

nary has allowed it, proof before answer. That leaves open every possible argument, either as to competency of proof when tendered or sufficiency of proof when concluded.

The second reclaiming-note is for the pursuers, against the Lord Ordinary's interlocutor refusing the diligence asked by them. I agree with your Lordships that this diligence is of a very sweeping kind, but in the peculiar circumstances of this case I think it is only justice to the pursuers, and only justice to the defenders, that the fullest inquiry should be made into the facts on which the action is based; such inquiry cannot be made unless the pursuers are granted a diligence such as they propose. I think the pursuers are entitled to the diligence they have sought, and therefore that the Lord Ordinary's interlocutor refusing it should be recalled.

LORD MONCREIFF—I agree to the course which your Lordships propose to take, on the understanding that everything is open except the questions of title and competency.

The Court pronounced the following interlocutors:—

“The Lords having heard counsel for the parties on the reclaiming-note for the defenders against the interlocutor of Lord Kyllachy dated 10th January 1896, Refuse the reclaiming-note, adhere to the interlocutor reclaimed against, and repel the first plea-in-law for the defenders, and remit to the said Lord Ordinary to proceed in the cause as accords: Find the pursuers entitled to the expenses of this reclaiming-note, and remit the same to the Auditor to tax and to report to the said Lord Ordinary, to whom grant power to decern for the taxed amount thereof.”

“The Lords having heard counsel for the parties on the reclaiming-note for the pursuers against the interlocutor of Lord Kyllachy dated 18th November 1896, Allow the pursuers to amend their record, and in order thereto open up the record, and the amendment having been made, of new close the record and recal the interlocutor reclaimed against: Find that the pursuers are entitled to a diligence in terms of their specification No. 28 of process: Therefore grant diligence in terms thereof: Find the pursuers entitled to the expenses of this reclaiming-note and remit the same to the Auditor to tax and to report to the Lord Ordinary to whom remit the cause to proceed therein, with power to him to decern for the taxed amount of the expenses now found due.”

On 26th January 1897 the defenders moved for leave to appeal to the House of Lords, chiefly on the ground that it was proper to have the question of title to sue settled finally before any further procedure should take place in the case, as in the event of the defenders' view of that matter being

ultimately sustained all the further procedure in the case would be useless.

On 28th January the Court refused leave to appeal.

Counsel for the Pursuers—D. F. Asher, Q. C.—Sol.-Gen. Dickson, Q. C.—Salvesen. Agent—J. Smith Clark, S. S. C.

Counsel for the Defenders—Balfour, Q. C. Guthrie—J. J. Cook. Agent—Alex. Morrison, S. S. C.

Friday, January 29.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

BURGER AND ANOTHER (“TALISMAN”) v. TAYLOR (“TYNE”),

et e contra.

Shipping Law—Collision—Order of Harbourmaster — Negligence of Master in Carrying out Harbourmaster's Order — Half Damage Rule.

The screw steamer T was coming up the harbour of Leith towards a lock leading into the Albert Dock, when on entering a basin between the outer harbour and the lock, two paddle steam-tugs were seen coming out of the lock. The T stopped and reversed, and was ultimately brought to a stationary position about 30 feet from the mouth of the lock, which was 60 feet broad, her starboard-bow being 12 feet from the south wall of the basin, which was a prolongation of the south wall of the lock, and her port-bow being about 85 feet from the end of the north wall of the lock. In remaining in this position the T had the approval of the harbourmaster. The tugs were of the same dimensions, and were 36 feet wide at the paddle-boxes. The first tug came out and passed clear, but only with 10 or 15 feet to spare. The master of the second tug, thinking there was not room to pass, stopped in the lock, but was ordered to come ahead by the harbourmaster, whose orders he was bound to obey. The harbourmaster immediately before had ordered the T to go astern with the view of keeping her in a stationary position, as the tide and wind were both causing her to drift nearer to the mouth of the lock. Both these orders were carried out, the T putting her engines astern sufficiently to keep her stationary, and the tug coming ahead. The tug in coming out of the lock struck the port-bow of the T with her port-sponson with such violence as to do considerable damage.

Held that it was proved that there was room for the tug to pass out safely, that the collision was due to the unskilful manner in which the harbourmaster's order was carried out by the tug, that the T was not to blame, as her only duty was to re-

main stationary in the position in which she was, and that consequently the tug was liable for the whole damage caused by her to the T in the collision—*diss.* Lord Moncreiff, who held that both vessels were to blame, the T in going or staying too near the mouth of the lock, and thus bringing about a risk of collision, and the tug in attempting to come out when there was not sufficient room to pass, but that both acted as they did in obedience to the orders of the harbourmaster, whose orders they were bound to obey, and that consequently neither was liable to the other for the damage caused by the collision.

Opinion (per Lord Trayner) that where a collision occurs, and one of the vessels is stationary at the time, the *onus* lies upon the vessel that had way on her to show that the collision was not occasioned by her fault.

Opinion (per Lord Stormonth Darling, Ordinary) that the English Admiralty rule, by which, when both vessels are to blame, but the fault of one of them is attributable to a pilot compulsorily employed, that vessel only recovers half her loss, ought not to be extended to the case where both vessels are to blame but one is excused as having acted in pursuance of the orders of a harbourmaster whose orders she was bound to obey.

These were cross actions brought by the owners of the ss. "Talisman" of Rotterdam, and the owner of the tug "Tyne" of Grangemouth, each claiming damages for loss sustained owing to a collision which occurred between the "Talisman" and the "Tyne" in the Albert Basin, near the mouth of the lock leading into the Albert Dock, Leith, on Sunday, 15th March 1896.

On the date in question the "Talisman" was coming up the outer harbour of Leith towards the Albert Dock, when on entering the Albert Dock basin two tugs were seen coming out of the lock. Thereupon the engines of the "Talisman" were ordered astern in order to stop her. The first tug, the "Fiery Cross," came out and cleared the "Talisman" by about 10 or 15 feet. The second tug, the "Tyne," was about 500 feet behind the "Fiery Cross." When he got about half-way through the lock the master of the "Tyne," thinking he had not room to clear the "Talisman," stopped his engines, whereupon the deputy harbourmaster, who was in charge of this part of the harbour, and whose orders he was bound to obey, asked him "why he did not come ahead and clear the passage as there was ample room for him to pass." Just before he spoke to the master of the "Tyne" the harbourmaster had ordered the "Talisman" to go astern so as to stop her way. Her engines accordingly were given a turn or two astern and then stopped. The harbourmaster was satisfied with this as a compliance with his orders, and he approved of the position taken up by the "Talisman." At this time the tide was slack but still on the

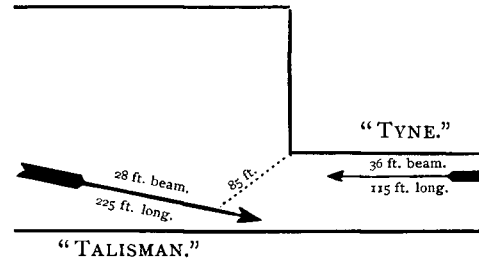
flood, and the wind was blowing up the basin. In consequence of what the deputy-harbourmaster had said the "Tyne" went ahead at half-speed, and struck the "Talisman" on the port-bow with her port-sponson. Before doing so the captain of the "Tyne" had stopped and reversed, but too late to avert collision.

In the action at the instance of the owners of the "Talisman" against the owner of the "Tyne," the defenders pleaded, *inter alia*:—"In attempting to leave the lock and pass the 'Talisman,' the master of the 'Tyne' having acted under the orders of an officer of the Leith Dock Commissioners, whose orders he was bound to obey, the defender ought to be assoilzied with expenses."

The owners of the "Talisman" did not rely upon the fact that the "Talisman" took up the position she did in compliance with an order of the harbourmaster.

By interlocutor dated 5th June 1896 the Lord Ordinary (STORMONTH DARLING) conjoined the two actions, and in the conjoined actions allowed a proof.

At the proof there was considerable conflict of testimony as to the exact position of the "Talisman," and her distance from the mouth of the lock, and also as to the possibility of the "Tyne" being so navigated as to get out without colliding with the "Talisman," but the effect of the evidence as finally viewed by the majority of the Court appears from the annexed sketch plan and from the following statement taken from the opinion of the LORD JUSTICE-CLERK:—



"The 'Talisman,' which is the vessel of one of the parties here, was coming up the South side of the Albert basin for the purpose of entering the lock and going into the Albert Dock. She had reached very nearly to the south side of the Albert basin a certain distance outside the entrance to the lock. The first question is, what was her position? and the second question, was she moving or not? Now, I think it is clearly proved by the evidence, both of those representing the 'Talisman' and those representing the 'Tyne,' that she was about 30 feet at least back from the gates leading into the dock. All the evidence on behalf of the 'Talisman' is to that effect, and I find that Orr, the engineer of the 'Fiery Cross,' who had full powers of observation, because being on a tug, his place for taking charge of the engines enabled him perfectly well to see, says that she was about 30 feet from the opening of the lock. And he describes what he means

by that, not the point at which the gates commence, but the point at which the mouth of the lock opens from the dock, which point is about 15 or 20 feet further up from the gates, thus making it about 50 feet from the gates. Therefore, I take it that the plan which we have before us is practically correct and shows the true position in which the 'Talisman' was as regards proximity to the mouth of the lock.

"The next question is. How did she lie by the south side of the Albert basin? All the evidence is to the effect that she was lying with her head rather in and her stern rather more out towards the north side of the basin. The 'Tyne's' own master gives the distance of the 'Talisman's' stern from the south side of the quay at from 15 to 20 feet, and therefore if her head was nearer in to the quay, her stern was then necessarily something less than that distance from the quay. Therefore she must have been very near the quay, and her stern must have been about 50 feet from the entrance gates of the lock. Goodwin, the man who had to attend to her bow for the purpose of receiving the rope and taking it ashore if necessary, and who was between her head and the quay, gives similar evidence. Now, it is certain that if that was the real state of matters the 'Tyne' had sufficient room to pass.

"The 'Fiery Cross,' which was a tug belonging to the same owner, and of the same build, had passed shortly before with safety—just immediately before—and the 'Tyne' was going at a like speed of her engines. At that time the harbourmaster had given the order to the 'Talisman' to go astern, meaning, and I think evidently meaning upon his own statement, and also by the way his order was taken and obeyed, that as she was sagging a little towards the east, towards the lock, he wanted to bring her to a stationary position where she was; and the evidence is that she was brought to that stationary position. The harbourmaster says so; the master of the 'Fiery Cross' says so; Goodwin says so; and the engineer of the 'Tyne' himself says so. Therefore it can hardly be contended that she was not brought to a standstill. If that was so, and the plan before us is not disputed as regards measurements, there was certainly ample room for the 'Tyne' to get out. She might not be able just to forge ahead, but she had 85 feet of span at least between the port-bow of the 'Talisman' and the opposite corner of the entrance of the lock, and as much space as the 'Fiery Cross' had had, which went out immediately before her with safety. In these circumstances the master of the 'Tyne' came out upon a starboard helm. It must have been absolutely certain to anybody who was watching him, that if he remained upon his starboard helm, he must ultimately come into collision with the 'Talisman,' because as one of the witnesses described it, she was bearing down upon her the whole time. There is evidence—and the collision as a fact of real evidence tends

to confirm it—that she remained upon her starboard helm too long. That is to say, she remained too long without any change, and her port-helm could not take effect in time.

"Now, the paddle sponson of the 'Tyne' struck into the 'Talisman,' and that is accounted for by the master of the 'Tyne' by the statement that the 'Talisman' had then come ahead, and was close up to the entrance to the lock. That is not a fact. I think that the 'Talisman' was still clear, as I have already said, of the mouth of the lock. The harbourmaster, who was an experienced man in these matters, and quite capable of judging, is satisfied that there was plenty of room for the 'Tyne' to come out. It looks very much as if the collision had happened from the master of the 'Tyne' being so anxious about his paddle going round the corner on the starboard side to clear there, and looking behind him, had been a little too long, not watching himself sufficiently carefully, and keeping his vessel in such control as to be able to clear out into the basin. It strikes one as a somewhat extraordinary thing, that if there is 15 or 20 feet to spare in a place where vessels are moving slowly and with care, a collision should take place causing such serious damage to both vessels as this collision did, particularly not being a collision stem on, but only with the rounded corner of the sponson of the steamer. It looks as if he had been over anxious about his starboard paddle-box, and had just omitted to keep a sufficiently sharp look-out ahead of him as to the time when he should either take his way off, or should alter his helm so as to go round the corner satisfactorily."

From the plan referred to by his Lordship, it appeared that the "Talisman" was 225 feet long and 28 feet broad; that the "Tyne" was 115 feet long and 36 feet broad at the paddle-boxes, which were practically amidships; that the narrow place in which the lock was situated was 570 feet long and 60 feet broad, and that the south wall of the basin was practically a prolongation of the south wall of the lock. The stem of the "Talisman" was shown as 65 feet from the mouth of the lock, but, as found by the Lord Justice-Clerk *supra*, the stem of the "Talisman" was 30 feet from the mouth of the lock. The point of impact of the two vessels was 33 feet from the bow of the "Talisman."

It was admitted that the damage caused to the "Talisman" by this collision amounted to £78, 3s.

On 10th November the Lord Ordinary issued the following interlocutor:—"Finds that the collision in question was caused by the fault of the master of the 'Talisman' in obstructing the exit from the lock of the Albert Dock, Leith: Finds that the collision was not caused by the fault of anyone for whom the owner of the 'Tyne' is responsible: Therefore in the action at the instance of William Simon Burger and Jean Martin Burger against William Taylor, assolziez the said William Taylor from the conclusions of the action, and decerns; and

in the action at the instance of the said William Taylor against the said William Simon Burger and Jean Martin Burger, decerns and ordains the said William Simon Burger and Jean Martin Burger to make payment to the said William Taylor of the sum of £86, 16s. 8d. sterling, with interest thereon, as concluded for in the summons: Finds the said William Taylor entitled to expenses in the conjoined process," &c.

Note.—[After stating the facts not in dispute.]—"In considering the question of fault, the first thing to be observed is, that admittedly it was the duty of the 'Talisman' to leave room for the tugs to come out. That means, not bare room, but reasonably sufficient room; for the 'Talisman' had the whole dock basin behind her, and had no need to run the thing fine. One finds that the love of running things fine is a common enough infirmity with those who handle all kinds of craft, but it is certainly not one to be encouraged. It is said that there was room enough for the other tug, the 'Fiery Cross,' to pass. I think, on the evidence, there was just room, and no more, but the 'Talisman' moved forward after she passed, and it was because of this that the harbourmaster gave the perfectly proper order to go astern. If that order had been sufficiently carried out, there would, I am convinced, have been no collision, but giving the engines 'a turn or two astern' and then stopping them had only the effect of canting out the stern of the vessel from the south wall, without backing her sufficiently to clear the exit from the lock. Then I find that the case made against the 'Tyne' on record is not at all supported by the evidence. That case, as disclosed in the leading action, is that the 'Tyne' suddenly swerved to port and struck the 'Talisman' a violent blow. Now, nobody in the witness-box said that the 'Tyne' suddenly swerved to port. She came out of the lock on her starboard helm in order to clear the north wall, but she just cleared it and no more, and within the next moment or two she struck the 'Talisman.' That there was no sudden swerving is made abundantly clear by the boatman Goodwin, who says that the 'Tyne' was heading for the 'Talisman' all the way down the lock, and that he saw what was going to happen. I distrust the mere opinion of the witnesses for the 'Talisman' who say that there was room enough to pass, because the facts of the collision seem to be against it, and therefore I hold the 'Talisman' at fault for blocking up the exit from the lock.

"On the other hand, if there was no question of superior authority in the case, it would follow that there was contributory fault on the part of the 'Tyne' in attempting to force her way when there was not room enough to pass. But her owner pleads, I think with effect, that in doing so she was acting under the orders of the harbourmaster, whom she was bound to obey. That official was not disposed to admit that what he said amounted to an order. 'I did not tell him to come ahead,'

he says. 'I asked him why he did not come ahead and clear the passage, as there was ample room for him to pass.' That from a harbourmaster was very like an order, and there is no doubt that he left the 'Talisman' for the very purpose of directing the movements of the 'Tyne,'—indeed, he himself, in a later part of his cross-examination, uses the significant expression, 'When I left the 'Talisman' to give the order to the 'Tyne,' I could not say what happened.' The mate of the 'Talisman' admits that he heard the order given. The master of the 'Tyne' understood it to be an order, and I cannot for my part distinguish it from what the House of Lords held to be an order to come on, given by a harbourmaster in the case of *Reney v. The Magistrates of Kirkcudbright* [1892], A.C. 264.

"If the order was a wrong one in the circumstances, if the master of the 'Tyne' was bound to obey it, and if he made no mistake in carrying it out (all of which I hold to be established), I must find that the collision was not caused by the fault of anyone for whom the owner of the 'Tyne' is responsible. He must therefore be assolizied in the action at the instance of the owners of the 'Talisman.' He must also, I think, have decree in his own action for the damage which he suffered, and which I assess at the sum of £86, 16s. 8d. I am aware that it is a rule of the English Court of Admiralty that the owner of a ship which by the fault of her compulsory pilot has damaged another, and at the same time has received injury herself, shall recover only half his loss from the other ship if she is also in fault. But I am not disposed to extend a rule, of which I do not perceive the justice or reason, to the case of a ship which has done and received injury by the fault of a harbourmaster. The identification of the ship with the wrongdoer (which is, I suppose, the foundation of the rule) is not so complete in the case of a harbourmaster as in the case of a pilot, and I am not aware that the rule has ever been applied to the case of a harbourmaster even in England."

The owners of the "Talisman" reclaimed. Before the hearing it was intimated on behalf of the owner of the "Tyne" that it was not proposed to maintain in the Inner House that he was entitled to more than half the amount of his damage.

Argued for the "Talisman"—(1) The "Talisman" was brought to a standstill in a position which left room for the "Tyne" to pass. If that were so, then the order of the harbourmaster was a perfectly proper order which the "Tyne" failed to carry out properly, and the "Tyne" was alone to blame. (2) Even if it were held that the deputy-dockmaster ought not to have ordered the tug a-head when there was so little room to pass, still the tug was also to blame because she did not carry out the order skilfully, and if so she was liable—*The "Cynthia"* (1876), 2 P.D. 52; *The "Belgic"* (1875), 2 P.D. 57. (3) If on the other hand there was absolutely not room for the tug to pass, and collision was inevit-

able, then the tug had no right deliberately to run into a stationary vessel, which she must have done on that supposition, and if she did so she was liable, for no one was bound or entitled to obey an order of a harbourmaster the inevitable result of which would be collision. (4) Even if it were held that the "Talisman" was to blame in coming so near the mouth of the lock, still the "Tyne" was also to blame, because the collision was at least partly due to unskilful management on her part. (5) In any view, if the tug had been properly handled, and had been going at a proper rate of speed the collision would not have been so violent, and consequently not so destructive, and on that ground alone the "Tyne" was at least partly to blame.

Argued for the "Tyne"—The "Talisman" was so close up to the mouth of the lock, and in such a position with her stern out across the mouth of it, that it was impossible for the "Tyne" to go out without a collision. It was proved that the collision occurred immediately after the "Tyne" cleared the lock with her starboard paddle-box. Until she cleared the corner she had to keep a straight course, and the "Talisman" was so close up that the "Tyne" had not time after clearing the corner to go off on a port-helm clear of the "Talisman" into the basin. The plan really showed the position of the "Talisman" when the "Fiery Cross" passed. At that time there was only 10 or 15 feet to spare. In the next two minutes the "Talisman" sagged up with wind and tide nearer the mouth of the lock, and her stern drifted out, leaving no room for the "Tyne" to pass. In this view of the facts the "Talisman" was to blame for the collision. She ought never to have come so near the mouth of the lock, and if she drifted up she ought to have backed out again. If it were argued that the "Talisman" was excused by the order of the deputy-harbourmaster, the answer would be (1) that no such defence was pleaded; and (2) that the "Talisman" was liable for not carrying out the harbourmaster's orders properly—*The "Cynthia," cit.* She did not go far enough astern when ordered to do so. Even if the "Talisman" was as far from the lock as was maintained by those in charge of her, she was still to blame for running things too fine. She was bound to stop and reverse whenever there was a risk of collision. Such a risk arose as soon as she came into the basin, and she ought not to have come in along the south side of the basin at all. If she was too far on when she saw the tugs first, she ought to have gone astern till there was a perfectly clear and safe passage for them to come out. It could not be said that she left such a passage free here. In any view, it required a very nicely-timed and difficult manœuvre for the tug to get out without collision. This was shown by the fact that the "Fiery Cross" only got clear by 10 or 15 feet. This state of things was brought about by the "Talisman" coming where she did, and she was therefore to blame for the collision which followed.—Marsden on Collisions at Sea (3rd ed.), p.

349, and authorities there cited. It was not maintained that, apart from the order of the deputy-harbourmaster, the "Tyne" would not be to blame, but she was excused by the order given by him. The order was one which the master of the "Tyne" was bound to obey. Whatever might be his own opinion, he was entitled to assume that the harbourmaster was right. He was not in such a good position for seeing the actual position of matters as the harbourmaster was, and in these circumstances he was not entitled to take it upon himself to disobey the harbourmaster's orders. He knew that the harbourmaster could order the "Talisman" astern, and he was justified in assuming that this would be done if necessary or desirable. It was "only in the last resort, and where the danger was fully obvious" that a master was entitled to disobey the orders of a harbourmaster—*Reney v. Magistrates of Kirkcudbright* (1892), A.C., 264, per Lord Herschell at p. 275. This order was not so clearly dangerous as to entitle the "Tyne's" master to disobey it. The "Tyne" was therefore bound to go ahead when ordered. She was navigated with all proper skill and care. The carefulness of her master was shown by his stopping in the lock when he thought there was not enough room. He could not go on—to a port-helm—until his starboard-paddle was clear of the lock, and when that was the case he had not room to go round and clear the "Talisman." It could not be the case that the "Tyne" ran into the "Talisman" on a starboard helm, for if she had done so her stem would have struck the "Talisman's" side, whereas it was with her sponson she struck, which showed that she was then on a port-helm. The result was that both vessels were to blame, but that the "Tyne" was acting under the orders of the harbourmaster, whose orders she was bound to obey. That being so, the rule of law was the same as where the vessel was under compulsory pilotage—Marsden on Collisions at Sea, pp. 251-252; Abbott (13th ed.), 203; "*The Bilbao*" (1860), Lush, 149, at p. 153. The "Tyne" was therefore entitled to recover half her damage from the "Talisman"—Marsden on Collisions at Sea (3rd ed.) 236; "*The Hector*" (1883), 8 P.D. 218, at p. 221.

At advising—

LORD JUSTICE-CLERK—This case would, I think, have been easily disposed of so far as my own opinion is concerned had it not been for the view at which the Lord Ordinary has arrived, which deserves, of course, all respect and attention. He has evidently given great care to the consideration of the case. I regret to say that my opinion—and upon full consideration my decided opinion—is one to the opposite effect, and I shall as shortly as I can state the grounds on which I arrive at that opinion—[*His Lordship then stated the facts as above set forth*]. I am unable myself to see from the facts as stated, and which I hold to be proved, how the "Talisman" could be in any way to blame. The "Talisman" took

up the position ordered by the harbourmaster, and that position was a position which could create no danger to anybody, unless the harbourmaster ordered somebody else to do something. That being so, I am unable to see how the "Talisman" could be to blame for anything which happened. If being placed there was a wrong thing, which the harbourmaster had ordered, that was a wrong thing, with which the owners of the "Talisman" had nothing to do. Under the harbourmaster's orders those in charge of the "Talisman" were intended to remain passive, and the evidence, as I read it establishes that the "Talisman" did so.

Therefore I have come to the conclusion that the judgment of the Lord Ordinary ought to be reversed, and that we ought to find that the "Tyne" is liable for the damage done to the "Talisman."

The LORD JUSTICE-CLERK then read the following opinion, written by LORD YOUNG, who was absent at the advising:—I am unable to concur in the verdict of the Lord Ordinary on the evidence. It is at variance with the testimony and opinion of Mr Robertson, the deputy-dockmaster, who was on the spot in the discharge of his duty, and in whose sight the collision and everything leading to it and connected with it occurred. I can see no reason to doubt the accuracy and reliability of his testimony in point of fact, or to reject his opinion, which is certainly to the effect that the "Tyne" and not the "Talisman" was in fault. We must assume that he was qualified to observe all that occurred, including the position of both vessels when the "Tyne" started to go on at his invitation, whether it is to be called exactly a direct order or not. I take it as an order given by him according to his judgment and duty, and see no reason to doubt his judgment in giving it. He approved of the position of the "Talisman" when he gave it, and was of opinion that the "Tyne" might and ought to have passed out in safety. I have considered the evidence carefully to see if there was any on which I should feel warranted in deciding the case contrary to this testimony and opinion of the dockmaster, who had undoubtedly opportunity and capacity to observe the facts as they occurred, and form an opinion upon them. The result of this consideration is that I find no such evidence. I think, on the contrary, that looking to the whole evidence the true conclusion is, that had the "Tyne" been properly steered out the collision would not have occurred. There is, I think, no question of law for decision.

LORD TRAYNER—It is a peculiarity in this case that the collision between the two vessels occurred when one of them was stationary. When that happens I think the *onus* lies upon the vessel that had way on her to show that the collision was not occasioned by her fault, and that in my opinion has not been shown here by the "Tyne. The Lord Ordinary is of

opinion that the "Talisman" was in fault, because she was obstructing the exit from the dock, and that the "Tyne" was not to blame because she obeyed the orders of the harbourmaster. I quite agree with the view that, within his jurisdiction, the orders of the harbourmaster must be obeyed, but a rule stated so generally must be reasonably interpreted. If a harbourmaster gave an order to one vessel to run into another, no one would say that such an order should be obeyed; and if the order was one which if obeyed would in all probability lead to a collision or other damage, the duty of the person receiving such an order would be to point out to the harbourmaster, before obeying, what the probable consequences of direct obedience would be. But I think the Lord Ordinary in absolving the "Tyne" because of the harbourmaster's order to "come on," has failed to give effect to the consideration that the position taken up by the "Talisman" was so taken in consequence of the harbourmaster's order, or at all events with his approval, which is the same thing in effect. The "Talisman," according to the Lord Ordinary's principle, could not be in fault if she acted with the approval or under the orders of the harbourmaster, as I think it proved she did. Then, was the harbourmaster to blame in ordering the "Tyne" to "come on," considering the position in which he had placed the "Talisman"? None of the parties say so, and there is no reason for saying so, in my opinion. I think it is established by the proof, that given the "Talisman" as she lay, there was room for the "Tyne" to pass her in compliance with the harbourmaster's order, if ordinary care and skill had been observed in the navigation of the "Tyne." It appears to me that the collision is proved to be the result of faulty navigation and mismanagement on the part of the "Tyne," and that that vessel is alone to blame for what occurred.

I am therefore for recalling the judgment of the Lord Ordinary, and finding in favour of the "Talisman."

LORD MONCREIFF—In these cross actions the Lord Ordinary has assoilzied the owners of the "Tyne," and found them entitled to damages against the owners of the "Talisman. On the evidence, in my opinion, neither party is entitled to damages; but in so far as I differ from the Lord Ordinary, I do so upon a ground which is not expressly pleaded by the owners of the "Talisman," and which perhaps was not presented to or pressed before him.

I agree with him in so far as he holds that the owners of the "Tyne" should be assoilzied in respect she was acting under the orders of the harbourmaster whom she was bound to obey. But upon the same ground I think the owners of the "Talisman" must also be assoilzied, as in taking up the position which she occupied when the collision took place, she was acting under the orders of the harbour-

master. There is no plea to that effect on record, and in the view which your Lordships take of the case such a plea is not required; but if necessary a plea could be added, and if it were, I should be for assailing the owners of the "Talisman" as well as the owners of the "Tyne."

But for the orders of the harbourmaster, I should have been disposed to hold that both the "Talisman" and the "Tyne" were in fault—the "Talisman" in coming dangerously near the mouth of the lock, and incurring a risk of collision, and the "Tyne" in attempting to get out of the lock when there was not sufficient room to do so with safety.

But both vessels acted under the orders of the harbourmaster. As regards the "Talisman," the harbourmaster, as she approached the entrance to the lock, ordered her to stop and remain in the position in which she was, and this order was obeyed by the vessel reversing her engines. After that the vessel did not go ahead by means of her engines, but I think it is proved that owing to the wind she "sagged" or drifted to a greater or less extent towards and across the mouth of the lock. In so acting I think it may be held, although the matter is not free from doubt, that the "Talisman" was absolved from responsibility, as she obeyed the orders of the harbourmaster. But as regards the position which with his sanction she took up, I think she was unnecessarily and dangerously close to the mouth of the lock. If she had gone astern her own length, or even half her own length, there would have been no risk of collision; but instead of this being done she was allowed to remain in a position which made a collision possible if not probable, and as the wind was blowing strongly from the west, there was the risk of drifting towards the lock.

In cases of this kind it is notoriously difficult to obtain reliable evidence as to the precise position of the vessels before and at the time of collision. The present case is no exception. The master of the "Talisman," as I understand, says that the "Talisman" was brought to a standstill about 60 or 70 feet from the outer entrance to the lock. The master of the "Fiery Cross" again makes the distance 20 feet to the west of "the gates." The engineman of the "Fiery Cross" puts it 30 feet to the west of a bit of quay wall to the west of "the gates." Even at a distance of 60 feet from the entrance I think the "Talisman" would have been too near for safety. But if it be the case, and there is evidence to support it, that her bow was 30 feet from the outer entrance to the lock, it is apparent from the plan that there was not sufficient room for the "Tyne" to take the turn so as to clear the "Talisman" without risk of collision.

As regards the management of the "Tyne," the master at first thought, and I think rightly, that there was a risk of collision; he stopped his vessel halfway through the lock, and advanced only in obedience to the orders of the harbourmaster. It appears from his evidence that when he

got the order to advance he was under the impression that there was room to pass. If so, there can have been barely room; and, such as it was, it must have been gradually reduced by the drifting of the "Talisman." But the point in favour of the "Tyne" is that I think the master would not have attempted to pass out if he had not been ordered to do so. I will only add that the "Fiery Cross," which preceded the "Tyne," only cleared the "Talisman" by 10 or 15 feet, and the "Talisman" had not completely stopped when she passed her. If this is believed, it shows at least that the "Tyne" had still less room to spare, as every foot that the "Talisman" advanced made the exit more difficult. If the master of the "Tyne," executed the harbourmaster's orders unskilfully, and these orders were proper, no doubt the "Tyne" would be liable; but this has not, in my opinion, been proved.

The witnesses for the "Talisman" say that the "Tyne" swerved to port as she came out. That I think is disproved. She came out in a straight line, and it seems to me extremely improbable, that if in coming out in a straight line she was able to get so far into the basin as the witnesses for the "Talisman" say she did, her master should not have put her more to starboard so as to round the corner of the lock, he being admittedly alive to the danger. My impression on the evidence as a whole is that the collision took place before the "Tyne" was able to answer the port helm. In those circumstances I cannot agree with your Lordships in subjecting the owners of the Tyne in damages. The harbourmaster is not a party to this action, and I desire to say not a word more than is necessary in regard to his conduct.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Find that the collision in question was caused by the fault of the master of the 'Tyne' in not navigating his vessel with ordinary care and skill: Find that the collision was not caused or contributed to by the fault of anyone for whom the owner of the 'Talisman' is responsible: Therefore, in the action at the instance of William Simon Burger and Jean Martin Burger against William Taylor of Grange-mouth, owner of the steam tug 'Tyne,' decern and ordain the said William Taylor to make payment to the said William Simon Burger and Jean Martin Burger of the sum of seventy-eight pounds three shillings (sterling), with interest at five per cent. as concluded for: And in the action at the instance of the said William Taylor against the said William Simon Burger and Jean Martin Burger, assoilzie the said defenders from the conclusions of the action, and decern: Find the said William Taylor liable to the said William Simon Burger and Jean Martin Burger in the expenses of the conjoined processes," &c.

Counsel for the "Talisman"—Sol.-Gen. Dickson, Q.C.—Salvesen—Younger. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the "Tyne"—Aitken—Constable. Agents—Wallace & Pennell, W.S.

Wednesday, February 3.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SMYTH v. THE CALEDONIAN RAILWAY COMPANY AND ANOTHER.

Reparation—Negligence—Defect in Plant—Duty to Maintain Plant in Safe Condition.

The children of an employee of the Glasgow Iron and Steel Company raised an action of damages against the Caledonian Railway Company and against the said Steel Company for the death of their father. The accident by which the deceased met his death was due to the defective working of certain points on a line of railway within the Steel Company's works, which line of railway, according to the pursuers' averment, together with the engine and waggons concerned in the accident, belonged to the Caledonian Railway Company. The pursuers averred fault on the part of the Railway Company in failing to have the rails and points in good condition.

As against the Steel Company the pursuers averred that the defenders had kept up the line in question for ten years, that it was their duty to see that the rails and points were in good condition, and that they had failed to do so.

Held that the case as laid against the Steel Company was irrelevant, there being nothing in the averments to show that any duty of maintenance attached to them, but an issue *allowed* against the Railway Company.

Peter Smyth, Motherwell, and others, raised an action in the Sheriff Court of Lanarkshire at Hamilton against the Caledonian Railway Company and the Glasgow Iron and Steel Company for payment of a total sum of £1500 in name of damages for the death of their father Andrew Smyth, who was killed on 5th September 1896 while in the employment of the last-named defenders. Three other sets of pursuers brought similar actions of damages against the same companies at the same time, but their cases present no feature distinguishing them from the case reported here.

The pursuers averred that on the afternoon of the day libelled the deceased was employed as a platelayer on a siding of the railway within the gates which formed the entrance into the Steel Company's works. "(Cond. 4) At the place where the deceased was engaged there is a V siding which crosses from the up-line of rails going out of said Steel Company's works to the Weighs Road at the side of said works. At

the time stated one row of waggons was being shunted along the up-line, and another row was stationary on the Weighs Road. The former consisted of thirty-eight waggons, and were only in charge of a brakeman. There was no pointsman. The deceased was working along with others at a point within the V crossing preparing a length of rail which was to form part of the line. Said engine, waggons, and lines were the property of the defenders the Caledonian Railway Company, but both of said defenders are responsible for the upkeep and proper conduct of said lines and the traffic thereon. (Cond. 5) While the said row of thirty-eight waggons was being shunted past the junction of the up-line and the V siding which crosses to the Weighs Road, all the waggons except the last eight got past the points, but these latter jumped the points at said junction, and leaving the line shortly thereafter were dragged over to where the deceased and others were working, and he was jammed between them and the stationary waggons and killed instantaneously. (Cond. 6) The said accident was caused through the fault of the defenders the Caledonian Railway Company, or those for whom they are responsible, in respect that the switch-points and switch-boxes were defective, and of old material and pattern, and worn out, the switch-points being so loose that they could not be shut, and the switch-boxes broken and useless, and worked with a piece of scrap iron, and the rails bent and pieces broken off them. The sleepers also were very badly ballasted. It was their duty to have had said points so that they could shut, and said switch-boxes, rails, and sleepers of good material and in good condition, and periodically overhauled, and to have had said switch-boxes worked with a lever. This they culpably failed to do. By an examination the defects would easily have been seen. It is usual, necessary, and safe to have such points so that they can shut, and said boxes, rails, and sleepers of good material and good condition, and periodically overhauled, and also said boxes worked with a lever. They further failed to have a pointsman shifting the points, or a flagman or other person to watch said siding and lines in order to warn deceased and other workmen of approaching danger. Both of these precautions are usual, necessary, and safe. (Cond. 7) The said accident was also caused through the fault of the defenders the Glasgow Iron and Steel Company, or of their superintendent for whom they are responsible, in culpably failing to see that the said points and switch-boxes were defective, the switch-points being so loose that they could not be shut, and the switch-boxes broken and useless, and worked with a piece of scrap iron, and the rails bent and pieces broken off them. The sleepers were also very badly ballasted. *The defenders the Glasgow Iron and Steel Company have kept up these lines for ten years at least.* It was their duty to have seen that said points could shut, and that said boxes, rails, and sleepers were in good condition before putting deceased to work at or near them, to have