LORD JUSTICE-CLERK — This is a very unfortunate case for the pursuer and real raiser; but this party is in no different position from any other party who, having allowed an interlocutor to become final, is not entitled afterwards to have that interlocutor overturned. I can see no distinction between the Inner House and the Outer House at all, because the question is not what branch of the judicature has given the decision, but the question is whether the interlocutor is final or not. I am clearly of opinion that it is final. If the party had desired to prevent himself falling into that position, he might have lodged a reclaiming-note in time, before the interlocutor became final, and then not have proceeded with it if it were found not to be advisable to proceed with it further. But, seeing that this is a case of an interlocutor which is not now reviewable by us, I do not see how we can interfere.

LORD DUNDAS—I am of the same opinion. One is reluctant to refuse to admit a claim which, *prima facie*, seems to have something to say for itself upon the merits, if the claimant could get there. On the other hand, it is essential that our procedure should be kept normal and regular, and I am bound to say that I think, as your Lordship does, that we should be going against the whole trend of the decisions if we were to admit this claim. The Lord Ordinary has treated the matter with his usual care and gone into the cases, and I do not see that any good would be done by commenting upon them in detail. I shall only make one or two remarks with reference to what Mr Brown has said. The case of *Hall*, which he pressed upon our attention, seems to me to have very little to do with the present case, because there the claim, which was admitted at a late stage, was truly a claim for purposes of administration, whereas here, although the claim which it is sought to put in may be said in a sense to be an administrative one from one point of view, it is quite plainly much more than administrative, and is indeed actively competitive, from the point of view of the bank. The case of *Dymond* was very special in its circumstances, and has always been so regarded. One may notice also that there was no delay, so far as appears, on the part of Mr Dymond in making his claim *qua* arrester (which was somewhat of the nature of a riding claim) after his arrestment had been made, and the arrestment of course formed a new fact in the case. These facts distinguish it, to my mind, from the present, where there has been, from some unexplained cause, an unfortunate delay, during which the Lord Ordinary's former interlocutor became final. The reclaimer has been from the outset a party to the action; he knew it was there, and ought to have observed what course it was taking. In the recent case of *Landale* this Division went pretty fully into the earlier decisions. It is true that there the case had been to the Inner House at a previous stage, whereas here the final interlocutor is an Outer House one. But I do not think the reclaimer can make much of that distinction, looking to some of the other decisions, *e.g.*, *Duncan's Factor*. I do not see that we are in any better position as regards the admission of this claim than the Lord Ordinary was. The interlocutor of 22nd January 1910 has become final, and final I am afraid it must remain.

LORD SALVESEN—I entirely agree with both your Lordships. I think this proceeding on the part of the judicial factor was simply an attempt to get the Lord Ordinary to review his previous interlocutor after it had become final. That being so, it was of course incompetent for the Lord Ordinary to do so, and it is equally incompetent for us.

LORD ARDWALL was absent.

The Court adhered.

Counsel for Pursuer and Real Raiser (Reclaimer)—Murray, K.C.—C. H. Brown. Agents—L. & L. Bilton, W.S.

Counsel for the Claimants (Respondents)—Macphail, K.C.—F. C. Thomson. Agents—Mackenzie & Kermack, W.S.

Wednesday, May 17.

FIRST DIVISION.

[Lord Dewar, Ordinary.

ALEXANDER STEPHEN & SONS, LIMITED *v.* THE ALLAN LINE STEAMSHIP COMPANY, LIMITED.

Ship — Collision — Pilot—Fault of Pilot—Proof—Merchant Shipping Act 1894 (57 *and* 58 *Vict. c.* 60), *sec.* 633.

The presumption of fault on the part of a ship which runs into a vessel while moored is not a presumption of law but a presumption of fact, depending, *inter alia*, on the time of the collision, the place where it happened, and the existing weather conditions.

A steamship on her way up the Clyde in charge of a compulsory pilot collided with and injured another steamship moored to a wharf in the river. The collision took place when it was very dark and when there was a very thick fog. In an action of damages at the instance of the injured vessel, *held* that the pursuers had failed to prove that the collision was caused by the fault of the defenders or of any one for whom they were responsible, and defenders *assoilzied*.

Held further, that the defenders were not bound in order to come within the statutory exemption to prove any specific fault on the part of the pilot, but that it was enough for them to show that the vessel was under the pilot's orders, and that his orders were obeyed.

The Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), sec. 633, enacts—"An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law."

On 26th October 1909 Alexander Stephen & Sons, Limited, shipbuilders and engineers, Govan, *pursuers*, brought an action against the Allan Line Steamship Company, Limited, Glasgow, *defenders*, for £15,000 damages in respect of injuries sustained by their vessel the "Bruxellesville" through being (as they alleged) run into by the defenders' vessel the "Buenos Ayrean" while she (the "Bruxellesville") was moored to Shieldhall Wharf in the Clyde.

The defenders pleaded, *inter alia*—"(5) In any event, any fault or negligence in the management or navigation of the 'Buenos Ayrean' being that of the licensed pilot compulsorily employed, the defenders are entitled to absolvitor."

The *facts* sufficiently appear from the opinion (*infra*) of the Lord Ordinary (DEWAR), who on 15th July 1910 sustained the fifth plea-in-law for the defenders and assoilzied them.

Opinion.—"The s.s. 'Buenos Ayrean' when coming up the River Clyde in charge of a pilot collided with and damaged the s.s. 'Bruxellesville,' which was being fitted out and completed at Shieldhall Wharf, where she was moored under the direction and to the approval of the harbour authorities.

"The owners of the 'Bruxellesville' bring this action against the owners of the 'Buenos Ayrean,' alleging that the collision was due to the fault of the defenders, in respect that the 'Buenos Ayrean' was deficient in build and did not steer properly; that the crew did not keep a proper lookout, and that the tug engaged by the master was not of sufficient power.

"The defenders deny these averments. They state that they were in no way to blame; that the collision was caused by the negligence of the pursuers in failing to indicate the position of their vessel by proper lighting and ringing of a fog-bell, and they bring a counter claim for £2000 against the pursuers for damages caused to the 'Buenos Ayrean'; and parties have put in a minute agreeing that to save the expense of raising a counter action for said sum it shall be competent for the Court to deal with this case as if such counter action had been raised. The defenders further plead that, in any event, any fault or negligence in the navigation of the 'Buenos Ayrean' being that of the pilot compulsorily employed by them, they are not liable for any damage which the pursuers may have sustained.

"I am of opinion that the collision was caused by an error in judgment of the pilot, and that there was no fault on the part of either the pursuers or defenders.

"The material facts are as follows:—The 'Buenos Ayrean' is built of steel, and is about thirty-one years old. She is 385 feet long and 42 feet in beam. She has a right-handed propellor. Her crew is thirty-seven. She started from Greenock at 2·45 a.m. on 16th December 1908, for Princes Pier. It is compulsory pilotage from Greenock to Glasgow, and James Christian, licensed pilot, was in charge. There was a tug astern for steering purposes, and the 'Buenos Ayrean' came up on her own steam.

"When they started the weather was clear and fine, but when they reached Bowling at 5·50 it became foggy. About Rothesay Dock the weather again cleared; but as they approached the bend in the river, opposite Shieldhall Wharf, the fog came down in a dense bank, the sides of the river could not be seen, and navigation was very difficult. The engines were put at slow, and they went at about three knots an hour, with half a knot of flood tide. Their course was a little south of the Channel, and the wheel was slightly starboard—to take them round the bend which lay on the port or north side. The crew were all stationed. The master and the third officer were on the bridge with the pilot. The chief officer, boatswain, and an A.B. were on the lookout on the forecastle head. The second officer was aft with his watch, and the carpenter ready to let go at the anchor.

"Shieldhall Wharf lies on the south side of the river. There were two large vessels lying in the wharf—the 'Koombana' lying nearest Greenock, and the 'Bruxellesville' about 600 feet further up. Between them lay three hopper barges. All these vessels had lights, but owing to the fog they were not visible except at comparatively close quarters.

"When the 'Buenos Ayrean' came abreast of the 'Koombana'—and about 100 feet off—the master saw the loom of this vessel against the light from Shieldhall Wharf and directed the pilot's attention to her. A few seconds afterwards the chief officer shouted:—'A light ahead.' The pilot asked whether it was fixed or blinking. He was told it was a fixed light. Almost immediately the chief officer shouted—A vessel right ahead.' The light was on the 'Bruxellesville," and she was the vessel right ahead.

"The pilot ordered the helm to be put 'hard a-starboard,' and this was at once obeyed. He also ordered 'full speed ahead,' but before there was time to carry out this order he shouted, 'Full speed astern,' and 'Let go the anchor.' These orders were promptly obeyed, but they did not succeed in preventing the collision. The bluff of the bow of the 'Buenos Ayrean' struck the 'Bruxellesville' between the fore rigging and the bridge, about 20 feet from the stem, and damaged her.

"In these circumstances each party blames the other. . . . [*After examining the evidence and coming to the conclusion that the pursuers were not in any way responsible for the collision, his Lordship proceeded*—]

"As the 'Buenos Ayrean' was the moving

vessel, the *onus* fell upon the defenders to show that the collision was not caused, either wholly or partially, by any fault or negligence on their part, and they accordingly led in the proof. They have in my opinion discharged the *onus*, and have proved that they were in no way to blame.

"They proved that the tug they employed was adequate, and that one was sufficient. It is not customary for vessels of the 'Buenos Ayrean' class to have more than one tug. She has been many times up and down the Clyde, and she never employed more than one. The pilot did not ask for more or he would have got another. No one even suggested how a different or an additional tug could have prevented the collision.

"The defenders proved with equal clearness that there was nothing deficient either in the build or steering capacity of the 'Buenos Ayrean.' She had never made a mistake. She had steam-steering gear, and it was carefully and regularly examined. It was examined immediately after the accident, and found to be in good order. No one had ever experienced any difficulty in steering her. She had never been known to sheer against her helm, and I think it is proved that she did not in point of fact sheer on the occasion in question.

"It was also proved that the crew were competent and attentive. The men were properly stationed, kept a good lockout, and obeyed the pilot's orders promptly. There was neither delay nor fumbling in the execution of any order. If there had been any lack of watchfulness on any part of the ship one might have expected perhaps to find it in letting go the anchor. But this order, like the others, was instantly obeyed.

"The pursuers argued that the lookout could not have been efficient, in respect that some of the shore lights and the lights on the 'Koombana' and the barges were not reported. But the fog is a sufficient explanation. The lights were not visible at the distance.

"Then the pursuers argued, alternatively, that if the fog was of sufficient density to obscure the lights, the master should have interfered to prevent the pilot proceeding, and they referred to the '*Strathspey*,' 18 R. 1042. If the vessel had been still in dock, and the danger of starting was so obvious on account of the fog that any seaman of competent skill ought to have known it, no doubt responsibility might have been thrown on the master. But the fog in this case was intermittent. It was clear and fine when they started. It came down at Shieldhall Wharf in a dense bank, and they were caught in it. It appears to me that in such circumstances the master could not prudently interfere. If he could not go on he could not go back, and there was obvious danger in remaining in the fairway. His only course was to trust to the superior local knowledge of the pilot, and that is what he did. To have interfered in such circumstances would I think have been an inexcusable mistake.

"I have therefore reached the conclusion, on this part of the case, that the defenders have proved that the collision was not due either wholly or partly to any fault or negligence on their part, or on the part of those for whom they were responsible.

"But the pursuers contend that this is not enough to free the defenders from liability. They argued that to obtain the benefit of the 633rd section of the Merchant Shipping Act it is necessary for the defenders to prove the actual fault which the pilot committed, and I was referred to the following cases, viz.—'*Colina*,' 3 R. (H.L.) 44; '*Indus*,' 12 P.D. 46; '*City of Edinburgh*,' 7 F. 213; '*Sunbeam*,' S.C., (1907) 1145.

"These authorities show that the defenders must prove that the fault was that of the pilot and the pilot alone. But I do not think that they establish the proposition that it is necessary in every case to prove the precise fault which the pilot committed. It may be sufficient to throw the fault upon the pilot to prove—as the defenders have proved—that the collision was not due to any defect in the ship or her apparel, and that the crew obeyed and properly carried out the pilot's orders—see opinion of Lord Low in '*Strathspey*' case and Lords Trayner and Moncreiff in '*Assyria*,' 5 F. 1089. But even if this view be wrong it does not affect my decision, for I am of opinion that the defenders have succeeded in showing the actual mistakes the pilot made. They were, I think, as follows —1. When the master drew his attention to the 'loom' of the 'Koombana' against the light from Shieldhall Wharf, he ought to have known that he was too far to the southward, and as this point was about 600 feet from the 'Bruxellesville' there was then time for him to take action and get his ship more into mid-channel and so clear the latter ship. 2. When the light on the 'Bruxellesville' was reported by the chief officer right ahead, the pilot should have acted promptly. But instead of doing so he showed considerable indecision. He first gave the order 'full speed ahead,' and before it could be carried out he changed his mind and ordered 'full speed astern.'

"Had the pilot adhered to his first order —'full speed ahead' and 'hard a-starboard' —the 'Buenos Ayrean' might have gone clear, seeing the angle of the blow was very slight. The propeller of the 'Buenos Ayrean' being right-handed, the effect of going 'full speed astern' is to cant the ship's head to starboard and so counteract the starboard helm.

"I have consulted the nautical assessor on this part of the case, and he agrees with me in thinking that the collision was entirely due to the fault of the pilot.

"The pursuers further argued that it was impossible for the defenders to discharge the *onus* of showing that they were not in fault without calling the pilot as a witness, and they referred to the opinion of the Lord President in the unreported case of the '*Atbara*,' where it is stated that in the circumstances disclosed by the evidence in that case it was clearly

the duty of the defenders to put the pilot in the witness-box, but I do not understand the Lord President to mean that in every case it is essential for defenders to call the pilot as a witness. The fact that he is not called may no doubt be important, and in some cases even fatal, to the defenders' success, but everything, I think, must depend upon circumstances. In the case of the '*Assyria*,' for example, the pilot was not examined as a witness, and although the pursuers founded upon that fact in argument the defenders were successful. In the present case the defenders disposed of all the averments which the pursuers had made against them on record. They proved that their vessel was in good order, and that the crew was attentive and prompt in obeying orders. They further showed what the mistake of the pilot was, and I do not think there was any obligation upon them to put him into the witness-box and ask him to admit that mistake.

"I am therefore of opinion that the plea founded on the 633rd section of the Merchant Shipping Act falls to be sustained, and the result is that I sustain the fifth plea-in-law for the defenders and assoilzie them from the conclusions of the summons, and I repel the second part of their fourth plea, in which they seek payment from the pursuers of £2000."

The pursuers reclaimed, and argued—The fact that the pursuers' vessel was run into while moored to the wharf constituted a *prima facie* case of negligence against the defenders—*The "Indus,"* (1886) L.R., 12 P.D. 46; *The "City of Peking,"* (1888) L.R., 14 A.C. 40. It was not enough to say, as the defenders did here, that their vessel was in charge of a compulsory pilot, they must show (1) that they themselves had in no way contributed to the collision, and (2) that the collision was due to some specific fault on the part of the pilot—*Clyde Navigation Trustees* v. *Barclay, Curle, & Company*, May 23, 1876, 3 R. (H.L.) 44, 13 S.L.R. 753; *Owners of the "Strathspey"* v. *Owners of the "Islay,"* July 3, 1891, 18 R. 1048, 28 S.L.R. 787; *Mann Macneal & Company* v. *Ellerman Lines*, December 6, 1904, 7 F. 213, 42 S.L.R. 159; *Clyde Shipping Company, Limited* v. *Miller*, 1907 S.C. 1145, 44 S.L.R. 920; *London and Glasgow Engineering and Iron Shipbuilding Company, Limited* v. *Anchor Line*, July 7, 1903, 5 F. 1089, 40 S.L.R. 753. The defenders were to blame in respect (*a*) that they had allowed their vessel to take a "sheer" across the river, (*b*) that they had failed to carry out the pilot's orders with sufficient promptness, and (*c*) that they had not kept a proper look out. Further, the defenders had failed to aver or prove any specific fault on the pilot's part, and that being so they were not entitled to the benefit of the 633rd section of the Merchant Shipping Act 1894 (57 and 58 Vict. c. 60).

Argued for respondents—The defenders were not bound to prove negatively that they were not in fault. The *onus* of proving that the defenders were to blame lay on the pursuers, and where, as here, the pursuers had failed to discharge that *onus*, and the defenders' vessel was in charge of a pilot compulsorily employed, they (the defenders) were entitled to absolvitor—*Clyde Navigation Trustees* (*cit. supra*); *Mann Macneal & Company* (*cit. supra*). No inference could be drawn from the fact that the pursuers' vessel was moored to the wharf, when, as here, the view was obscured by fog—*The "Nador"* [1909], P. 300. The cases of the *"City of Peking"* and the *"Indus,"* relied on by the pursuers, were distinguishable, for there the collision took place in broad daylight. *Esto*, however, that it was not enough merely to say that a compulsory pilot was on board no contributory fault on the part of the defenders or their vessel had been proved. That being so, they were entitled to absolvitor—Merchant Shipping Act 1894 (*cit supra*), sec. 633.

LORD PRESIDENT—On the 16th of December 1908, early in the morning, when it was very dark and when there was a condition of bad and varying fog upon the river Clyde, the screw steamer "Buenos Ayrean," proceeding up the river Clyde, ran into the steamer "Bruxellesville," which was moored at Shieldhall Wharf, and damaged that vessel. The present action is brought by the owners of the "Bruxellesville" against the owners of the "Buenos Ayrean."

Now the record, after setting forth the fact of the collision, says that the collision was due to the fault of the defenders, and of their master, officers, and crew. It is said that the "Buenos Ayrean" was deficient in build and did not steer properly; and, in particular, on the occasion of the accident she sheered to the southward against her helm and from the course upon which the pilot had put her. Further, the tug engaged by the master was not of sufficient power to tow a ship of the size of the "Buenos Ayrean" in an efficient manner, and the master should have employed another tug as well. Further, the master and crew were negligent, in that a proper lookout was not kept on board the "Buenos Ayrean," and the pilot was not kept timeously informed of the position of the "Bruxellesville" as he ought to have been.

The answer to that is to deny all these defects as set forth, and then the defenders go on to say—"So far as the 'Buenos Ayrean' was concerned, if there was any fault or negligence in the navigation or management of the 'Buenos Ayrean,' which is not admitted, either in directing the course of the vessel too far to the southward of mid-channel, or in bringing her too close to Shieldhall Wharf, or in any other way whatever, it was not that of the defenders or their servants, but of the pilot who was in command of the navigation of the vessel and who directed her to be steered on the course she took. All orders given by the pilot to the officers and those in charge of the 'Buenos Ayrean' were promptly executed,"

So far as the faults alleged, which I have read, are concerned, most of them

have been abandoned in the course of the argument. It is no longer contended that it has been in any way made out that the "Buenos Ayrean" was deficient in build and did not steer properly. I think it is quite right that counsel should have given these contentions up, for the ship was a perfectly good ship and had for many years steered well; and so far as look-out is concerned, although that was argued, I am clearly of opinion that it was not made out against the "Buenos Ayrean" that she had not a proper look-out. On the contrary, it appears to me that they had put every man on board in look-out positions, and the look-out was perfectly proper, and being attended to with great precision at the moment of the accident, and that is shown by a conversation which took place between the pilot and a man on the look-out on the occasion in question.

The specific causes of fault being gone, the pursuers are really resting their case, not upon any particular fault which they say they have been able to prove, other than one which I shall afterwards specially deal with of rather a different character, but upon general propositions that, inasmuch as they were moored and the other vessel was moving, that raises a presumption of fault against those responsible for the vessel which ran into them. Well, I have no doubt that that is an ordinary presumption, and a presumption of common-sense. Of course it is at its strongest in the case put by Lord Watson in the "*City of Peking*," where a vessel runs into another which is moored, in broad daylight, where there is no difficulty in seeing it. In the case of an accident at night the presumption is not so strong as in broad daylight, but there again there may be a perfectly good presumption where there is nothing to prevent the vessel's lights from being seen, and it is proved that the vessel moored had its lights in a proper position. But the presumption becomes much more slender when we come to conditions such as existed on this night of extreme darkness and very great fog, of such a character as to obscure lights even when these lights were very near—and fog coming, as witnesses describe it, in lumps and patches —a condition which makes the recognition of lights doubly difficult. But still I am not without the feeling that the presumption, or whatever you like to call it, is not altogether gone; because in the narrow waters of the river it is common knowledge to anyone using it that there are wharves, and that vessels may be moored at those wharves. Those in charge of the vessel are expected to know on the Clyde where they are going, and it is part of their duty to keep in the proper channel and not run into the wharves where they may go against other shipping. But the presumption is one merely of fact—I do not think it is a presumption of law; and, as I have said, I think it is very easily displaced when you come to the very extraordinary conditions of weather that existed on this occasion.

Well now, we come to the history of the accident. It is quite certain that this vessel came up very slowly. She began to take the necessary bend into the Shieldhall Wharf on the port helm. It was then necessary in order to get her out again round the bend to put her upon the starboard helm. For some reason or another she had got too near the south side of the river, and consequently the starboard helm on which she was at the moment of the collision had not had time to act and she ran into this vessel, the "Bruxellesville," with the luff of her bow, at the end of the Shieldhall Wharf.

Now, put in no technical way, I think the cause of the collision is quite obvious. The cause of the collision was that the vessel had got too near to the south side. Now another way to put that is that the course upon which the vessel was being directed at that time was a wrong course. The position of her head was such that instead of clearing the vessel moored at the side of the wharf she did not clear it but ran into it. Now whether there was any fault in that matter or not I confess I think it is rather difficult to say, because the condition of the weather was such that I think those in charge of the vessel might, in the peculiar circumstances, well be excused for finding themselves rather more to the south of the proper channel than they had expected to be. These wisps of fog were such, and the difficulty of seeing the lights was such, that I think a mistake in that way was very probably excusable. But the form of pleading which is taken by the defenders appears to me a perfectly correct form of pleading. They say "there was no fault on our part in the special matter which you allege. If there was any mistake or fault in respect that our course was *de facto* wrong, we are not responsible, because the course was directed by the pilot, and we have the advantage of the exception which is made by section 633 of the Merchant Shipping Act 1894."

Now, it is there really that the most of the legal argument of the pursuers' counsel has turned. He says that it is necessary for the defenders to prove a specific fault on the part of the pilot, and that that has not here been done. He seems to consider that the presumption of fault which he gets from being run into is really a presumption of law, and that once he has shown that his vessel was run into while moored he has got a position in law from which he cannot be dislodged unless the defenders show a specific fault on the part of the pilot. I do not look at it in that way. It is quite true that in the authorities to which we have been referred it is said—my opinion in the case of the "*Sunbeam*" was quoted—that it is not enough simply to say that a vessel was in charge of a compulsory pilot when a collision happened. You must do more; you must show that in a general way the condition of the ship and the way in which it was navigated excluded every form of liability for any proximate cause which would complicate the question of the pilot's fault. I think it is necessary to show that

at the moment the ship was in the charge of the pilot, and that the pilot's orders were obeyed. That was done here, subject to a special matter which I shall deal with in a minute. But when Mr Horne argued that no special fault of the pilot had been here alleged, I do not agree with him. I think it is a sufficient allegation of a special fault to say that he ran into a moored ship. I do not think it is necessary to say—"You ran into the moored ship because at a certain period you did not change from the port to the starboard helm." I do not see how, as matter of fact, any pleader could say that. I suppose the precise place at which in taking that double bend you need to change from the port to the starboard helm depends upon a variety of circumstances which it is impossible afterwards absolutely correctly to state. It is not a mathematical proposition which you can tell by a calculation merely of the curve of the river and the length of the ship. It is a practical question, and to ask the defenders' counsel now, as a matter of pleading, to lay down his finger at a place where the pilot ought to have changed his helm is to ask something which is too much to ask. Accordingly I think the defenders' pleading here was quite right, and that they have done enough when they have shown that the ship was entirely under the command of the pilot and his orders were obeyed.

That brings me to another point, and that is, Were the pilot's orders obeyed? There has been an argument on that in respect of one particular order, which was given just shortly before the collision, of "full steam ahead." The captain and the chief engineer both say that although the pilot rang "full steam ahead," before the engineer had any time to act upon that order the order was countermanded by "full steam astern." I think that is proved, and, in any view, I think that a valuable contribution was made by Captain Thomson, the assessor, who says that when a ship was moving, as this one was, slowly ahead, and then an order is given "full steam ahead," that is not taken as an emergency order, that is to say, a man according to the ordinary practice of engineers might proceed comparatively slowly to the execution of that order—a matter of seconds—and would not be bound to go with the extreme promptitude of "full speed astern." I think this is perfectly well reconciled with the evidence of the chief engineer, who says that before they had time to execute the order of "full steam ahead" came the order "full speed astern." I think it is not enough to base the broken order upon the imperfect evidence of the third officer, who said there was just a short time between the giving of the order of "full steam ahead" and "full speed astern"—about a minute or a minute and a half.

Upon the whole matter, therefore, I am of opinion that here the pursuers have failed in proving, what it is necessary for them to prove, namely, that the collision occurred through the fault of someone for whom the defenders are responsible; and I think that the better form of finding, rather than that of the Lord Ordinary, and in consequence that the defenders should be assoilzied.

LORD KINNEAR—I agree with your Lordship, and I have nothing to add.

LORD JOHNSTON—I do not think that the determination of this case depends, in the circumstances as proved, upon the clause (section 633) of the Merchant Shipping Act 1894, which relieves owners from liability for loss occasioned by the fault or incapacity of a qualified pilot in compulsory waters.

I think that when the statute speaks of fault it means what it says, namely, something culpable. Now navigation may be faulty whether the navigator is the culpable cause or the innocent instrument. But the relieving clause only comes into play, and is only required, when the navigating pilot is the culpable cause of faulty navigation.

Here I do not think that the pilot was at fault in the sense of the statute. For I am satisfied that, at the point where the act of faulty navigation occurred, he had lost his bearings by reason of supervening fog of a bad and shifting character. The loss of bearings may have been very small in degree, but in the narrow waters which were being navigated it was just as much a loss of reckoning as a loss of bearings with plenty of sea-room.

If this be so, the case has, I think, to be judged of just as if the pilot was in the voluntary employment of the ship, with no question of compulsion or relieving clause.

For his error of position I think, then, the navigating pilot was in no way culpable, but was entirely to be excused by the condition of the atmosphere.

Having been brought to a knowledge that the ship had overrun the point at which she ought to have been taken out of the bight of Shieldhall Wharf on a starboard helm, I cannot find anything to except to in the orders the pilot gave in the emergency in which he found himself. A question or two followed to assure himself of the situation ahead, then a proper order, "Hard a-starboard—full speed ahead." Then finding that order ineffectual, whether by reason that it had not been promptly executed or that it was too late, there followed another proper, though again ineffectual, order, "Hard astern—let go the anchor."

I am led therefore to find that there was no fault on the part of the pilot attributable to the owners.

But I have greater difficulty in exonerating the crew—or at least the engine-room—and that difficulty is not diminished by the nature of their evidence and the condition of their logs. I am not altogether, even now, satisfied that more reasonably prompt execution than was given of the pilot's first order would not have saved the collision. But I accept the explanation of the nautical assessor that an order "Full

speed ahead" is not *per se* in practice recognised in the engine-room as an emergency order; and I have therefore come to concur with your Lordships that no fault is proved against the engine-room staff. If so, the pursuers have altogether failed to prove fault, and though I do not entirely accept his reasoning, I come to the same result as the Lord Ordinary, and agree that the defenders are entitled to be assoilzied.

LORD MACKENZIE—I concur with your Lordship in the Chair. I think the pursuers have failed to prove fault on the part of the defenders, or on the part of anyone for whom they are responsible.

The Court pronounced this interlocutor—

"Recal the finding in said interlocutor 'that the collision was caused by an error in judgment of the pilot, and that there was no fault on the part of either the pursuers or the defenders': In place thereof, find that the pursuers have failed to prove that the collision was caused by the fault of the defenders, or of anyone for whom the defenders are responsible: *Quoad ultra* adhere to the said interlocutor, and decern. . . ."

Counsel for Pursuers (Reclaimers)—Horne, K.C.—Hon. W. Watson. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Respondents)—D.-F. Scott Dickson, K.C.—Murray, K.C.—D. P. Fleming. Agents—Webster, Will, & Company, W.S.

Thursday, May 18.

SECOND DIVISION.

[Sheriff Court at Wigtown.

EARL OF GALLOWAY *v.* M'CONNELL.

Landlord and Tenant—Lease of Farm—Counter Claim—Obligation on Landlord to Put Buildings, Fences, and Gates into Tenantable Repair—Claim of Tenant to Retain Rent against Failure to Implement—Relevancy.

In a lease of a farm entered into in 1906 the landlord bound himself to put such of the buildings as were necessary for the farm as a grazing farm, and also the fences and gates, into a tenantable state of repair. In an action by the landlord against the tenant for the term's rent due at Whitsunday 1910 the defender pleaded that he was entitled to retain the rent sued for until fulfilment by the pursuer of the above obligation, and averred that the pursuer was in breach thereof in respect that buildings alleged to be necessary for a grazing farm, and fences, were and had been since the commencement of the lease in a state of dilapidation and disrepair in certain respects. *Held* that this defence was relevant, and proof allowed.

The Earl of Galloway, *pursuer*, raised an action in the Sheriff Court at Wigtown against James M'Connell, *defender*, for £187, 10s., being the half-year's rent due at Whitsunday 1910 of the farm of Maidland, of which the pursuer was proprietor and the defender tenant under a lease for twelve years from Martinmas 1906.

The lease provided, *inter alia*—"And the proprietor binds himself to put such of the buildings on the farm as are necessary for the farm as a grazing farm, also the fences and gates on the farm, into a tenantable state of repair so far as necessary, the tenant performing all carriages of materials free of charge; and in respect of said obligation the tenant hereby accepts the whole houses, dykes, gates, fences, ditches, and drains on the farm as being in good tenantable condition and sufficient for the farm."

The defender averred, *inter alia*—"(Stat. 2) The pursuer has entirely failed to implement the obligation . . . although the defender has since the commencement of the lease persistently urged him to do so. . . . (Stat. 3) The farm buildings are, and have been since the commencement of the lease, in a state of great disrepair and dilapidation, and quite unsuitable for the purposes of a grazing farm. In particular, the roofs require in many parts to be reslated and the woodwork renewed, the walls also require to be rebuilt in part and repointed. The steading is insufficiently lighted, and the sewage arrangements are insanitary and defective. It was built for a dairy farm, and in order to make the buildings of use and available for a grazing farm for the wintering of cattle, which is incidental to and necessary for such a farm, they require in many instances extensive repairs. (Stat. 4)—[*After specifying various repairs required in terms of his obligation above quoted*]—The condition of matters narrated in this article has existed since the commencement of the lease, and still exists. The defender has thus not been put in possession and enjoyment of the full subjects let in terms of the said lease. (Stat. 5) The fences on the farm also require to be attended to and repaired, and in particular the sunk fence between Jedderland field and Quay field requires to be put into a proper state of repair. Since the commencement of the lease the fences have been in a state of great disrepair, and in particular they were in such state of disrepair during the period for which the rent in question is sued for. (Stat. 6) The whole of the work detailed in the preceding articles requires to be done, and is absolutely necessary in order to make the buildings and fences suitable for the use of a grazing farm."

The pursuer pleaded, *inter alia*—"(2) The defences are irrelevant"

The defender pleaded, *inter alia*—"(1) In respect the defender has not got possession of the entire subjects let to him under the