

with. I have a strong impression that they could not have done more than they have done without embarking on an expensive and doubtful litigation in Spain at their own expense. I do not think they could be expected to do anything of the kind, and in my opinion no sufficient reasons have been disclosed for removing them. At the same time I think it advisable to continue the liquidation under the supervision of the Court.

The Court pronounced an interlocutor ordering the liquidation to be continued subject to the supervision of the Court, and confirming the appointment of the petitioners as joint liquidators.

Counsel for the Petitioners—Lorimer, K. C.—J. H. Millar. Agents—J. S. & J. W. Fraser Tytler, W. S.

Counsel for the Respondents—M'Lennan, K. C.—Mercer. Agent—John Baird, Solicitor.

Wednesday, January 23.

SECOND DIVISION.

[Sheriff Court of Dumfries and Galloway at Dumfries.]

DUMFRIES HARBOUR COMMISSIONERS v. STEAMSHIP "FULWOOD," LIMITED.

Reparation — Negligence — Harbour Commissioners — Berth at Quay — Ship.

Harbour commissioners had laid the bottom of the berth at a certain quay with timber baulks or skids, but had allowed these to fall into such disrepair that several were amissing, and those remaining were not on a uniform level. An inspection would have disclosed the defects. A vessel berthing there was strained and damaged.

Held that the commissioners were liable in damages, as they had not used reasonable diligence to keep the berth safe.

This was an action by the Steamship "Fulwood," Limited, Preston, owners of the steamship "Fulwood," against the Commissioners of the Harbour of Dumfries and the Navigation of the river Nith, to recover damages from them for injuries sustained by the said ship while berthing at Glencaple Quay in the river Nith. The defenders were vested with the control and management, *inter alia*, of Glencaple Quay, and were by "An Act for Improving the Harbour of Dumfries and the Navigation of the River Nith" (51 Geo. III, c. 147), entitled to levy dues on goods imported to and exported from the river Nith, and on all vessels entering the said river. By section 11 of the said Act these dues were directed to be applied by the Commissioners "to the improvement of the navigation of the said river, . . . and for performing every other thing necessary for the safety

of the shipping and goods belonging to the said port."

About 1866 the defenders, for berthing purposes, laid the bottom of the berth at Glencaple Quay with a series of skids or timber baulks. These skids were laid in the bed of the river, and ran out at right angles to the quay in the form of a "grid."

The facts in the case, as disclosed by proof, appear from the note of the Sheriff (FLEMING) and from the following findings in fact, the first seven of which were made by the Sheriff-Substitute (CAMPION), the remaining findings being added by the Sheriff (FLEMING), and the portions of 9 and 10 printed in italics being added by the Inner House:—(1) That the pursuers are owners of the steamship 'Fulwood' of Preston, and that the defenders, as Commissioners of the Harbour of Dumfries and the navigation of the river Nith, are vested with the control and management of Glencaple Quay; (2) that on 21st March 1905 the 'Fulwood' having arrived at the river Nith was joined at Carsethorn by the pilot Robert Major, and by him taken to Kingholm Quay, where she discharged and loaded part of her cargo; (3) that on 22nd March 1905 the 'Fulwood' was taken by Major, the pilot, to load the remainder of her cargo down to Glencaple Quay, where she was moored about 1.45 p.m.; (4) that at the time the 'Fulwood' was moored at Glencaple Quay the tide was ebbing, and that about an hour afterwards the vessel took the ground; (5) That in consequence of it having been reported to him that the rigging of the foremast was becoming tight and the vessel straining, the master Joseph Quaile, between 5 and 6 o'clock after the ebb of the tide examined the berth and found that the vessel was unsupported from the foremast forward; (6) that on the turn of the tide the 'Fulwood' floated about 11.30 p.m. on the evening of 22nd March, and an hour later sailed for Liverpool with a cargo of 190 tons on board, arriving there about midday on the 23rd, when the master made a report to the managers of the 'Fulwood'; (7) that in consequence of said report the 'Fulwood' was inspected by the witness Smart, when it was discovered that the 'Fulwood' had sustained considerable damage; (8) that the said damage amounts to at least the sum sued for, and was sustained at Glencaple Quay on 22nd March 1905; (9) that said damage was caused by the skids placed at said quay by the defenders, and maintained by them for berthing purposes, having been allowed to fall out of a uniform gradient, and by several of them where the forward part of the vessel would rest as she was berthed being wanting; (10) that said defects could have been ascertained by the defenders by the exercise of reasonable care; (11) that the defenders by their harbourmaster were aware that the 'Fulwood' was about to take up the berth at said quay; and (12) that no warning was given to the master of the 'Fulwood,' or anyone on his behalf, that said defect existed. . . ."

The pursuers pleaded—"The pursuers having suffered loss and damage through

the fault of the defenders as condescended on, decree should be granted for the sum sued for, with interest and expenses as craved."

The defenders pleaded—“(1) The pursuers' statements are irrelevant and insufficient in law to support the conclusions of the action. (2) The injury to the pursuers' vessel not having been sustained at Glencaple Quay, the defenders are not liable. (3) The said injury not having been sustained through the fault or negligence of the defenders, they are entitled to absolvitor with expenses. (4) *Separatim*, the said injury having been caused by, or materially contributed to by, the pursuers, or those for whom they are responsible, the defenders are entitled to absolvitor with expenses.”

On 2nd November 1905 the Sheriff-Substitute (CAMPION) after a proof pronounced an interlocutor, which after making the seven findings in fact above quoted proceeded—“Finds it not proved that any damage sustained by the ‘Fulwood’ was sustained through fault or negligence on the part of the defenders: Therefore sustains the third plea-in-law stated for the defenders: Assolizes them from the conclusions of the action, and decerns.”

The pursuers appealed to the Sheriff (FLEMING), who on 19th February 1906 sustained the appeal, recalled the interlocutor of the Sheriff-Substitute of 2nd November 1905; found of new in terms of the seven findings in fact contained therein; found further in fact as above quoted; found in law that defenders were liable for the damage sustained by the “Fulwood,” and granted decree for £500.

Note.—“The defenders are by the Act 51 Geo. III, c. 147, entitled to levy dues on goods imported to and exported from the river Nith, and on all vessels entering the said river. They are directed to apply the said dues ‘to the improvement of the navigation of the said river and for . . . affixing cranes upon the quays, and for performing every other thing necessary for the safety of the shipping and goods belonging to the said port.’”

“Their duty is to provide such facilities for unloading and loading as will induce shipowners to pay the dues levied on ships entering the river. Glencaple Quay is one of the quays maintained by them under their statutory powers. It is a quay at which vessels using it must take the ground at low water.

“I think there is little doubt about the liability of port and harbour authorities such as the defenders are. There is no absolute obligation upon such authorities to insure against accident, but there is an obligation to take reasonable care that the accommodation which they provide is in a safe condition. The imposition of dues upon vessels entering the river is, in respect of the facilities for working these vessels, provided by the Commissioners, and the permission and right to use these facilities thus given implies an undertaking that reasonable care has been taken to see that these facilities are such as can be used with safety, and, further, if they are not

in such a state, implies a duty to warn all who are permitted to use these facilities.

“The facts here are not seriously disputed. The steamer ‘Fulwood,’ with a carrying capacity of about 190 tons, arrived with cargo from Liverpool at Kingholm Quay, Dumfries, on 21st March 1905. She discharged her cargo, and loaded a part cargo there. M‘Call, the defenders' harbour-master, who has charge of all the defenders' quays, heard that the ‘Fulwood’ was to complete her loading at Glencaple Quay, and on the following morning he went down there to survey the berth. On his return to Kingholm Quay he was told by the master of the ‘Fulwood’ that she was going down to Glencaple Quay, and he gave the direction that she should be made well fast as the tide was strong. He gave no warning that the berth at Glencaple was unsafe, having come to the conclusion from his inspection that morning that it was in good order. The ‘Fulwood’ accordingly dropped down the river and made fast alongside Glencaple Quay at a point to suit the loading-place prepared for carts. No one was present on behalf of defenders, nor were any directions given to the master as to where he should moor. As the tide ebbed the vessel took the ground, when it was noticed that the rigging had tightened, and the master making an examination from the ground found that she was lying with no support from the foremast forward. That the vessel there and then sustained the injury complained of is not disputed.

“The cause of the accident is not very clear. There had been at one time a series of baulks of timber laid in the bed of the river running out from the quay at right angles to it. These baulks of timber are called skids, and are stated by the defenders to be placed there and maintained by them for berthing purposes. Two views of the precise use which these skids are intended to serve are put forward in this case. One of them is that they are to form a ‘grid’ on which any vessel moored at this quay should rest. The other that they are merely as guides to aid the harbour-master's eye in clearing away accumulations of gravel or sand and keeping the berth fairly level. Whichever of these views be taken it seems to me to be of the first consequence that these skids should all be there or none. If the grid is imperfect by the loss of some of the skids the danger is obvious if a vessel either has to bridge over too great a space between the remaining skids or takes the ground with a considerable part of her length either fore or aft unsupported.

“Similarly, if these skids are for levelling purposes only, the danger is exactly the same, unless the bed of the river where the skids are wanting is not only level with the remaining skids but is of the same unyielding character.

“And even if the skids are all in position, it is essential that they should be so levelled that a vessel resting on them receives support from each. When some of the skids are wanting and the remaining skids are not on a uniform level the probability of injury to a vessel lying there is greatly increased.

"In this case there had originally been fourteen skids. Counting from the skid furthest up stream, Nos. 1 and 2 are still there, Nos. 3, 4, 5, 6 have gone, No. 7 remains, No. 8 has gone, and Nos. 9, 10, 11, 12, 13, 14 remain. The 'Fulwood' was lying on Nos. 9 to 14, No. 9 being under her foremast. According to the evidence she was unsupported forward of that skid; the injuries she received are consistent with that evidence, and the sections produced by the pursuers are in accordance with it. The defenders produce sections also, but if they are correct I fail to see how the vessel could ever have sustained any injury, and I feel bound to prefer the pursuers' sections. It seems to me that the cause of the injury was that the down stream skids Nos. 9 to 14 were out of truth, with the general line of the skids, by the lower skids having been allowed to settle down too much. The result was that when the 'Fulwood' took the ground her stern came down to the level of No. 14 and she received support forward to No. 9, but that, the level of the skids forward changing there, No. 9 became a fulcrum, and on it she strained and nearly broke her back.

"Is this condition of these skids a fault for which the defenders are responsible? I have no doubt it is, if it is a condition which could have been avoided by the exercise of reasonable care. The absence of certain of the skids was obvious, and clearly could have been remedied by reasonable care; but I am not satisfied that this was the cause of the injury. I think that the inequality of the level of the skids was the cause, and the question thus narrows to this: Could such an inequality have been avoided by reasonable care?

"The inequality is a matter of not more than two inches, and could only be detected by very close examination, but it seems to me that such an examination was incumbent on the defenders. If they put down a grid for berthing vessels they must know that its absolute equality is an essential, and they cannot escape liability on the ground that it would be unreasonable to expect them to see that its absolute equality is maintained.

"I think it is proved that there was a defect in this berth, and a defect which could have been discovered by the exercise of the care called for in the circumstances. That being so, it was the duty of the defenders, when they knew that a vessel which had paid dues which included the right to use this berth was about to proceed there, to have warned her of the defect. They did not do so, and are therefore liable for the loss sustained.

"The defenders plead that the sum sued for is excessive, but the pursuers' evidence is not challenged on this point."

The defenders appealed, and argued—To make them liable the pursuers required, but had failed to establish, that the accident was due to defects in the berth which rendered it unsafe, and that the defenders though aware, or if ignorant, negligently ignorant, of the fact that it was

unsafe, had allowed it to remain so. Such evidence as there was for the pursuers showed that the accident was attributable—and so the Sheriff had found—not to the absence of skids but to one skid being about two inches higher than the others. It was not proved that the defenders knew of this defect, and it was too slight and not sufficiently obvious to infer the negligent ignorance necessary to cause liability. *Thomson and Others v. Greenock Harbour Trustees*, July 20, 1876, 3 R. 1194, 13 S.L.R. 155; *The Mersey Docks Trustees v. Gibbs*, 1866, L.R., 1 H.L. 93.

LORD JUSTICE-CLERK—The facts as to the state of this quay are clearly established. When it was constructed, or at least for a long time while it has been in use, the Harbour Commissioners have thought it proper that there should be a series of skids projecting at right angles from the quay into the bed of the river. It is said that the presence of these skids prevents inequalities being formed in the bottom of the river at the berth, because anything being brought over the berth by the tide is warded off and sent away, and the material forming the bed near the quay is retained there by the skids, preventing scouring. But undoubtedly it was contemplated and intended that vessels berthed at this quay should rest upon the skids. Now when this vessel was berthed at this quay, the berth was in a dilapidated condition if its proper state was as it was originally when the skids were put there. Five of the skids were wanting, four of them at one place. The next fact is that having her load forward the pursuers' vessel began to strain. The evidence on that matter is quite satisfactory. The mate found that the guys of the foremast, which are forward of the foremast, were getting taut and strained. This is confirmed by the master, whose attention was called to the guys by the mate. There seems to be no doubt that this was the case. If it was so, it showed that the forepart of the vessel was going down, and therefore that a camber was coming on the keel. The captain says that he went down, and that when he looked he saw daylight under the keel. Taking that to be the case—and there seems no reason to doubt that it was—then it is plain that there was no rest for the forepart of the vessel unless she cambered. Mr Macmillan says that shows that the forepart of the vessel had not gone down. I do not agree. It must have gone down to some extent if the guys of the foremast were strained. Well then, what happened next? For the next three or four hours the vessel was not waterborne. During all that time she would go on straining. If the missing skids had been there she could not have gone down very much. Where the skids were missing she could go down much more than she could have done if they had been there. The result was that she was strained. She came out of the berth strained, and the berth was in a dilapidated state as compared with the standard adopted by the

Commissioners themselves for its condition. It is not necessary to say whether the presence or absence of any particular skid caused or did not cause the injury. It is clear that the grid was defective, that its defects were known to the harbour authorities, and that injury to the pursuers' vessel resulted from these defects. This is enough to make the defenders liable. I think, therefore, that the Sheriff's interlocutor should be affirmed, with certain variations.

LORD STORMONTH DARLING—I agree.

LORD LOW—I am of the same opinion. I think it is proved beyond doubt that the injury sustained by the pursuers' vessel was received when lying at Glencaple Quay. It is not suggested that the injuries resulted from the vessel being improperly berthed. There were no representatives of the defenders present at that time, but the vessel was in charge of a pilot, and her captain was familiar with the quay. She was moored in the ordinary way at the ordinary place. What is alleged is that the injuries resulted from the condition of the bottom of the berth. The question of law which arises upon that allegation is stated by the Lord President (Inglis) with the utmost precision in the case of *Thomson v. Greenock Harbour Trustees* (3 R. 1194, at p. 1200). What he said was this—"The Harbour Trustees of Greenock, like the managers of any other harbour, provide accommodation for shipping, and invite the masters and owners of ships to occupy that accommodation, and charge them a price for it. The obligation thence arising is not an obligation to ensure against accident but only an obligation to use reasonable diligence to prevent the occurrence of injuries to vessels." The question therefore is whether the defenders used reasonable diligence to keep this berth safe. I am of opinion that that question must be answered in the negative.

Somewhere about 1866 the harbour authorities thought it advisable to lay the bottom of the berth at Glencaple Quay with skids in the form of a grid. The witness Little, who assisted in laying the grid, and afterwards became harbour-master, says that in his time if any of the skids were injured or carried away they were replaced. When he left they were all there and all in good order. But since he left they have been allowed to get into a dilapidated condition. At one place four skids are wanting, and at another one skid. The result is that the pursuers' vessel was lying on skids for more than half her length measuring from her stern, but that her fore part was on the place where the four skids were wanting, and which extended to a distance of 43½ feet.

What happened was that the forepart of this vessel came down and she was strained and injured. It may be difficult to say exactly how the injury was occasioned, but there can be no question that it was caused by the state of the berth.

In these circumstances I think that the defenders are liable. They had known for years that the part was defective and

dilapidated, and they took no steps to have it put right. I do not doubt that they did not believe that the condition of the part was a source of danger, but in my opinion that does not free them from liability.

I therefore agree that the Sheriff was right in the result at which he arrived.

The Court pronounced an interlocutor, which, after making the alterations in the Sheriff's interlocutor printed above in italics, proceeded:—

"With these variations find in fact in terms of the findings in the said interlocutor: Therefore dismiss the appeal, and of new grant decree against the defenders for the sum of £500, with interest as craved, and decern."

Counsel for the Pursuers (Respondents)
— Solicitor-General (Ure, K.C.) — Spens.
Agents—J. & J. Ross, W.S.

Counsel for the Defenders (Appellants)
— Clyde, K.C. — Macmillan — Carmont.
Agents—Beveridge, Sutherland, & Smith,
S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, January 18.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord M'Laren, Lord Kinnear, Lord Stormonth Darling, Lord Low, and Lord Pearson.)

M'PHERSON *v.* BOYD.

Justiciary Cases — Jurisdiction — Statutory Offence—Motor Car—Jurisdiction of Burgh Police Court—Motor Car Act 1903 (3 Edw. VII, c. 36), secs. 11 (1), 18, (5), (6).

Held that a police magistrate had no jurisdiction to try an offence under the Motor Car Act of 1903 (3 Edw. VII, c. 36), and *opinions* that justices of the peace also had no such jurisdiction.

Per the Lord Justice-General—"I have always understood it to be the law of Scotland that, in the case of statutory offences which are not offences at all until they are created so by statute, the jurisdiction must be specially conferred on any courts which have not universal jurisdiction, and the only courts which have universal jurisdiction are the Sheriff Court and this Court. I am talking, of course, of criminal matters. When I say universal jurisdiction I mean an inherent universal jurisdiction."

The Motor Car Act 1903 enacts—section 11 (1)—"A person guilty of an offence under this Act, for which no special penalty is provided, shall be liable on summary conviction in respect of such offence to a fine not exceeding twenty pounds, or in the case of a second or subsequent conviction to a fine not exceeding fifty pounds, or in the discretion of the Court to imprisonment for a period not exceeding three months. (2) Any person adjudged to pay a fine