is produced; Brydon says the paint was in good condition; Key could see the black and red horizontal stripes from the wreck-buoys; Meldrum says the colours were quite distinct; Captain Ewing, “the buoy was all right.” This buoy (No. 273) is said to have been sighted by those on board the “Circassia” at 7:20 a.m. when she was standing in on her course from the Bell Rock to pick up a pilot at the entrance to the river Tay. It is said to have been then 4 or 5 cables on the port bow, though the master adds—“It is very difficult to judge in a haze like that.” It is impossible to piece together the times given in the pursuers’ record (which are not in the log and are not spoken to by the master in his evidence-in-chief) and the distances estimated with the bearings given. It is only possible to get a general picture from the evidence of the situation as it presented itself that morning. The master was aware that he was close to the place where he expected the Fairway Buoy to be. He had come in by dead reckoning and had apparently set his course from a point two miles S.S.W. of the Bell Rock. The chart the master had, dated in 1915, shows the Fairway Buoy as a black and red horizontally-striped light-and-bell buoy, surmounted by a top mark and exhibiting an occulting white light every ten seconds. The chart showed no wreck of the “Clan Shaw.” She was sunk in 1917.

The impression produced on the master by 273 is thus described by him—“It had no light or bell. After seeing that that which I thought was the Fairway Buoy had no light I thought it was something that I did not know anything about, or it might have been a floating buoy, and I really did not take any more notice of that buoy. (Q) Did it occur to you that it was a substitute for the Fairway Buoy?—(A) No, not the slightest. I accordingly proceeded on, expecting to get to the Fairway Bell Buoy and get my pilot.” In cross-examination he says—“I ultimately passed the buoy on my port hand at a distance, I should say, of about 2 to  $2\frac{1}{2}$  cables. I would not like to say what the actual distance was, because it was hazy. I had ceased to take any notice of the buoy more or less. I put that to one side as being a buoy. That was when I saw the light. I ceased to take any notice except looking casually around. It was not interesting to me because I was enough distance off and not in any danger. It was out of my course I thought. I took no further interest in that buoy.” Robey says—“(Q) Did you regard the buoy as being of any importance for your purpose?—(A) None at all.” The “Circassia” proceeded on at about 3 to  $3\frac{1}{2}$  knots.

Shortly after passing the Fairway Buoy, which I hold it is proved was half a cable to the northward of the line of leading lights, the master suddenly saw a white light ahead occulting every ten seconds. This corresponded with what was on his chart as the Fairway Buoy, but was the light on the westmost wreck-marking buoy. The master altered his course a point to the northward from N. 54 W. to N. 44 W. He held on until at 7:33 a.m. his port bow collided with the sunken wreck of the “Clan Shaw.”

The case turns, in my judgment, on the view taken of the distance he was past the Fairway Buoy when he sighted the light on the westmost wreck-marking buoy. If the master saw simultaneously the Fairway Buoy and the occulting light on the westmost wreck-marking buoy I should be disposed to take the view that he was confronted with a puzzle, and that the defenders were responsible for the consequences of that. This view, however, it is not possible to take, looking to the course marked by Captain Osborne on the chart No. 250 and the course marked by Commander M’Intosh on No. 311. These two markings appear to me all-important. The pursuers fail to take off their effect by saying that the witnesses were asked to mark the courses for a different purpose, viz., to show at what distance the “Circassia” passed the Fairway Buoy. They are consistent in showing that the “Circassia” was well past the Fairway Buoy when her course was altered on the occulting light being sighted. This is confirmed by the pilot Robey and the first officer Erskine. It was admitted by counsel for the pursuers that when Captain Osborne altered his course he had dismissed from his mind the possibility of the dumb buoy being the Fairway Buoy.

The Lord Ordinary expresses the opinion



that this white occulting light on the west-most wreck-marking buoy instead of being a warning acted as a bait which attracted the "Circassia" to the wreck, and that but for the defenders' fault in removing the light-and-bell buoy without altering the appearance of the light, the accident would never have happened. His Lordship also says—"In my judgment the removal of the light-and-bell buoy from its position marking the fairway to the position which it occupied on 9th March without so altering its appearance as to ensure that under no circumstances would a navigator be justified in assuming that it still marked the fairway constitutes a failure in the discharge of their duties which amounts to fault."

In these passages the Lord Ordinary assumes that the white occulting light misled Captain Osborne into thinking that the dumb buoy was not the Fairway Buoy. If, however, as I hold, he had passed the Fairway Buoy before he saw the occulting light the question is whether he was entitled to pass it without examining and identifying it. The next question is whether his failure to do so was not the proximate cause of the accident under the weather conditions as they existed that morning. The evidence of Commander M'Intosh, the leading expert for the pursuers, makes it plain that if Captain Osborne had seen "Tay Fairway" upon the buoy the fact that the wreck-marking buoys were as they were would not have deceived him. The misleading depended upon whether the Fairway Buoy was either seen or recognised or ought to have been seen or recognised.

It is here that there is a sharp conflict of testimony between the expert witnesses on both sides. Commander M'Intosh says the master was justified in going on because the dumb buoy did not coincide with what he had been led to expect by his chart and notices, and that he was justified in going on cautiously and keeping a good look-out. He admits the master was taking a risk—"He was perhaps taking a risk, but then a man who won't take a risk is no use at sea. (Q) Was he taking a risk in your opinion in proceeding up the river in ignorance of what the buoy denoted?—(A) Until he got a safe distance away from that buoy he was taking a risk. (Q) Because he did not know what it denoted?—(A) He did not know what it might have been. (Q) You say he would not have been justified, being ignorant of the meaning of the buoy, in going fast, but he was justified in going slow?—(A) Yes."

Captain Peel, another expert for the pursuers, says that the master of the "Circassia" was entitled to "ignore" the Fairway Buoy. His reasons are given in the following passage—" (Q) If you were looking for the Fairway Buoy wouldn't it be as well to go and see?—(A) No, not that buoy, because it is nothing like a Fairway Buoy. It has no pretence as a Fairway Buoy. (Q) It has got black and red stripes on it and the word 'Fairway' painted on both sides?—(A) Yes, but it had not got any bell or light on it."

The Fairway Buoy was placed in position

in March 1917. It had been the permanent buoy there until 1910, when it had been replaced by a lighted buoy. Commander M'Intosh does not criticise the buoy, but says it is a poor substitute for the one the master was led by his sailing directions to expect there—a lighted buoy. It is the case that when the "Circassia" left Liverpool in December 1918 the master had No. 34 of process, which I understand is issued by the Board of Trade and contains duplicates of the Admiralty notices. On p. 34 there is under date 29th November 1918 a notice that lights are to be re-exhibited. This was following the armistice. But the master knew that the chart he had was out of date. As he says he was very worried and tried all he could possibly do to get the latest charts at Calcutta when he was ordered to Dundee, and at Port Said, but without success. He is quite frank about it. "I was not happy entering an unknown estuary with a chart four years old." I am unable to hold it proved as a separate ground of fault against either the owners or the master that the latest chart was not on board the "Circassia." The fact, however, that his chart was out of date imposed upon him the greater obligation to be cautious.

The question in the case is this—Was the master of the "Circassia" entitled in hazy weather to pass the Fairway Buoy without making a proper examination of it because on the chart he had which was four years old the Fairway Buoy was marked as a light-and-bell buoy?

This is a question of navigation upon which the Court must look for guidance to the skilled witnesses. The evidence for the defence is, that in approaching that morning an estuary like the Tay the master was not entitled to pass the outermost buoy without taking the trouble to examine and find out what it was. Buoys in the first instance are only warnings until they are identified and their colour and marks seen. After that they are more or less of a guide. As Captain Ewing puts it—"A man is not justified in passing a buoy to go into an estuary without ascertaining what it is or verifying his own position." He adds that when the master came up and saw he had not got the buoy he expected he should have let go and waited the arrival of the pilot. Captain Ruthven's evidence is to same effect. A passage follows in his cross-examination which is liable to misconstruction, in which he says the master might if he went very cautiously go a  $\frac{1}{2}$  or a  $\frac{1}{4}$  of a mile past the buoy. This, however, it is clear from his evidence is on the assumption he was keeping the lead going and getting no bottom. As Captain Ruthven says, the master had the dip of the water and if he had been keeping his lead going it would have shown him that he was inside the line of soundings on which the Fairway Buoy is laid. The master's evidence is that the first fathome the leadsman gave him from the time he started was  $6\frac{1}{2}$ , just about the time he struck. He admits that when he saw the light of the westmost buoy he was not paying much

attention to the leadsman then and whatever soundings he was giving. He is quite explicit that his purpose in posting the leadsman was to aid him in going in, not to aid him in finding the Fairway Buoy. The leadsman was not giving him soundings before he got to the bar. Captain Ruthven says that the lead ought to have been kept going all the time approaching the land, and that the master was looking for trouble if he was not keeping his lead going.

The conclusion I am compelled to reach on this evidence is that the master was in fault in not taking proper steps to identify the Fairway Buoy. It was the outermost buoy of the estuary and a conspicuous one. He disregarded it. He was a stranger to the Tay and knew that his chart was out of date. The weather was so hazy that he could not see the body of the wreck-marking buoys until he was close to them. He was not paying attention to the soundings. There was no occasion for his being in a hurry to get into the estuary. He was not placed in any position of emergency. It is not legitimate to take the view that there was merely an error of judgment, for he did not examine the buoy. The proximate cause of the accident was faulty seamanship in passing the Fairway Buoy without satisfying himself what it was. This was the reason why he was misled in the haze by the light on the westmost wreck-marking buoy. This, and not the want of a pilot, was the reason why he collided with the wreck.

Whether the faulty seamanship of the master was the sole cause of the accident, or whether it was only contributory negligence, depends upon the view taken of the alleged breaches of duty on the part of the defenders. I therefore proceed to examine these.

The grounds of fault against the defenders are summarised by the master in his deposition—"The said ship arrived off the Bell Rock at 3:30 a.m., and at daylight, 6:17 a.m., proceeded to pilot station. No pilot was at the station, and proceeding further deponent discovered the bell buoy for which he was making was not in the position shown on his chart, having been shifted to mark the wreck of the 'Clan Shaw' with another buoy east of it, both in the centre of the channel. . . . The cause of the casualty was—(1) the pilot was not at the pilot station; (2) the bell buoy was shifted to help to mark a wreck; (3) insufficiency and even absence of marking to indicate the position of the wreck, and it might have been avoided by any of the above matters receiving proper attention." These are substantially the grounds of complaint set out on record. I do not consider it necessary to refer to the discrepancies between the original and the amended versions of the record on which the defenders founded.

1. *Pilotage.*—The pursuers' case is that the defenders hold out the prospect to all the world that a ship coming into the Tay will get a pilot at or near the Fairway Buoy. The master was aware of the statement in the "North Sea Pilot" that "the Tay pilot vessel, unless driven in by stress of weather,

is always at anchor or under weigh near the Fairway Buoy." He says he was shaping his course for the Fairway Buoy in the expectation he would obtain a pilot between the Fairway Buoy and the entrance to the Tay. The Lord Ordinary has expressed the opinion that if the pilot cutter had been at her station the accident would not have occurred, but has taken the view that what was decided in the "*City of Naples*" case negatives liability on the part of the defenders for the pilots' absence from their station. I do not regard the question of the defenders' liability in this case as foreclosed by what was decided in the "*City of Naples*" case. It was there recognised that there is a duty on the defenders to take reasonable steps to provide a sufficient service. This rests on statute. The defenders had been relieved of their duty during the later years of the war because of the provision by the Admiralty of a steam drifter. When, however, this service ceased, as it did in January 1919, the responsibilities of the defenders revived. Their difficulties seem throughout to have arisen from finance and from indisposition on the part of the pilots to anchor down the river. They anchored at Buddon Ness. The defenders on record state that on 9th March the pilot boat was justified in being at Buddon Ness because of mine-sweeping operations. This is not proved, although in the pilots' log there are entries which indicate the presence of mine-sweepers in the river before and after that date.

It was argued that there was on the day of the accident a higher duty than usual because (1) the defenders had received some days before the 9th of March intimation that the "*Circassia*" was to arrive on that day, and (2) they knew of the serious danger to navigation from the wreck of the "*Clan Shaw*." The Dundee Harbour Bye-laws provide (Bye-law 1)—"That regular attendance is given, and that vessels requiring the assistance of pilots are promptly supplied." Bye-law 7 provides that it is the duty of the pilots to be on the look-out "and when a signal for a pilot is observed from any ship" coming into the Tay to proceed with all dispatch to take charge of such ship.

The master of the "*Circassia*" does not prove that he ever signalled for a pilot before the collision. The one passage in his evidence relating to this matter is as follows. He is asked in examination-in-chief as to his reason for not giving some signal by whistling if he wanted a pilot, and his answer is this—"I never do that if it is clear weather, and he would see you then because you would have your flag up." It is not proved that the pilot signal was hoisted before the collision, and the explanation given by the master is unintelligible looking to the evidence as to the weather conditions. Bye-law 12 provides that the pilot cutter "shall be kept as near to the entrance to the river as practicable both by day and night." The table of rules appended to the bye-laws shows that a ship inward bound may be boarded as far as 3 miles outward of the Fairway Buoy. There is no evidence that if the master had signalled for a pilot

he would have had to wait an unreasonable time before he got one. The pursuers' case involves this—that the pilot cutter ought to have been moored at the Fairway Buoy. I am not able to hold this to have been made out. There does not seem to have been any complaint before the date of the accident since October 1912. I do not think the pursuers have proved in this case that the system was faulty and amounted to negligence on the part of the defenders.

2. *Buoys*.—The Lord Ordinary says that no questions really arise in this case as to the proper method of marking a wreck. With this view I agree. The buoys had been in position for two years. The master admits that with a copy of the chart No. 250 he would have had no difficulty in avoiding danger if he had seen the buoys. The Lord Ordinary's opinion, in the passage to which reference has been already made, attributes fault to the defenders because they used the light-and-bell buoy to mark the wreck without altering its appearance. Counsel for the pursuers criticised this ground of judgment as too narrow. The Lord Ordinary declines to hold that the use of a dumb buoy at the fairway necessarily amounted to fault. In this I agree, and therefore do not go into the question whether it would have been possible to replace the light-and-bell buoy at the fairway before the date of the collision. The pursuers' argument was that the trap was laid, not at the white occulting light of the wreck-marking buoy but at the Fairway Buoy, because it was a dumb buoy. I agree with the Lord Ordinary. I think it proved that the white light should have been altered to green. I do not think that after the armistice the defenders were entitled to disclaim responsibility and say they were acting under Admiralty orders. I disagree with the argument that the use of a dumb buoy by the defenders at the fairway was *per se* negligent. If the master had had the latest chart issued before the accident it would have shown a dumb fairway buoy. (For some unexplained reason the Admiralty survey gives the wrong colouring.) The argument is founded on the notice dated 23rd November 1918, after the armistice, sent by the Northern Lighthouse Board to the defenders' general manager and engineer. It is in these terms—"By instructions of Admiralty, from now onwards your navigation lights are to be exhibited as in peacetime; please telegraph receipt." The reply of same date was—"Buddon Ness and Tayport lights will be exhibited to-night and river buoys as soon as possible." As already pointed out, the master had the Admiralty notice that the lights were to be re-exhibited. The view taken by the Lord Ordinary on this point is that the light-and-bell buoy ought at once to have been restored to its position at the fairway. I am unable to assent to this as amounting to fault on the part of the defenders. They were entitled to use a dumb fairway buoy. The transposition of the buoys without altering the light is another matter altogether. If that had been the direct cause of the accident I should have thought the defenders liable.

The direct cause of the accident was, however, not the white occulting light but the faulty seamanship of the master. He was thus guilty of contributory negligence. There was no controversy as to the law, but I may refer to the opinion of Lord Wood in *M'Naughton v. Caledonian Railway Company*, 21 D. 160, at p. 167—"If while there was fault on the part of the defenders directly conducing to or causing the injury, there was at the same time fault on the part of the individual injured by rashness or want of the care which he was bound to exercise, or in any other way which also directly contributed to the injury, then damages cannot be recovered by him."

If this view be correct it displaces the ground of the Lord Ordinary's opinion.

If the master had identified the Fairway Buoy, then the occulting light beyond would have been a danger signal. It would not matter whether it was white or green. The view I take does not involve that the master was obliged to stop at the Fairway Buoy and that if he passed it he did so at his peril. But my view does involve that he was not entitled to pass it without knowledge of what it was. If he had had this knowledge then the wreck-buoy would have been a warning which the master could not disregard and pass on. It would have served the purpose already held in the "*City of Naples*" case to be the proper purpose of a wreck-marking buoy to a person without local knowledge and without a chart marking the wreck. It would not be a guide compelling him to proceed but a hand up compelling him to stop and locate the danger.

The master admits that with a copy of the chart No. 250 he would have had no difficulty in avoiding danger if he had seen the buoys. Apart from the point about the disposition of the buoys forming a trap, which has been already disposed of, I do not think fault is proved against the defenders for buoying the wreck as they did.

The action in my opinion fails because the master attempted to enter an unknown estuary with an old chart in hazy weather without locating the Fairway Buoy. The interlocutor of the Lord Ordinary ought in my opinion to be recalled and the defenders assoilzied.

LORD SKERRINGTON—The collision between the pursuers' s.s. "*Circassia*" and the sunken wreck of the "*Clan Shaw*" took place in the daytime, the weather being fine and calm but misty. It was certainly not due to inevitable accident. The Lord Ordinary has held that it was brought about substantially in the manner described by the captain and chief officer of the "*Circassia*," and by the North Sea Pilot, Robey, all of whom were on duty at the time on the bridge of the pursuers' ship. The defenders were not able to lead any counter evidence as to the events which preceded and led up to the collision, but their counsel argued very earnestly that the evidence of these three witnesses was not trustworthy, that it was improbable in itself, and that it had been discredited by various extrinsic

circumstances. They suggested as the only satisfactory explanation of the accident that a proper look-out had not been kept on board the "Circassia." Upon a question which is essentially one of credibility I see no sufficient reason for differing from the Lord Ordinary. I therefore take it as a proved fact that the pursuers' captain and officers kept a careful look-out and that they observed as early and as distinctly as the mist permitted such of the buoys and lights as were visible on the morning in question. Still following the opinion of the Lord Ordinary, I also hold it proved that when he navigated his ship on the course which took her into the wreck, the captain of the "Circassia" believed (erroneously as it afterwards turned out)—(1) that a buoy which "loomed up suddenly out of the haze" on his port bow and which from its position he at first thought to be the "Tay River" or Fairway Buoy marking the seaward end of the fairway, was really some other buoy with which he had no concern, seeing that on further inspection he observed that it was only a dumb buoy unlike in appearance and structure to the buoy which he was looking for, viz., the light-and-bell buoy described in his chart (1915 edition) and in his copy (1914 edition) of the official "North Sea Pilot," and (2) that a white light occulting every ten seconds, corresponding in colour and occultation with the light of the Fairway Buoy as above described, which he suddenly observed on his port bow shortly after passing the buoy previously mentioned, was the light of the Fairway Buoy, although the buoy which carried this light was hidden in the mist and remained invisible until just before the collision.

The Lord Ordinary has held, for reasons which seems to me to be as sound as they are simple and obvious, that the defenders were in fault at the date of the collision because they used as one of the two wreck-buoys intended to mark the position of a particularly dangerous sunken wreck distant only half a sea mile from the charted position of the Fairway Buoy, the identical light-and-bell buoy which had been used as the Fairway Buoy for some years before the war "without so altering its appearance as to ensure that under no circumstances would a navigator be justified in assuming that it still marked the fairway." In addition to painting this buoy green—the distinctive colour of a wreck buoy (as was done)—the defenders could easily have altered the colour and occultation of its light so as to differentiate the light from that of the Fairway Buoy as described for many years in the Admiralty charts and also in the "North Sea Pilot." While I agree with the Lord Ordinary that the defenders were in fault for not having taken a simple and natural precaution which would probably have rendered the accident impossible, I think (differing from the Lord Ordinary) that in the special circumstances they were also in fault for not arranging to have the light-and-bell buoy restored to its proper function and position within a reasonable time after they

had been instructed by the Admiralty that "from now onwards your navigation lights are to be exhibited as in peace time." These instructions were given to the defenders on 23rd November 1918, but they did not "replace the Fairway Buoy in its correct position" until some weeks after the collision which took place on 9th March 1919. The words in inverted commas are quoted from a letter written by the defenders' general manager and engineer to the Northern Lighthouse Board on 13th December 1918. The defenders ought to have foreseen that mariners might rely (as did the pursuers' captain) upon the Admiralty notice issued on 29th November 1918 that "all lights on the coasts of the British Islands are being re-exhibited," with certain specified exceptions, among which the Tay Fairway Buoy was not included. Although navigation lights had been discontinued by order of the Admiralty during hostilities they continued to be depicted and described in the Admiralty charts, and among others so depicted and described was the "Tay River" Buoy. In ordinary circumstances the delay of a few weeks or months in the substitution of the light-and-bell buoy for the dumb buoy which temporarily did duty at the fairway might not have been accompanied by any obvious danger such as the defenders should have foreseen; but they ought, I think, to have applied their minds to the exceptional state of matters consequent upon the presence of a large and dangerous wreck not far from the charted position of the Fairway Buoy, lying close to the central line of the fairway and in a place where ships bound for Dundee were likely to come for the purpose of picking up a Tay pilot. The presence of this wreck rendered it of critical importance that the Fairway Buoy should be one which no ship would be likely to pass without recognising it. The natural method of effecting this object was to replace in its correct position the familiar light-and-bell buoy described in the "North Sea Pilot" and also in the editions of the Admiralty charts issued prior to January 1919. The mistake, as it seems to me, which the defenders committed was in failing to realise that the two lighted buoys by which, under Admiralty orders given early in the year 1917 they had marked the wreck of the "Clan Shaw" might prove insufficient and even misleading under the changed conditions following upon the armistice. There were two reasons for this—(1) The lights on the defenders' wreck-buoys might be confused with navigation lights (then exhibited for the first time after the outbreak of war) and in particular with the light which a mariner might expect to find on the Fairway Buoy, and (2) the discontinuance by the Admiralty in January 1919 of the services of an armed steam drifter provided for the purpose of securing during the submarine menace "efficient means of putting pilots on board vessels," ought to have led the defenders to anticipate that ships bound for Dundee would probably not be so promptly provided with a Tay pilot as when the pilot service was under Admiralty control. There was also the

risk that strangers might be puzzled by an arrangement of wreck-buoys which does not seem to be either very intelligible in itself or to have been sanctioned by custom or convention.

If I am right so far I think that the pursuers have proved enough to make out a *prima facie* case of liability against the defenders, and that it lies upon the latter to exonerate themselves by proving that the "Circassia" would not have struck the sunken wreck if she had been navigated with ordinary care and skill. The burden of proof which the defenders have to discharge is specially heavy because we start from the fact that three competent and experienced navigators who were attending to their duty were actually misled by the lights and buoys which they sighted near the entrance to the river Tay. I have, however, come to the conclusion that the defenders have proved that the captain of the "Circassia" did not exercise due care and skill in the navigation of his ship, and that the casualty was directly due to this cause.

The description of the collision as given by the pursuers in their pleadings and by their captain in his evidence makes it clear that they do not maintain that the present case falls within the familiar category where an error of judgment has been committed by the person responsible for the navigation of a ship, but where the surrounding circumstances are appealed to as showing that the mistake was excusable and not inconsistent with good seamanship. Their case is that the captain made no mistake of any kind, but that he navigated his ship in all respects as a skilful and careful seaman would have done who paid due regard to the buoys and lights exhibited by the defenders. Indeed, even if they had wished to do so, it would have been impossible for them to have taken their stand upon the plea to which I have referred. The captain was never at any time (until the collision became inevitable) placed in a position of difficulty or emergency, nor was he compelled to expose his ship even to the slightest and most remote danger. Though he did not identify the dumb buoy with the Fairway Buoy which he was making for he none the less knew when he had reached the dumb buoy that he was close to the pilot station, and that if there was any danger in taking his ship further towards the entrance to the Tay his proper course was to remain where he was and signal for the pilot vessel to come to him. He deponed that after passing the dumb buoy he was expecting to get the pilot every moment. Accordingly I do not see how he can be exonerated from the charge of bad seamanship if he ought to have known that it was dangerous for him to take his ship further inwards without the help of a local pilot owing to the state of the weather, the nature of the locality, the want of a reliable chart, his uncertainty as to the precise position of his ship, or any other reason. The unfortunate feature in the present case is that the captain never realised or considered the question upon which, in my opinion, it was his duty to

form a practical judgment, viz., whether in view of the whole circumstances it was a reasonable and prudent act on his part to steer his ship upon a course which would take her abreast of and thereafter past a light which he had sighted on his port bow and which he believed to be the light of the Fairway Buoy. The circumstances which it was his duty to consider included (1) the fact that he had nothing whatever to gain by going forward and "dodging about" on a misty day in search of a pilot instead of anchoring his ship and signalling and waiting for the pilot to come to him; (2) the possibility that the pre-war arrangement for marking the seaward end of the Tay fairway might have been altered since the armistice, and that the official notice of the alteration might have been issued after he had started on his outward voyage; (3) the incomplete and unsatisfactory view which he had obtained of the only two beacons which he had sighted after leaving the Bell Rock Lighthouse; (4) the fact that he had not verified the position of his ship either by lowering a boat to examine the dumb buoy or by taking exact soundings of the depths of the water to the westward of that buoy; and (5) the antiquated character of his chart which on a misty day might make it impossible for him, however carefully he navigated his ship, to avoid striking the carcass of some vessel not marked upon his chart which during the preceding four years had been torpedoed, mined, or otherwise wrecked while waiting for the tide or for a pilot before entering the channel of the Tay. The captain seems to have thought that he had discharged his whole duty when he had decided in his own mind that of the two beacons which he had sighted imperfectly in the haze the one did and the other did not mark the seaward end of the fairway. Though he deponed that he was not "happy entering an unknown estuary with a chart four years old" he does not point to any additional precaution which he took on that account.

I do not think it necessary to express an opinion as to whether the captain was in fault for proceeding a short distance, which I estimate at about 2 cables, beyond the dumb buoy and up to the point where he sighted the white light on his port bow, without at the same time verifying his position by taking exact soundings. Even if he was so in fault his action in this respect does not seem to me to have been the proximate cause of the collision. The collision was due to the captain's unfortunate decision and action after he had sighted the light. I do not gather from the evidence that up to this point he had either imperilled the safety of his ship or come to any definite decision as to how far he would proceed. At the same time I think that his decision and action at the critical moment when he altered his helm and decided to take his ship past and inside the light would have been different if he had not dismissed the dumb buoy from his mind as soon as he had ascertained that it was not a light and bell buoy. If (as I think he ought to have done) he had kept an open mind as to the possi-

bility of the dumb buoy having some message for him, his action both before and after he sighted the white light would probably have been different. He showed what I regard as an excessive confidence in the accuracy of an inference which was at best only a probable one. He also completely forgot at the critical moment his former and very proper anxiety about his antiquated chart.

For the reasons which I have indicated I think that the casualty was directly due to the imprudence of the pursuers' captain. So far as the present action is concerned it is immaterial whether this negligence is regarded as the sole cause or merely as a contributory cause of the accident operating in conjunction with the negligence of the defenders as previously described.

I have not thought it necessary to go into the question of pilotage. While my impression is that the defenders were negligent as regards this matter, I do not think that this negligence was a direct cause of the casualty. If I am wrong in attributing the accident to the fault of the pursuers' captain,

it was due to the misleading character of the defenders' buoys and lights. If the defenders had properly discharged their duties as regards the lighting and buoying of the river and Firth of Tay and the entrances thereto, their failure as a pilotage authority to enforce upon their pilots the duty of punctuality would not as a natural consequence have imperilled the safety of the pursuers' ship.

I agree with Lord Mackenzie that the defenders ought to be assoilzied.

LORD CULLEN did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

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Counsel for the Defenders and Reclaimers—Solicitor-General (Murray, K.C.)—Sandeman, K.C.—Ingram. Agents—J. K. & W. P. Lindsay, W.S.