

As to the first of these contentions, it is impossible to read the order without seeing that it is framed primarily with the intuits of the duties of firing being performed by a regularly appointed shot firer. Such an appointment is prescribed as a necessity in many cases, but there are exceptions, and the position in this mine was admittedly one of them. The framers of the order have thought it sufficient to put an embargo on the firer of the shot himself, and to entrust to him the duty of keeping others away. This being so, I do not think that we as Judges are entitled to spell out of the terms of the Order a further restriction which may be truly according to the spirit but is certainly not in any way expressed in the letter. The only person actually prohibited from approaching is the firer of the shot, and the respondent was not the firer of the shot.

As regards the second argument, it was pointed out by myself in *Conway's* case (48 S.L.R. 632) that there may be a prohibition as to entering a territory which would operate to make any action by the workmen within that territory an action outwith the scope of his employment. And though *Conway's* case was held by your Lordships in *Donnelly's* case to have been an erroneous determination in its application of the law to the facts, none the less the law as laid down in it was approved by your Lordships as was expressed in the opinions delivered, especially that of the Lord Chancellor. But such a prohibition must, I take it, be clear and express. At any rate I do not think it may be gathered from such implications as would here be necessary in order to find it.

Prohibition is laid on one man alone, viz., the shot firer. It would be easy to frame the order in such terms as "No one shall approach," &c. It is not so framed, and until it is so I do not think we can find a universal prohibition. I am therefore of opinion that the decision of the Court of Session was right and the appeal fails and should be dismissed with costs.

LORD SHAW—I entirely agree.

Their Lordships ordered that the interlocutor of the Court below be affirmed, and the appeal dismissed with costs.

Counsel for Appellants—Sandeman, K.C.—Beveridge. Agents—W. T. Craig, Solicitor, Glasgow—W. & J. Burness, W.S., Edinburgh—Beveridge & Company, Solicitors, Westminster.

Counsel for Respondent—The Solicitor-General for Scotland (Murray, K.C.)—Fenton—Brightman. Agents—Hay, Cassels, & Frame, Solicitors, Hamilton—Simpson, & Marwick, W.S. Edinburgh—Deacon & Company, Solicitors, London.

Tuesday, January 24.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw.)

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

(In the Court of Session, March 18, 1921 S.C. 547, 58 S.L.R. 440.)

II.—ELLERMAN LINES, LIMITED (S.S. "CITY OF NAPLES") v. TRUSTEES OF HARBOUR OF DUNDEE.

(In the Court of Session, November 27, 1920, 1921 S.C. 169, 58 S.L.R. 186.)

THE "CIRCASSIA."

Ship — Collision with Sunken Wreck in Navigable Channel Leading to Harbour — Whether Due to Fault of Master or of Harbour Trustees.

Harbour — Defective Buoyage — Misleading Use of Buoys—Liability of Harbour Trustees.

Harbour — Duty of Harbour Trustees — Pilotage—Failure of Trustees to Enforce Bye-laws as to Attendance of Pilots at Station — Absence of Pilots — Injury to Vessel Approaching Harbour—Liability of Harbour Trustees.

A vessel under Government requisition, and which had been ordered to proceed to Dundee, arrived in March 1919 off the estuary of the Tay. Neither the master nor anyone on board had any personal knowledge of the estuary, and the latest sources of information in the master's possession regarding it were a chart dated 1915, a copy of the North Sea Pilot dated 1914, and a collection of Notices to Mariners, the latest of which was dated December 1918. In these he found a recommendation to take a pilot obtainable from a pilot cutter stationed in the immediate vicinity of the buoy marking the entrance to the channel and known as the Fairway Buoy. It was the duty of the pilots under the bye-laws made by the Harbour Trustees to be at their station, but during the war they had been in the habit of anchoring inside the entrance to the river, some miles above the Fairway Buoy—a practice which the Trustees (the pilotage authority) though aware of it had taken no active measures to stop. In the master's chart the Fairway Buoy was described as a light-and-bell buoy exhibiting a white light occulting every ten seconds, surmounted by a top mark, and painted in black and red horizontal stripes. During the war, when navigation lights were extinguished, the Trustees had removed the buoy described in the master's chart from its position at the entrance to the fairway, and replaced it with a dumb buoy marked with black and red horizontal stripes, and having

the words "Tay Fairway" painted on it in large letters. After the armistice, when navigation lights were restored, the Trustees kept the dumb buoy in position at the entrance to the fairway, and used the original Fairway Buoy without altering its light or shape as one of two buoys marking the site of a submerged wreck which lay some way up the channel and of which the master was not aware. About 6:30 a.m. on 9th March the master shaped his course for the Fairway Buoy described on his chart in order to obtain a pilot. The weather was clear above with low-lying mist, and became more hazy as he proceeded. When near what he estimated to be the position of the Fairway Buoy he reduced the speed of the vessel to slow. Shortly thereafter he sighted the dumb buoy, which he at first thought might be the Fairway Buoy, but which, as no pilot cutter was visible, and as the buoy did not appear when examined by the naked eye and through glasses to correspond with the description on his chart, he concluded was not the Fairway Buoy and passed without inspecting it more closely. He then saw the white light of a buoy occulting every ten seconds, and concluding that this was the Fairway Buoy proceeded towards it, and at 7:33 a.m. struck the sunken wreck. He did not see the smaller lighted wreck-marking buoy until immediately before the collision. The pilot cutter was not at her station, but was lying about 2½ miles up the estuary, although the Harbour Trustees had on the previous day received intimation of the time when the vessel would arrive.

Held (rev. judgment of First Division, diss. the Lord President) that the trustees were liable for the loss in respect (1) that they as pilotage authority had failed in their duty to maintain an efficient pilot service, especially in view of the existence of the sunken wreck of which they were aware; and (2) that they as the harbour authority were in fault in regard to the buoyage of the channel and of the sunken wreck.

Held further (diss. Viscount Cave and Lord Dunedin) that there had been no contributory negligence on the part of the master.

Observations per Lord Dunedin as to the proper method of indicating by buoys the position of a sunken wreck.

The Case is reported *ante ut supra*.

The Shipowners appealed.

Their Lordships' judgment is reported *infra* at p. 121.

THE "CITY OF NAPLES."

Ship — Collision with Sunken Wreck in Navigable Channel Leading to Harbour — Whether Due to Fault of Master or of Harbour Trustees.

Harbour — Defective Buoyage — Absence of Charted Buoys — Liability of Harbour Trustees.

Harbour — Duty of Harbour Trustees — Pilotage — Failure of Harbour Trustees

to Enforce Bye-laws as to Attendance of Pilots at Station — Absence of Pilots — Injury to Vessel Approaching Harbour — Liability of Harbour Trustees.

A vessel was approaching the entrance to a channel leading to a harbour about midnight. Pilotage was not compulsory, but the Harbour Trustees maintained a licensed pilot service for the navigation of the channel. The bye-laws made by the Trustees required the pilots to be at all times on the look-out for signals and the pilot cutter to be at her station near the entrance to the channel, but owing to war conditions the service had become disorganised and the pilots were in the habit of sheltering a few miles inside the entrance. On the restoration of peace conditions, however, the Trustees issued instructions to the pilots that the bye-laws requiring the cutter to be at her station were to be observed. Shortly after the issue of these instructions the Trustees received information of the approach of the vessel and the probable time of her arrival. When the vessel arrived at the entrance to the channel the pilot cutter was not at her station, having had owing to stress of weather to seek shelter inside. The master sent a wireless message for a pilot to the Harbour Trustees, and also signalled for a pilot, but got no reply. Next morning about 10 a.m. he decided not to wait longer, and proceeded to navigate the channel without one. His only sources of information were his chart, corrected down to three months before, sailing directions, and observation of sea marks afloat. Near the entrance to the fairway was a "fairway" buoy to guide vessels towards the entrance. Between the "fairway" buoy and the entrance to the fairway lay a sunken wreck, the position of which was approximately indicated on the master's chart by a wreck symbol and by two wreck-marking buoys, coloured green, conical in shape, and lighted, about a cable length to the south of the wreck. Since the date of the corrections on the chart these buoys had been removed and a single green can buoy with "wreck" painted upon it, but unlighted, placed midway between the site of the two buoys shown on the chart. It was visible without glasses at least a mile away. The master concluded from the absence of the charted buoys that the wreck had been dispersed, and steered a course which took the vessel across the position of the wreck, with which she collided. The single buoy was seen from the vessel, on which an ordinary look-out was being kept, but was not reported to the master, who was on the bridge.

Held (rev. judgment of First Division) that the Trustees were liable for the loss in respect (1) that they as pilotage authority had failed in their duty to maintain an efficient pilot service, especially in view of the existence of the sunken wreck, of which they were

aware, and of the advent of the vessel, of which they had ample notice; and (2) that they as the harbour authority were in fault in regard to the buoyage, both of the channel and of the sunken wreck. *Held* further (*diss.* Viscount Finlay) that there had been no contributory negligence on the part of the master.

Observations per Lord Dunedin as to the proper method of indicating by buoys the position of a sunken wreck.

The case is reported *ante ut supra*.

The Shipowners appealed.

Their Lordships' judgment is reported *infra*.

III.—THOMSON, SHEPHERD, & COMPANY, LIMITED *v.* TRUSTEES OF HARBOUR OF DUNDEE.

Ship—Collision—Damage to Cargo—Liability of Wrongdoers to Owners of Cargo.

Held that the owners of cargo which had sustained injury owing to the negligence of Harbour Trustees were entitled to recover damages from the Trustees, irrespective of the question whether there had or had not been contributory negligence on the part of the master of the ship carrying the cargo.

The "*Bernina*" (1888), L.R., 13 A.C. 1, followed.

At delivering judgment—

VISCOUNT HALDANE—These three appeals have been heard consecutively. While each of them must be in the end the subject of separate consideration, it is convenient to deal with them in some measure connectedly. The reason is that in all three cases the questions at issue depend on matters of fact which are partially common, and that the same principles of law obtain in each instance. For the rest, the first and second of the appeals dealt with turn on further sets of circumstances which are in the main wholly independent, and the decisions to be reached must therefore be arrived at independently.

The first of the appeals to be considered relates to the steamer "*Circassia*," the second to the steamer "*City of Naples*," and the third to the cargo of the "*City of Naples*." Both steamers arrived at the mouth of the estuary of the river Tay, from Calcutta, bound for the harbour of Dundee. On entering the estuary on the 9th March 1919, when about 13 miles from her destination, the first to arrive, the "*Circassia*," struck the submerged wreck of a steamer called "*The Clan Shaw*," which had been sunk in the estuary by enemy action on the 23rd January 1917. The "*City of Naples*" arrived at the same position in the estuary a little later on and similarly struck the wreck of "*The Clan Shaw*" on the 15th April of the same year. Both vessels managed to reach Dundee, though in a damaged condition, and in the case of the "*City of Naples*" the cargo also was damaged. Your Lordships are not asked to give any decision as to the *quantum* of damage sustained, a matter which has been reserved for subsequent inquiry if neces-

sary. The only question at present is whether there is ground for fixing the respondents with liability. In all three cases the appellants, the owners of the ships and the cargo, sue the respondents, the Trustees of the Harbour of Dundee, for damages for negligence causing injury by collision with the wreck. The defence is in each case a denial of negligence, and in any event an averment of contributory negligence on the part of the appellants. The respondents are incorporated as the Harbour Authority of Dundee by the Dundee Harbour and Tay Ferries Consolidation Act 1911. Under this Act they are a local lighthouse authority within the meaning of the Merchant Shipping Act 1894 for the river and Firth of Tay. Section 92 of this statute enacts that the respondents shall provide for, manage, and maintain the lighting and buoying of the river and Firth of Tay and the entrances thereof, and may erect and maintain such lighthouses, lighting apparatus, lights, beacons, buoys, and other machinery for the purpose of lighting and buoying the river and firth and the entrances thereto, as they may consider necessary and proper. Section 94 gives them power to establish, moor, and place, *inter alia*, buoys and beacons in such situations in or near the sea or river channel or other places within or near the harbour and the river or firth as they think proper, with power to vary or remove them. By section 107 the respondents may license and appoint pilots for the port and harbour and make bye-laws for the purpose. By section 113 they are not to be liable for any accident, loss, or damage occasioned to any shipping or cargo by the fault or incapacity of any pilot licensed or appointed by them, or happening in any way in consequence of the employment of such pilot. The Act empowers the respondents to levy rates on vessels for the lighting and buoying above referred to, and enables the harbour-master to remove any wreck or other obstruction to the harbour or its approaches. The Merchant Shipping Act, which is made applicable, further enables the respondents to remove sunken vessels in the approaches, and to light or buoy them until removal. It is not in controversy that the scene of the collisions which happened was within the area to which the above powers extend.

Before turning to the evidence it will be convenient to inquire what is the situation in contemplation of law of the respondents as invested with these rights and duties, and what answers they can successfully make to pursuers who charge them with negligence in not having sufficiently advised them of the perils occasioned to navigation by hidden wrecks. As to the respondents, they owned a harbour to which they must be taken to have invited those navigating vessels to resort on condition of paying harbour rates. The owners of the vessels so resorting to this harbour became under these circumstances more than bare licencees, for they would approach the harbour in the course of business in order to exercise a privilege they were to pay for and which they had been invited to exercise. Their

legal position would thus be like that of the plaintiff in the well-known case of *Indermaur v. Dames* (L.R., 1 C.P. 274, 2 C.P. 311), and they would be entitled to look for the discharge of a duty resting on the respondents to exercise reasonable care to avert peril to them from any unusual danger of which the respondents knew or ought to have known. It is important to bear this in mind, inasmuch as it bears on the extent of the counter-duty of those approaching the harbour as regards the standard of skill required of them in navigating their vessels in the course of such approach. The latter, approaching under such an invitation as I have referred to, are entitled to rely on care having been taken by those inviting them to avert any unusual danger of which they are cognisant. I think that the duty imposed on the Harbour Trustees arose not only under the principle of invitation but as the result of section 92 of the Act of 1911 already quoted. On the other hand those approaching with their vessels must, notwithstanding their right to rely on such care having been exercised, use care on their own part not to incur peril rashly. For as Lindley, L.J., said in the "*Bernina*," 12 P.D. at p. 89—"If there has been as much want of care on A's part as on B's, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A cannot sue B. In such a case A cannot with truth say that he has been injured by B's negligence; he can only, with truth, say that he has been injured by his own carelessness and B's negligence, and the two combined give no cause of action at common law." In all such cases B must prove affirmatively the contributory negligence of A and the burden lies on him to do so. He cannot discharge this burden if A can show that what he did he did relying on an assurance, expressed or implied, from B of his safety in taking the course he did; but on the other hand it may be shown against him that notwithstanding his title to rely on that assurance, he used his freedom to do so in such a fashion as a prudent man in ordinary circumstances would not have done, and that his own negligence led to the actual damage. The question of whether he has been thus negligent is as a rule at least as much one of fact as law, for the measure of the legal obligation in cases where negligence is alleged cannot readily be laid down *a priori* apart from consideration of all the material circumstances in each individual case. No merely general principles can extend to all the concrete details of which account has to be taken in estimating whether there has been imprudent action, and for this reason the question of negligence is largely one for a jury or for a judge of fact, who will estimate according to the standards which regulate the daily behaviour of ordinary but prudent men the whole circumstances in each individual instance, and pronounce in accordance with accepted standards of conduct how a reasonable man ought to have behaved. That is what renders the task of

judges of appeal a somewhat restricted one when they are called on to review the finding of the judge of fact who has had all the witnesses before him.

I will refer next to the physical character of the estuary which forms the approach to the harbour of Dundee. Slightly south-east of the mouth of the estuary, well out to sea, lies the Bell Rock Lighthouse. The mouth of the estuary is marked by a buoy at the entrance to the fairway, which has been called in these proceedings the Fairway Buoy. The line of light as seen from this buoy proceeds from two lighthouses at Buddon Ness on the northern or Forfarshire coast of the estuary. As a vessel proceeds along this line of light she meets after an interval with another line of light coming from a more westerly direction, which includes the subsequent course up the river. Roughly, though not exactly, these lines of light indicate the middle of the channel, where the water is deep. About half a mile further up from the Fairway Buoy, and slightly to the north of the middle line of the channel, lay at the time of the collisions in question the submerged wreck of the "*Clan Shaw*." About $2\frac{1}{2}$ miles to the north-west from the Fairway Buoy is the promontory of Buddon Ness. In the estuary there is a buoyed channel delineated on the northern or Forfarshire side by unlighted red conical buoys, and on the southern or Fifeshire side by unlighted black can buoys. The width of this channel at the entrance is about 3400 feet. As regards the pilotage of the channel as I have described it, I have no doubt that the respondents had a duty to the shipowners, who were invited to use the access to the harbour, to provide a proper pilotage service. They in fact purported to maintain such a service, as indeed they had statutory power to do. Although they acted in this matter through a special pilotage committee, it is, I think, clear that they were as a body responsible for the service, and had power to resort to the harbour dues for its maintenance should the pilotage rates collected prove insufficient. They had made bye-laws, which provided that it was to be the duty of the pilots whom they licensed to look out for signals from ships for a pilot, and when such signals were observed to proceed with all despatch to take charge, and also that the pilot cutters licensed by the respondents should be kept as near to the entrance of the river as was practicable both by day and by night. These bye-laws, which had statutory authority, and the table of pilotage rates which the respondents had approved, were published, and in my view amounted to a representation that incoming vessels would find pilots available on approaching the entrance to the river. In point of fact the pilots licensed did not regularly keep station there. They remained further up the estuary off the Buddon Ness promontory, alleging that unless they had the use of a steam cutter they could not unbrokenly keep or serve the station at the entrance. No steam cutter was provided by the respondents, the plea being that the revenue from the pilotage

dues was not sufficient for its maintenance, and they appear to have been unwilling to resort to any increase of the harbour dues for the purpose. During the war the Admiralty appear to have supplied somewhat reluctantly, first, a motor boat, and then a steam vessel for the purpose. But after the war terminated the old practice of relying on a sailing cutter was again reverted to by the respondents. As I have said, I think the respondents must be taken to have represented to the public that an adequate pilotage system was maintained by them in the river, and if they failed to maintain such a system I do not think that they can rely on section 113, which I have already cited from the Act of 1911, as excusing them from the consequences, for that section only exempts them from liability for damage occasioned by the fault or incapacity of any pilot licensed or appointed by them, and not from liability arising from failure to maintain the general system of pilotage itself. As regards charts and information available for vessels approaching the harbour the case stands thus—The war, which lasted from August 1914 to November 1918, had led to the extinction of many of the lights indicated on charts and in sailing directions, and the Admiralty had in large measure taken over the regulation of lighting. This control ceased soon after the war, and during the three or four months which elapsed between its termination and the 9th of March 1919, the date of the first of the collisions in question, control by the port authority had been resumed. Some time had of course to elapse before things could be restored to their normal condition. It was not the less the duty of the port authority to do all in its power, consistently with what was permitted, to make the channel as safe as it could manage, and to provide for warning approaching ships of special and non-apparent dangers. The information required by approaching vessels was looked for in the charts issued to the public in successive editions from time to time under the supervision of the Admiralty hydrographer, and in the North Sea Pilot, a well-known book of information of which general use is made. The details in the charts and North Sea Pilot were of course varied from time to time as circumstances altered. Every master of a ship endeavours to have the latest editions, and it is generally understood that he will place reliance on what they tell him. New editions of the charts were issued during the war. Among others there was one showing the entrance to the Tay dated 30th April 1915. There were later editions, one of which was issued on 1st February 1918. The last edition of the North Sea Pilot available before the collision appears to have been one issued in 1914. There was also a book called Brown's Almanack, but this does not appear to have contained information bearing materially on the questions to be decided.

At the stage I have now reached it is necessary to divide the further narrative into the part relating to the "Circassia" and that relating to the "City of Naples." As regards the former, she was a steamer

475 feet long and of 4326 tonnage. At the time she met with the accident she was under Government requisition. She had left Liverpool on 12th December 1918 on a round voyage to Calcutta and back to London or Glasgow. After her arrival at Calcutta her master received Government orders to proceed to Dundee with a full cargo. The route instructions were to go to Port Said, where he received further orders to proceed to the Downs. There she was directed to go to Dundee. As there was a heavy sea at the Downs and a strong wind the Admiralty officer could not board the vessel, but he gave her orders when she proceeded to keep three miles off Fife Ness on account of mines. A Trinity House pilot, a Mr Robey, was taken on board, and she left the Downs on 7th March for Dundee. Mr Robey piloted the steamer as far as Yarmouth, where, as the compulsory pilotage which had obtained up to there ceased, the master resumed charge. But Mr Robey remained on board and continued to assist him. The owners about this time intimated to the pilot and harbour-master of the respondents that the steamer was *en route* and might be expected by the 8th March. Early on the 9th, about 6.35 a.m., the "Circassia" left the vicinity of the Bell Rock for the estuary. During the war there had been difficulty in obtaining charts, and the Admiralty appears to have provided requisitioned vessels with the charts required. When the steamer left Liverpool in December 1918 it was not anticipated that she would go to Dundee from India, and consequently no North Sea charts were supplied to her by her owners. But when the master was directed by the Government to sail for that port he applied to the port officer at Calcutta for the requisite charts. He was then told to apply to the Admiralty agents there and was given the latest chart they had, that of April 1915 already referred to. He applied again at Port Said, but no further chart was to be had there. He had also a copy of the North Sea Pilot and some Admiralty notices of later date, which do not appear to have any material bearing on the question before us excepting that they warned him that during the war, which was over, lights and aids to navigation might have had to be discontinued. The chart of 1915 showed at the entrance to the Tay the buoyed channel and the Fairway Buoy, indicated as a light-and-bell-buoy with a white light occulting every ten seconds, and marked with black and red horizontal stripes. The sailing directions in the North Sea Pilot were to the same effect and indicated ten fathoms of water. These directions also stated that "the Tay pilot vessel, unless driven in by stress of weather, is always at anchor in or near the Fairway Buoy," and that strangers should be exceedingly cautious on entering the river, and were strongly recommended to take a pilot, particularly at night. Before the master approached the estuary he had studied all the materials in his possession. He had been in no way informed that there was a sunken wreck in or near the channel. At 6.35 a.m. on the 9th March, as dawn was coming in, and as high tide at Dundee was

at 7:35, the master left the vicinity of the Bell Rock and steered for the Fairway Buoy expecting to find a pilot there. He was on the bridge along with the chief officer and Mr Robey the pilot, who although then beyond his own jurisdiction was accompanying him and lending expert assistance. There were two hands on the look-out forward and a quartermaster in the chains casting the lead. When the course was set the weather was clear, but as the Tay was approached a low-lying morning mist was encountered. As they came to the estuary they saw a buoy which was not lighted. It was about two points on the port bow and about four or five cables off. They were watching for the lighted buoy, but they observed the buoy in question with glasses. It turned out to be a dumb buoy carrying neither any structure for a lamp nor a bell. In the haze they could distinguish on it neither a distinctive colour nor any lettering. They therefore concluded that it could not be the Fairway Buoy. Speed having been slowed down to 3 or 3½ knots they passed it, and shortly after sighted about a point on the port bow and about 800 yards off a buoy with an occulting light. This they thought was probably the Fairway Buoy, and as their course had been from a south-easterly direction the master altered it 10 degs. to the northward in order to get more free water in the northward half of the channel. He was expecting to pick up a pilot but none came. Presently the "Circassia" struck the sunken wreck, and about the same time it was seen that the buoy carrying the light was coloured green, and that there was another buoy in line with it about a cable and a-half to the eastward. It must be remembered that the visibility of the surface of the water was not good on that morning. The positions and character of the buoys when the "Circassia" came up to them was accordingly this—Instead of the Fairway Buoy being a light-and-bell one (which when in its place stood 16 feet from the water to the top of the superstructure), surmounted by a top painted in black and red horizontal stripes and exhibiting a white light occulting every ten seconds, as described in the chart of 1915 and the sailing directions in the North Sea Pilot, the actual buoy was a dumb one, not carrying the usual structure for a lamp or bell. There was too a haze which prevented its colours from being distinguished clearly. It had no superstructure, and stood just about 11 feet out of the water. "Tay Fairway" was painted on it, but it is not clear that on this morning anyone could have read these words at the distance of four or five cables at which the "Circassia" passed it. Moreover, the movement round the buoy caused by roughness of the water added to the difficulty in making out what was on it. This buoy had been placed in position in March 1917, since which date it had never been repainted. As to the buoys which indicated the presence of the wreck, these were two in number. Both of them had lights occulting every ten seconds. That nearest to the Fairway Buoy, over a quarter of a mile off, was a buoy showing 10 or 11

feet above the water with a light of 150 candle power. That to the west was about a cable and a-half from the eastward wreck-marking buoy. It stood higher, about 16 feet out of the water, and consequently was more easily discernible over the mist. It was the very same buoy which used to be stationed as the fairway buoy to mark the entrance to the fairway, and corresponded to the descriptions in the chart of 1915 and the North Sea Pilot. It was the only buoy of its type belonging to the respondents, and had been used for no other purpose than to mark the entrance to the fairway until March 1917, when it was taken to mark the position of the wreck. Its transference then from its original situation may have been occasioned by Admiralty requirements about the extinguishing of lights, but these had ceased about three months before the accident, and it was not moved back to its place until after this had happened. On being stationed for wreck-marking purposes both this and its companion buoy were painted green, which is the distinctive wreck-marking colour. These two buoys were situated slightly to the south of the leading line. The wreck itself did not lie between the two buoys but at the apex of an isosceles triangle, and at about a cable to the north of the base line passing through the two buoys. This arrangement, under which the buoys did not indicate the line of the wreck, which lay to the north of them on the other side of the middle line of the channel, appears to have been adopted after consultation with the Admiralty. It was not, however, a general or usual mode of marking a wreck when placing buoys for the purpose, and it did not indicate with precision where the sunken vessel lay. The master and Mr Robey were misled by the appearance of the westerly wreck buoy. It exactly corresponded with the Fairway Buoy as described in the chart and sailing instructions. On seeing it the course was therefore altered slightly to the northward in the way I have already described, and the "Circassia," fortunately going very slowly at the time, collided with the wreck. She was manoeuvred off what she had struck and lay at anchor till about 11:30 a.m., when the pilot boat at last appeared and she was got to Dundee harbour in a damaged condition.

I do not propose to examine in further detail the evidence which was before the Lord Ordinary in minute detail on the question of negligence on the part of the master. It was contended for the Trustees of the harbour that the master took a risk in passing the buoy at the fairway entrance without taking further steps than he did—for instance, by lowering a boat to find out what it indicated. As against this it was said that the master did his utmost to steer a safe course, and that the collision was the direct consequence of the extent to which the respondents had altered the position and character of the buoys in such a fashion as to make the only charts and sailing directions which he possessed misleading. It was alleged against him that he ought to have had a later chart. His answer was that he had done his best to

procure the latest and that none further than that of 1915 was obtainable by him, nor had any disclosed the fact that there was a dangerous wreck in the channel. The green lighted buoys, he answered, even if observable in the haze would not have disclosed the position of this wreck, and there was no pilot provided to warn him. The Lord Ordinary found for the appellants on the whole case. After investigating with minuteness the points to which I have referred he decided that the master was not guilty of any negligence which deprived him of his right to expect that the respondents would make it practicable for him to enter the river and reach the port of destination safely. With the judgment of the Lord Ordinary the Lord President concurred fully in the Inner House. Lord Skerrington agreed so far in thinking that the master and his officers "kept a careful look-out, and that they observed as early and distinctly as the mist permitted such of the buoys and lights as were visible on the morning in question," and that the respondents were in fault in having transferred the regular light-and-bell buoy, which had been used regularly before the war to mark the entrance to the fairway, to the proximity of the particularly dangerous sunken wreck and in leaving it there after peace-time conditions had been restored. He thought, however, that the master did not navigate his steamer carefully, in so far as he should not have taken it further up the river without a pilot, and should have anchored and waited for one, and should also have realised that the war conditions might have altered the charted indications, and should have lowered a boat so as to be able to investigate for himself, having regard to the age of his chart. Lord Mackenzie, the other judge in the First Division, alone held the master to have acted negligently throughout in his attempt "to enter an unknown estuary with an old chart in hazy weather without locating the Fairway Buoy." No doubt, if the master had been in possession of a later chart or had known of the wreck or had seen a prospect of getting a pilot before the tide changed, he would have acted differently from what he did. But after considering the evidence and the judgments in the Courts below I have arrived at the same conclusion as the Lord Ordinary and the Lord President. I am unable to see that the master neglected any precaution which he ought to have adopted or overlooked any warning which he was in a position to interpret. He was misled by the changes made by the respondents in the buoyage of the river. Moreover, they had failed to secure the provision of the adequate and available pilotage service which was peculiarly necessary under the conditions which they had brought into existence. The pilot cutter was merely a sailing one, and it was lying off Buddon Ness, nearly three miles up the river, instead of being near at hand to meet a vessel of whose advent the respondents had been warned. The respondents had failed to give the "Circassia" either adequate warning or

adequate assistance in the difficult task of navigating a channel that was highly dangerous in circumstances of which they knew but the master did not. The burden of proof that he was guilty of contributory negligence rests on them. But it is not on this that I rest the conclusion to which I have come, for that burden readily shifts in the course of the evidence in a case such as this. After considering the evidence as a whole I think that no case of negligence is disclosed on the part of those in charge of the "Circassia."

I turn now to the case of the "City of Naples." This steamer was 418 feet long and of 3714 tonnage. Unlike the "Circassia" she was not sailing under requisition but was on a voyage from Calcutta, which she left on 6th March 1919, with a general cargo for Dundee. She called at the Downs on 13th April, and when off Flamborough Head signalled her name to be reported. The Lord Ordinary held it to be proved that the respondents were aware that her arrival in the Tay might be expected on the night of the 14th or the morning of the 15th April. She had picked up a North Sea pilot whose licence did not extend beyond Berwick, but he remained on board and assisted the master until the Tay was reached. The master had with him an admiralty chart of date 1st February 1918 which had been issued to him by the owners, the appellants, when the steamer sailed from Liverpool for Calcutta on 17th January 1919. It had had corrections inserted in the appellants' office extending up to the 14th of that January. He had also the "North Sea Pilot" of 1905 and "Brown's Almanack" for 1919. The chart showed, as in the other case, the Fairway Buoy at the entrance to the estuary as a light-and-bell buoy, with a white light occulting every ten seconds, and itself marked with black and red horizontal stripes. The chart also showed, unlike the chart in the other case, the existence of the wreck. There were indicated two green conical buoys with occulting lights, both a little south of and equidistant from the leading line, and indicating a wreck. There was also on this chart a wreck symbol inserted as showing the wreck close to the north of the leading line and about half-a-mile inwards from the Fairway Buoy. The hull of the "Clan Shaw" was 360 feet in length. It lay, roughly, N.E. and S.W., and the base line of the symbol shown on the chart would have passed through the hull as it lay, in point of fact, amidst-ships. But I do not think that it is clear from the evidence that the symbol, which is shown as distant about a cable length from the base line of the two wreck buoys, can be construed as meant to offer a precise indication of the actual position of the wreck. Again, in neither the "North Sea Pilot" nor in "Brown's Almanack" was there any information or warning about this wreck. As will presently appear, when the "City of Naples" entered the fairway, the two buoys which the chart showed had been removed. The "City of Naples" arrived off the estuary at about midnight

on the 14th April in time to proceed up to Dundee with the early morning high tide. Her draft was 23 feet 6 inches. In order to secure a pilot in time the recognised signal, a blue flare, was burned, and a look-out kept for the pilot. No answer was made to this signal. The pilot sailing cutter was, indeed, lying up at Buddon Ness, but the pilots appear to have failed to see the flare. The tide being now lost the master cast his anchor about three miles S.E. of the Fairway Buoy before 1 a.m. The anchor lights were lit up. The weather was fine, but there were intervals of mist. The Fairway Buoy being lighted had been identified in the darkness. The master and Mr Hiles, the pilot, looked for the lights of the two wreck-marking buoys indicated on the chart, but could not find them. At day-break another signal for a pilot was made by hoisting the pilot-jack flag, and later, at 7.10 a.m., as no pilot appeared, the master sent out a wireless message to Dundee asking about the pilot. No reply was received. The master then, about 10 a.m., decided to proceed. He was uneasy about floating mines, which were believed to remain about in the open water. He and Mr Hiles again searched for the wreck-marking buoys. He wanted to get at least far enough up the estuary to find a pilot. He decided, after consultation, to pass the Fairway Buoy on his port side and to seek the northern half of the channel. A close look-out was kept by these two. The steamer passed the Fairway Buoy at a speed of about seven knots and thereupon reduced to "slow." Not seeing the wreck-marking buoys he concluded that the wreck had been dispersed since the date of his chart (February 1918 with the corrections made up to 14th January 1919). He therefore, avoiding the northern edge of the channel, made for the deeper water along the leading line. At 10.45 the "City of Naples" struck the submerged wreck of the "Clan Shaw." Just before this the first officer, who had no instructions but was observing the river, had noticed a small unlit can-shaped buoy broad on the port bow and about two ships' lengths off. He made it out to be green, the wreck-marking colour, but as it was neither conical nor, so far as he could make out, had the word "wreck" painted on it, he did not think that what they appeared to have already nearly passed clear was worth reporting. As the "City of Naples" was sinking the master decided to make for the beach near Buddon Ness. While he was proceeding in his endeavour a rowing boat with two pilots at last arrived and assisted in the beaching.

I now turn to the reason why the master could not find the two lighted wreck-marking buoys which the chart had told him to look for. The reason was that they had been taken away. On the 31st March, after the accident to the "Circassia," the west-most of the two lighted green buoys used to indicate the wreck had been what was formerly the old fairway buoy. It was about that date repainted with red and black bands, and was put in the place of the unlighted Fairway Buoy which was doing

duty when the "Circassia" collided on the 9th March. There was therefore after the 31st March only one lighted green buoy to mark the wreck. The Admiralty had taken the view that the wreck might be marked by one buoy. But matters did not stop there. On the 11th April, four days before the accident to the "City of Naples," the light on this one buoy went out. The harbour authorities appear not to have provided themselves with a spare buoy of the same kind. They therefore took the buoy the light of which had become extinguished up to Dundee to get it recharged, and put an unlighted green can-shaped buoy with "wreck" painted on one side of it and of comparatively small dimensions in its place. It may be that if the master of the "City of Naples" and those who were watching along with him had been on the alert to detect the presence of a buoy like this they might have seen it. The chief officer and one of the crew did notice but paid no attention to it. It was not for such a buoy that anyone was looking, and the master and Mr Hiles did not in fact see it. Whether there was any haze about at the moment of passing, or whether there were waves which partly concealed the can-shaped and unlit buoy, cannot be pronounced with exactitude. The atmosphere was generally clear, but it is at least possible that the condition of the water may have made markings difficult to make out. The master says that even if the chief officer had reported that he saw a single unlit green buoy he (the master) would not have acted otherwise than he did, inasmuch as he would have considered that he was safe if he passed a ship's length north of the buoy. It must be remembered that the indications on the chart had ceased to be applicable to the actual surface objects. Having regard to all the circumstances I do not think that, even if there had been no more, what was done was done negligently. He had to go, not by his chart, which was rendered almost useless by the changes made by the respondents in the surface marks on the water, but as best he could, using care and skill, and I do not think he has been shown to have been deficient in either of these. But matters do not stop there. The respondents had been warned of his advent, and they knew that they had so changed the surface marks that he might be in peril. They took no steps to warn him or to see that a pilot was on the spot. Under the circumstances I think that they were bound to have taken such steps even if they required special alertness and effort, and that their failure to take them ought to be regarded as the true cause of what happened. I have already in the case of the "Circassia" referred to the defective pilotage service and to the extent of the duty of the harbour authorities, and it is not necessary to repeat what has already been said. The Lord Ordinary took the same view and he held the respondents liable. But in the Inner House the Lord President and Lords Mackenzie, Skerrington, and Cullen reversed the decision. The main reasons given are those very fully stated in the elaborate judg-

ment of the Lord President. He thought that the respondents had sufficiently discharged the duty which was incumbent on them as regards pilotage. I have studied the reasons given for his conclusion by the Lord President—a Judge whose abilities make me reluctant to differ from him. But even if I could accept the conclusion as warranted by the reasons given, I should remain of opinion that the standard of duty imposed in the special circumstances of the arrival of the “City of Naples” off the Fairway Buoy had not been complied with. Nor can I think that the master was bound to do more than he did. The action of the respondents in altering surface marks, and in leaving him without warning or pilotage, placed him in a position so difficult that if he made a mistake I am not prepared to hold it to have been an inexcusable one.

Of course in a case which has been tried by a judge without a jury it is the right and duty of the court of appeal to review *de novo* the evidence taken. But for reasons given earlier, where the issue is one of negligence depending on a multitude of minute circumstances as well as on credibility, I think that the view of the judge who tried the issue ought to have special importance attached to it for the reasons given in your Lordships’ House in *Hood v. Anchor Line*, 1918 A.C. 837. It is not practicable to exhaust what must always be with such an issue as we have here—a concrete and individual case—by mere application of general principles. The jury or the judge may go wrong; the latter may misdirect himself. But the duty of the court of appeal is never quite the simple one that it is when the question is in the main only one of general principle. For these reasons I think that both in the case of the “Circassia” and in that of the “City of Naples” the interlocutors of the First Division should be recalled and those of the Lord Ordinary restored.

In the third appeal—that of *Thomson, Shepherd, & Company v. Trustees of the Harbour of Dundee*—the question relates simply to liability for the damage caused to the cargo on board the “City of Naples.” It follows as matter of course that if your Lordships decide in favour of the appellants in the appeal in that case that the appellants in the third case are entitled to a decree in their favour. There appears to be no reason why the respondents should not pay the costs here and in the Courts below in all three appeals.

VISCOUNT FINLAY—I have prepared a separate judgment relating to each of these cases. I take first the case of the Anchor Line. This action was brought to recover damages from the respondents, the Trustees of Dundee Harbour, for damages to the s.s. “Circassia” by collision with the wreck of a vessel called the “Clan Shaw” near the mouth of the Tay estuary on the 9th March 1919. It is alleged by the pursuers that the collision was the result of the negligence of the Trustees in not taking reasonable steps as the pilotage authority to secure the attendance of pilots for vessels coming up

the Tay, and in failing to have the estuary properly buoyed and marked so as to apprise vessels coming in of the presence of the wreck. The Trustees denied that they were guilty of any negligence, and asserted that the navigation of the “Circassia” was defective and that it caused or substantially contributed to the disaster.

The “Clan Shaw” was torpedoed and became a wreck on the 23rd January 1917. She sank in the position shown on the Admiralty chart 1481 (1st February 1918). The wreck was outside the mouth of the channel, marked by a line of red buoys on the north and another line of black buoys on the south as the approach for vessels going up the estuary to Dundee. The point was a little to the south-east of the mouth of the channel between No. 1 red and No. 2 black buoy, and about 2 cables to the northward of the prolongation of the line of the two Buddon Ness lighthouses marking the centre of the fairway of the channel. The Trustees have power to remove wrecks in this area, but no blame has been imputed to them for not exercising this power so long as the war lasted, and after the armistice the work was delayed owing to discussions whether the cost should be shared by the Admiralty or otherwise defrayed out of national funds. It was in the meantime necessary that the position of the wreck should be properly indicated by buoys. The Tay Fairway Buoy is shown on the chart No. 10 of process, which is No. 1 in the book of additional charts in this case. It was a lighted buoy, but the light was extinguished in September 1914 on account of the war. It is described in the chart as having black and red horizontal stripes (B.R.H.S.) with a bell and a light occulting every 10 seconds. The buoy remained in its position, charged but unlit, until 18th November 1916, when it broke adrift and was taken up to Dundee, and thereafter there was no buoy at the spot where this Fairway Buoy had been until on the 16th March 1917 it was replaced by a dumb buoy unlighted in the old position, which was a little to the north of the prolongation of the central line of the fairway. This dumb buoy was *in situ* when the “Circassia” arrived on her way up to Dundee on the 9th March 1919. The wreck of the “Clan Shaw” having occurred in January 1917, two unlighted buoys were on the 10th February 1917 put down by way of indicating its position, not actually at the site of the wreck, but on the south side of the prolongation of the central line of the fairway. On the 14th and 15th March in the same year (1917) for these two unlighted buoys there were substituted on the west the old Fairway Buoy, which for this purpose was painted green and brought down from Dundee, and on the east another acetylene lighted buoy, also painted green. On the 23rd November 1918, after the armistice, came the order for re-lighting, but it was not until the 31st March 1919 that the Trustees brought down the Fairway Buoy from its position near the wreck to its old position for marking the entrance to the channel. In the meantime the buoys were misleading in the highest degree. In the position

which should have been occupied by the Fairway Buoy to afford guidance in entering the channel was a dumb unlighted buoy, while near the wreck was the Fairway Buoy, now painted green, but with its bell and its occulting light as described in the charts when it was at its old position for marking the entrance to the fairway. This was a state of things which, as the slightest consideration would have shown, was likely to lead to disaster, and the responsibility for this situation rests with the Trustees.

What might have been expected happened. The "Circassia" had left Liverpool on the 12th December 1918 on a round voyage to Calcutta and back to London or Glasgow. At Calcutta the master received orders to go to Dundee with a cargo, and applied to the Admiralty agents at Calcutta for charts. He was given the latest chart they had—a chart of the river Tay dated 30th April 1915. The master made further inquiries for charts at Port Said but without success. The chart of 30th April 1915 had nothing upon it to indicate the wreck of the "Clan Shaw." The master had also on board a copy of the "North Sea Pilot" (part ii, 7th ed. 1914) which, at pp. 216 and 217, contained a full description of the fairway light-and-bell buoy to which I have already referred, and the following paragraph as to the pilotage in the Tay:—"Pilots—The Tay pilot vessel, unless driven in by stress of weather, is always at anchor or under way near the Fairway Buoy." This is all the information which the master had about the Tay. Owing to stormy weather he had no opportunity of getting charts in the Downs. A Trinity House pilot came on board there and remained till the vessel arrived at Dundee, but latterly only as a passenger, and in an advisory capacity, as the area of compulsory pilotage did not extend beyond Yarmouth. It was urged on behalf of the Trustees that the master of the "Circassia" ought to have taken some further steps to procure more recent charts of the Tay, and that these would have shown the existence of the wreck of the "Clan Shaw." I understand, however, that your Lordships agree with me in thinking that the master took every reasonable step to get the latest information when notified that he was to proceed to Dundee from Calcutta. As he expected to find a pilot boat near the Fairway Buoy, the master laid out a course from the neighbourhood of the Bell Rock lighthouse for that buoy. He continued his voyage during the night and his course was so truly laid that he was approaching the site of the Fairway Buoy soon after 7 a.m. on the morning of the 9th March. There was a haze, but he saw at a distance which he estimated at 4 or 5 cables the dumb buoy which was then acting as the substitute for the proper Fairway Buoy. Seeing that it had neither light nor bell he concluded that it could not be the Fairway Buoy and went on at a slow speed, soundings being taken to see that there was plenty of water. His purpose was to reach the Fairway Buoy and

find a pilot there. Suddenly he saw the occulting light of what had been the Fairway Buoy, which, as I have said, had been moved to do duty as a wreck buoy. The Pilot, Robey, was with the master and others on the bridge of the "Circassia," and when they saw this occulting light they all said at once—"That is the bell buoy." Under this impression the course was altered slightly more to the northward and the "Circassia" proceeded slowly in the hope of finding the pilot boat. The captain next saw one of the red conical buoys which marked the channel on the north and then another buoy broad on his port side. Suddenly the ship stopped, having struck the wreck at 7:33 a.m.

It was strenuously urged on behalf of the Trustees that the master of the "Circassia" was guilty of bad seamanship in going on without sending out a boat to examine the dumb buoy which occupied the site where the Fairway Buoy had formerly been. It was said that if he had done this, or otherwise examined the buoy more carefully, he would have found the description "Fairway Buoy" upon it and would have stopped there. I am quite unable to take this view. What he was in search of was the pilot boat. There were no pilot boats about, and the buoy was so entirely different from that described in the chart and in the "North Sea Pilot" that I think the captain acted reasonably in going on slowly in search of the Fairway Buoy and the pilot boat which he expected to find there. By the negligence of the Trustees he had been placed in a position of great difficulty, and in my opinion it would not be reasonable to say that there was any want of good seamanship or reasonable care upon his part. If there had been any pilot boat at the site of the Fairway Buoy (then marked by the dumb buoy) as the "North Sea Pilot" announced, he would have got a pilot, and the wreck would of course have been avoided as the vessel would then have been in the hands of the local pilot. This leads me to consider the second charge of negligence against the Trustees, that which relates to the pilotage. The minutes of the Trustees dated 9th October 1912 show that a complaint had been made before that date by the Vice-Consul for Sweden in a letter addressed by him to the Pilotage Board calling attention to the wreck of a Swedish barque, and pointing out that the pilot cutter was not at her station at the Fairway Buoy when the barque came up, and urging consideration of the pilotage service. A statement appears to have been made by the pilot master, and after discussion the committee remitted to the convener, the general manager, and engineer and the pilot master to consider the whole matter of the pilotage service and to report as to the cost of providing a steam or motor cutter for the use of the pilots. This sub-committee reported on the 21st February 1913 that a steam cutter could not be provided out of the revenue derived from pilotage and that it was not desirable to make pilotage in the Tay compulsory. On a remit it was reported that the time had

not come for seriously considering the provision of a steam cutter, and this report was approved by the Pilotage Committee.

During the war the pilots ceased to attend at the Fairway Buoy altogether and the pilot cutter lay at Buddon Ness, but provision was made from time to time for steam vessels by the Trustees and by the Admiralty. This provision, however, ended with the war. It was argued by the pursuers that a sailing cutter was inadequate for the pilot service and that a steamboat ought to have been provided. With a steamboat it would have been possible for the pilots to stop at Buddon Ness and to be fetched down to the Fairway Buoy when wanted. It appears to be the case that at a great many ports a sailing cutter is regarded as adequate for the pilotage service, and I do not think that the mere fact that the Dundee Trustees continued the service with a sailing cutter can be charged as in itself negligence on their part. But this imposed on the Trustees the duty of seeing that every reasonable step was taken to enforce the attendance of the pilots in their sailing cutter at the Fairway Buoy unless the conditions of the weather were prohibitive. It must have been generally known in Dundee that masters of vessels were informed in the "North Sea Pilot" that the Tay pilot vessel, unless driven in by stress of weather, is always at anchor or under way near the Fairway Buoy. The Trustees through their Pilotage Committee, if they were attending to their duties, must have been aware of this announcement. The provision of pilots is a matter which concerns the preservation of human life and of most valuable property. It was the imperative duty of the Trustees if they found that the pilots preferred remaining at Buddon Ness to take disciplinary measures to ensure that the pilots did not fail in attendance at the Fairway Buoy unless the weather really made it unsafe. The Trustees as the pilotage authority had power to suspend pilots' licences. This power would have enabled them to take effective disciplinary measures for the supply of this most necessary service. If they had taken all reasonable steps for this purpose they would not be liable for isolated acts of disobedience or neglect by the pilots. It must have been known to the Trustees that some action of this kind was necessary to ensure the return of the pilots after the cessation of the war to the discharge of their duty by attendance at the Fairway Buoy. Nothing whatever appears to have been done. Mr Hannay Thompson, the general manager and engineer of the Dundee Harbour Trustees, who was called as a witness for the defenders in the proof in the "City of Naples" case, which was referred to in the present case, admitted that the difficulty was a pecuniary one. He said that compulsory pilotage would enable them to get money to maintain the pilots:—"It is a question of the pilots getting a suitable remuneration for their services. That, I may say, is one of the greatest difficulties we have had to contend with—to get the men to remain on the station for the money they were earning." The Trustees

appear to have taken the view that they could not have recourse to any fund except that provided by the pilotage service itself for its maintenance. This was a mistake. The power to apply the harbour rates for other purposes connected with the undertaking would in my opinion clearly cover their application for the maintenance of a service so essential as proper pilotage is for the prosperity of the harbour undertaking. Nothing can more vitally concern the interests of a port than that the approaches to it should be rendered safe by an efficient pilotage service. The language used by Mr J. H. Thompson as to the absence of responsibility of the Trustees for the pilotage service may perhaps admit of explanation. It is, however, quite clear that the Trustees are responsible for taking every reasonable measure in their power to secure the performance by the pilots of their duty. This responsibility the Trustees appear to me not to have realised, and they did not discharge themselves of their duty in this respect. Lord Blackburn, the Lord Ordinary, indicated his opinion that the Trustees would have been liable on this ground in this action. He took, however, the view that the judgment of the Inner House in the "City of Naples" case precluded him from giving effect to his opinion on this point, but the Lord President, who took part in both these cases, said that the Lord Ordinary was mistaken in so thinking. The Lord President expressed his view in the present case on appeal that the Trustees were liable for default in their duty as regards pilotage, and I quite agree with his conclusion. He adverted to the circumstance that the pilot cutter had not been at her station at any time during the night preceding the collision, but was at anchor up the river 4 or 5 miles away, and emphasised the fact that the defenders had not called their pilot master, who was also harbour-master, nor any of their pilots as witnesses. I think that the defenders in taking this course probably exercised a very wise discretion as regards the conduct of the case. On the whole I think that the Trustees were guilty of default as regards both buoyage and pilotage, and that their default was the cause of the collision of the "Circassia" with the wreck. I am further of opinion that there was no contributory negligence on the part of the "Circassia."

There was a singular difference of opinion in the Courts below. The Lord Ordinary and in the Inner House the Lord President were in favour of the pursuers. Lord Mackenzie and Lord Skerrington were in favour of the defenders although they do not exactly agree in their ground. Judgment was accordingly entered for the defenders in accordance with the opinion of the majority in the Inner House. I agree with the Lord Ordinary and the Lord President, and am of opinion that the interlocutor of the Inner House should be set aside and that judgment should be entered for the appellants with costs here and below.

In the *Ellerman Lines* case the questions are to a considerable extent the same as in the case of the "Circassia," but the facts

differ in some respects. The collision in the case of the "Circassia" was on the 9th March 1919, and I need not repeat now the account which I have given of the buoyage in the Tay down to that date. The collision in the present case of the s.s. "City of Naples" with the wreck of the "Clan Shaw" took place on the 15th of the following month April. In the interval between these two collisions certain changes had been made in the buoys. The dumb buoy, which had since 16th March 1917 been substituted for the proper Fairway Buoy, and which was there at the time of the collision of the "Circassia" with the wreck, was replaced on the 31st March 1919 by the proper Fairway Buoy. That buoy had in the meantime been doing duty as one of the wreck buoys. On its restoration to its original position the "wreck" plate was removed from it and the buoy was re-painted red and white, while the word "fairway" was painted upon it as before. When the "City of Naples" came in on the 15th April the Fairway Buoy was in its old position and in proper order. On the 31st March the wreck buoy on the east was moved in a westerly direction to a point some 300 feet south of the site of the wreck and to the south of the prolongation of the line marking the centre of the fairway of the channel. Its new position is shown by a small red circle on the Admiralty chart 1481. The light on this buoy went out, and on the 14th April the buoy was sent up to Dundee to be re-charged. There was substituted for it a small unlighted flat-topped buoy which stood 4 feet out of the water; its colour was green, and it was painted on one side with the word "wreck"; it was visible at a distance of a mile. The pilots were not informed of this change. This unlighted flat-topped green buoy remained there until the 16th April and was consequently *in situ* when the collision took place on the 15th between the "City of Naples" and the wreck.

The "City of Naples" sailed from Liverpool on the 17th January 1919 for Calcutta and left Calcutta on her home voyage on 6th March. She took a pilot in at the Downs. His licence extended only so far as Berwick, but he went on to the Tay in the "City of Naples" although no longer as pilot. On passing Flamborough Head a signal was made that the "City of Naples" was on her way to the Tay, and the pilotage authorities at Dundee were informed of this. The captain of the "City of Naples" had with him the chart of the river Tay 1481, dated 1st February 1918, which had been checked as correct up to 17th January 1919 in the appellants' office. He had also the Sailing Directions and Brown's Almanack, which contained information similar to that given in the Sailing Directions to which I have referred in the case of the "Circassia." When the "City of Naples," about midnight 14th-15th April, reached the vicinity of the Fairway Buoy the captain made the usual signal for a pilot by burning a blue flare. To this there was no response, and he very prudently determined to remain where he was for the night. The "City of

Naples" accordingly came to anchor at 12:37 a.m. on the 15th April, some 3 miles to the south-east of the Fairway Buoy. From her bridge could be seen the Buddon Ness lights, the light of the Fairway Buoy, and the Bell Rock light, as well as the lights of the red and black buoys marking the channel, on each side. The captain looked for the lighted buoys marking the wreck which the chart indicated, but he looked in vain, as they were no longer there. In the morning he hoisted the pilot Jack, but no notice was taken of this, and at 7 a.m. he sent a wireless message announcing his arrival, which the Harbour Trustees' officials got about 10 a.m. Getting no answer the captain determined to go on, and hove anchor at 10:13 a.m. He had seen the statement in the Sailing Directions that the pilots were to be found near the Fairway Buoy, and started to get a pilot. He passed the Fairway Buoy on his port side, meaning to go up on the north side of the channel near the north line of red buoys. He looked for the two buoys which he expected to find near the wreck, but not seeing them he came, not unreasonably, to the conclusion that the wreck had by this time been removed, and that the buoys for that reason had been taken away. He starboarded a little and went on until his vessel was arrested by striking with her port bow the wreck of the "Clan Shaw." The blow was not a severe one, but holes were made by it and the water came in fast, so that the "City of Naples" had to be beached on the sands by Buddon Ness. The captain was on the bridge himself, and with him was the pilot Mr Hiles, although no longer in his official capacity, and an apprentice. On the fo'castle was Mr Constable (the chief officer) and the carpenter. There was no look-out—that is, no one had been told off specially as a look-out—but those on the bridge and the fo'castle kept a general look-out. The green buoy which had been put down as a wreck buoy was not noticed by anyone on the bridge. It was noticed by Mr Constable, but not until it was broad on the port bow of the "City of Naples," and he did not report it. He says—"I thought it was not a wreck buoy and was not worth reporting because we were abeam then and the ship would pass it." In my opinion the Trustees were guilty of negligence leading to the loss of the "City of Naples" in two respects—(1st) The buoyage was faulty, and (2nd) they had not taken adequate measures to ensure the attendance of pilots. (1) The changes made in the buoys were very misleading. For a long time there had been near the site of the wreck two lighted buoys. When the "City of Naples" arrived these buoys had been removed and there was only an unlighted buoy instead of them. The master of the "City of Naples" was not unreasonably in thinking from the disappearance of the lighted buoys shown on his chart that the wreck itself must have been removed. There was no light buoy at all to mark the wreck. The unlighted buoy was a quite inadequate substitute for the two lighted buoys which the Trustees had removed. The unlit buoy would have been

an inadequate mark for the wreck in any case, but it was in the highest degree misleading to take away the two lighted buoys and to substitute for them one unlighted buoy. (2) For the reasons I have given in the case of the "Circassia" I think that it is impossible to acquit the Trustees of blame for the absence of pilots. The "City of Naples" waited for a long time for a pilot owing to the announcement in the "North Sea Pilot" and the "Almanack" that they were to be found at the Fairway Buoy, and she waited in vain. I do not think that the Trustees had adequately discharged their duty in this matter. The absence of the pilots was not merely occasional and unexpected.

The Lord President, who in the case of the "Circassia" was of opinion that the Trustees were to blame for the absence of pilots on the 9th March, acquitted them of blame on this point in respect of the "City of Naples" on the 15th April, on the ground that on the 7th April they had admonished the pilots to keep their posts at the Fairway Buoy. In the minute of the proceedings of the 7th April there is nothing about this admonition. It concludes with a statement that there was an adjournment for information about the installation of steam or motor power. But Mr Plenderleath, one of the Harbour Trustees, says in his evidence that after the deputation on the 7th April withdrew the Trustees gave the pilots instructions to the effect that they must go to sea. Mr Reid, the pilot master, on the other hand, says that he never heard anything about complaints with regard to the pilotage service, and that no suggestion was ever made as to the performance of his duties. Even if there took place on the 7th April some conversation with the pilots such as Mr Plenderleath deposes to, it appears to me that something much more energetic was wanted to awaken the pilots to a sense of their duty to keep at sea near the Fairway Buoy. It is not surprising to find that on the 15th April, as on the 9th March, no pilots were available there. On the 15th there was nothing whatever in the state of the weather to justify the absence of the pilots from their proper post. The Trustees are, in my opinion, responsible for not taking action to secure attention by the pilots to duties so essential as the provision of pilotage for vessels at the mouth of the channel. I agree with the conclusion on this matter at which the Lord Ordinary arrived in the present case, and I think that the observations made by the Lord President in the "Circassia" case were just as applicable to the present case, inasmuch as nothing whatever had happened in the interval to show that the Trustees had become properly alive to their duty in this matter of keeping the pilots up to their work.

It remains to consider whether the Trustees have made out their charge that the navigation of the "City of Naples" was defective. In one respect, and that a very important one, I think that they have. No duty is more important than that of keeping a look-out. It is admitted that while at sea there must be a man specially

detailed for the look-out, with the special duty of picking up any objects deserving notice and reporting them to the navigation officer, but it was urged that this was not necessary at the mouth of the Tay. In my opinion this duty was still more imperative under the circumstances in which the "City of Naples" was placed when she began to go up the Tay. She was not in port; she was still in the open sea at a point nearly adjoining the entrance into the channel where other vessels might be expected, and those in command of the "City of Naples" knew that there had been a wreck in the neighbourhood. If there had been a look-out man it is quite impossible to suppose that the green buoy, which was intended to mark the wreck, would have escaped attention. Those on the bridge had other things to attend to, and failed to observe this buoy at all. There was no want of visibility on the morning in question, as the evidence shows that it would have been seen at a distance of a mile. The captain and others on the bridge never saw it at all, while those on the fore-castle did not see it till so late a stage that they thought there was no use in reporting it to the bridge. The defence is set up that the buoy if seen would have conveyed nothing to those in charge of the "City of Naples." To me it appears that it is pretty clear that if this buoy had been reported the collision would never have taken place. The captain knew there had been a wreck. He had come to the conclusion, seeing that the lighted buoys were no longer in its vicinity, that the wreck must have been removed, but if what was unmistakably a wreck buoy in the vicinity of the spot where he knew the wreck had been had been called to his attention, I think it would have awakened the captain to the danger of the course which he was taking in steering straight for the spot where the wreck had been, and where in fact it still was. There was abundance of room both to the right and to the left, and if he had seen the wreck buoy it would have forcibly called to his attention the possibility that the wreck which he thought had been removed might be still there, and I do not believe that the captain of the "City of Naples" if he had seen the wreck buoy would have been guilty of the rashness of taking his ship to the very spot where he knew the wreck had been. By taking this course he staked everything on the correctness of his inference that the wreck had been removed, and this inference had been made without that knowledge of all the circumstances which he would have had if a look-out had been kept. If there had been a look-out he would have been apprised that there was a wreck buoy in the vicinity of the spot where the wreck had been, and it appears to me to be improbable that if there had been a look-out to call attention to this buoy he would have persisted in taking his vessel right over the site of the wreck. On this point I think that the captain of the "City of Naples" cannot be acquitted of blame, and accordingly that judgment should be entered for

the Trustees. I arrive at this conclusion with regret. In every other respect the "City of Naples" was navigated with great care and skill. If the Trustees of the harbour had done their duty by buoying properly, and by properly providing for pilotage, the difficulty would never have arisen. But, on the other hand, I cannot see that there was any justification for failing to have a look-out, and think that if that ordinary and very necessary precaution had been taken the disaster would in all probability never have occurred.

On this ground, and on this ground only, I think that in the present case the appeal should be dismissed.

In the third case the claim was made against the Trustees of the Harbour of Dundee by the owners of the cargo on board the "City of Naples" in respect of the damage sustained in consequence of the collision with the wreck of the "Clan Shaw." In the case of the action brought in respect of the "City of Naples" itself it has been shown that the Trustees of the harbour were guilty of negligence which led to the collision. It is quite clear since the decision of your Lordships' House in the "*Bernina*" (1886, 13 A.C. 1), affirming the decision of the Court of Appeal (12 P.D. 58) that the fact that the collision was in part due to the negligence of those in charge of the carrying ship does not prevent recovery by the owners of the cargo against a third party to whose negligence the loss was also due. There must, therefore, be judgment for the appellants with costs here and below.

VISCOUNT CAVE—My judgment relates only to the first appeal—that which arises out of the injury to the "Circassia"—as I was unable to hear all the arguments relating to the other two appeals.

The decision in the "Circassia" case must turn on the question, What caused the accident? and it is important therefore to consider closely the circumstances in which it occurred. On the morning of the 9th March 1919 the position at the mouth of the Tay estuary was as follows:—The entrance to the estuary was marked at the centre of the fairway by a dumb buoy standing about 11 feet out of the water, painted with black and red horizontal stripes, and having the words "Tay Fairway" painted on each side of it in letters 11 inches high. About 800 yards further up the channel, and about half a cable north of the "line of leading lights" (which ran approximately along the centre of the fairway), the wreck of the "Clan Shaw," which had sunk there in January 1917, lay submerged. For the purpose of marking the position of this sunken wreck two green buoys, one standing 11 feet and the other 16 feet out of the water, and each marked with the word "wreck" and having an acetylene light occulting every ten seconds, were moored about half a cable to the south of the line of leading lights and in a line parallel with that line, so that these buoys formed with the wreck an isosceles triangle, the base line of the triangle being about a cable south of the wreck. The taller wreck buoy had

a bell, but the bell was tied. There was no pilot boat in the neighbourhood, for although it was stated in the handbook called the North Sea Pilot that "the Tay pilot vessel unless driven in by stress of weather is always at anchor at or near the Fairway Buoy," the pilot vessel was in fact lying at Buddon Ness, about 2½ miles up the estuary. The weather was fine, but there was a low-lying morning haze, patchy in places. Under these conditions and at about seven o'clock in the morning the "Circassia," bound from Calcutta for Dundee, approached the entrance of the estuary with the intention of picking up a pilot at the Fairway Buoy and proceeding up channel to Dundee. The master and the ship's officers were unfamiliar with the Tay, and the same was true of Mr Robey, who had acted as pilot from the Downs to Yarmouth only, but had since remained on board and was voluntarily assisting the master. The master had no proper chart of the entrance to the Tay. The latest chart which he could obtain at Calcutta was one dated April 1915, which of course did not show the wreck or the wreck-marking buoys, and which showed the Fairway Buoy as being (what in fact it was in 1915) a light-and-bell buoy occulting every ten seconds. The master had tried to obtain a later chart at Port Said but without success, and for some reason which I am unable to understand he had not telegraphed to his owners at home requesting them to provide him with the latest chart at the Downs, where he had to pick up his pilot and some papers. The latest chart, if he had had it, would have shown the position of the wreck and the wreck-marking buoys.

In stating what next happened I accept the master's evidence, which was clearly and frankly given. It appears from that evidence that when the "Circassia" was approaching the Tay estuary the master with the chief officer and Mr Robey were on the bridge, and were looking out for a buoy of the nature described in the chart of 1915—that is to say, for a light-and-bell buoy occulting every ten seconds—and the evidence proceeds as follows:—(Q) Were you accordingly looking out for picking up a buoy of that description?—(A) We were all looking out for a buoy of that description. (Q) About 7 a.m., as you were coming up towards the estuary, what was the state of the weather?—(A) The weather became hazy. I gave certain orders with regard to our speed. At 7.5 a.m. I reduced speed to half-speed. At 7.12 a.m. I ordered speed to slow. That was owing to its becoming hazy and I had not made out the buoy. As we were still going along on the course I had set for making the Fairway Buoy I suddenly saw a buoy on my port bow in the haze. It just loomed up suddenly out of the haze. (Q) What distance do you think you were from that buoy when you first saw it?—(A) Well, it is very difficult to judge in a haze like that, but I should imagine about four or five cables off. It had no light or bell. After seeing that that which I thought was the Fairway Buoy had no light, I thought it was something that I

did not know anything about, or it might have been a floating buoy, and I really did not take any more notice of that buoy. (Q) Did it occur to you that it was a substitute for the Fairway Buoy?—(A) No, not the slightest. I accordingly proceeded on, expecting to get to the fairway bell buoy and get my pilot.”

The buoy here mentioned was in fact the dumb buoy marking the entrance to the channel and inscribed “Tay Fairway.” The evidence proceeds—“As we were still proceeding on I suddenly saw a light occulting every ten seconds, and I said—in fact we all said at the same time, the chief officer on my left and Mr Robey the pilot on my right—‘That is the bell buoy,’ and it gave me confidence and I proceeded on. I altered my course immediately after I saw that light. I made an alteration to the northward of 10 degs. My purpose was to steer a little bit clearer and bring it a little more on the bow, and expecting to pick up the pilot any moment. . . . (Q) When you saw this light occulting every ten seconds, and which you identified as the Fairway Buoy, could you see the buoy at first?—(A) No; I saw the light first. As we drew nearer we made out the buoy. The next thing that happened was that I saw No. 1 conical buoy on my starboard side, but all these things came very suddenly—it seemed to be clearing away. That was a red conical buoy which marked the channel. As we were proceeding then I saw another buoy broad on my port bow, but what it was I could not say at the moment. I had great confidence in this light which I saw on the bell buoy which was leading me on, and then in looking all round suddenly the ship stopped.” The lighted buoy here first mentioned was in fact the westerly wreck buoy, while the buoy seen broad on the port bow was the easterly wreck buoy. The stoppage, which occurred at 7:33 a.m., was caused by the collision of the vessel with the sunken wreck.

In cross-examination the master speaking of the Fairway Buoy gives the following further evidence:—“Through the glasses I saw the buoy and the shape of the buoy at a distance of 4 or 5 cables and about $1\frac{1}{2}$ to 2 points on my port bow. I did not alter my course at that time. I continued upon the same course expecting to meet the lighted bell buoy. I did not call that one the Fairway Buoy at all. I certainly did watch it as we continued to approach it. I thought it was some buoy marking something maybe down by the Abertay Spit—a floating buoy or something of that sort. I never thought that it was the Fairway Buoy. (Q) Did you take any steps to inquire?—(A) No further than that because it had no light it was a dumb buoy. (Q) So far as your own chart was concerned the only buoy in about that neighbourhood was the Fairway Buoy?—(A) Yes, and that was what I was looking for. I assumed it was not the Fairway Buoy because it was not lighted. If you assumed that what else did you think it could be?—(A) I could not tell what it could be. The position was that I continued my course and speed in ignorance of what the buoy was.” And again, speaking

of the same unlighted buoy, he says—“Keeping that steady course I would approach the buoy. As I approached it and got nearer it did not reveal its character to me. I ultimately passed the buoy on my port hand at a distance, I should say, of about 2 to $2\frac{1}{2}$ cables. I would not like to say what the actual distance was because it was hazy. I had ceased to take any notice of the buoy more or less. I put that to one side as being a buoy. That was when I saw the light. I ceased to take any notice except looking casually around. It was not interesting me because I was enough distance off and not in any danger. (Q) You really made no examination to ascertain its particular shape—(A) I could see the shape through the haze. (Q) What was its colour?—(A) The colour was a sort of dirty colour; it was not a distinctive colour at that distance. (Q) It was so hazy that you could not tell what it was?—(A) It was not distinctive. (Q) And therefore it might have meant anything?—(A) Yes. (Q) And notwithstanding you kept your course?—(A) Yes, all the time.” This evidence, which was corroborated in every essential particular by Mr Robey and the chief officer, shows clearly what occurred. All three of them had studied the chart of 1915 and were on the lookout for a lighted bell buoy of the character there shown. On seeing the unlighted dumb buoy and observing that it did not correspond to that description they inferred at once that it was not—what in fact it was—the Fairway Buoy and accordingly passed it by without examination. After proceeding slowly for a further 600 yards or thereabouts they saw the taller (or western) wreck buoy with its occulting light, and observing that it corresponded with the description on their chart of the Fairway Buoy they concluded without hesitation that it was—what in fact it was not—the buoy marking the entrance to the fairway, and proceeded to approach it on the starboard side expecting to find a pilot close by. Both these inferences were founded on the chart of 1915 and both were wrong, and these two mistaken inferences with the action founded upon them brought the ship upon the wreck.

Upon this evidence I am unable to resist the conclusion that one cause, if not the main cause, of the accident was the action of the master of the “Circassia” in relying upon the chart of 1915 and acting accordingly. If he had had the latest chart, which was corrected up to January 1919, he would (as he admitted) have had no difficulty in avoiding the wreck. If he had had the earlier chart dated February 1918, which showed the wreck and the wreck-marking buoys, he would almost certainly have acted with greater caution, and would have made sure before proceeding that he was not in the vicinity of the wreck. If he had had no chart at all he would probably have stopped at the dumb buoy and examined it more closely before passing it. But trusting absolutely to his chart of 1915 he passed the dumb buoy without examination and steered close to the wreck-marking buoy and so came upon the wreck. It was urged

by counsel for the appellants that the responsibility for his error lay upon the Trustees on the ground that some considerable time before the accident they had taken away the old lighted fairway buoy and used it to mark the wreck, and had put an unlighted buoy in its place, but I am unable to follow this contention. The Trustees had a perfect right to change their buoys—to use the lighted buoy as a wreck-buoy and to put an unlighted buoy in its place—provided that the change was indicated by proper marks on the buoys themselves, and that due notice was given to the Admiralty so that the new conditions should appear upon the Admiralty chart. Both these conditions were observed, and this being so I am unable to see how the change can be said to have misled the master of the “Circassia.” He had never seen the lighted buoy in its former position at the entrance to the fairway but relied entirely on his obsolete chart which misled him. He admitted that he was “quite familiar with the weekly and monthly directions to mariners to be sure and obtain the latest charts and keep their charts up-to-date,” and added “I was not happy entering an unknown estuary with a chart four years old . . . I recognised the importance of having an up-to-date chart and I was unhappy about it.” His anxiety was justified and I think that it should have led him to stop and carefully to examine the dumb buoy, of the meaning of which he was uncertain, or wait until the haze lifted and a pilot could be obtained. He did neither, and in my judgment he cannot be absolved from blame.

Having regard to the above conclusion it is unnecessary for me to deal at any length with the question how far the Harbour Trustees were also to blame for the accident, but I think it plain that they contributed to it by a neglect of their duties as a pilotage authority. If a pilot boat had been at or near the Fairway Buoy the “Circassia” would at once have picked up a pilot who would have directed her course in safety. The Trustees were not bound to guarantee that a pilot should be always there. But they were bound in the performance of their duty as a pilotage authority to take due and reasonable care to have an effective pilot service, and this was the more incumbent upon them at the time in question as there was a dangerous wreck in the middle of the fairway and the arrival of the “Circassia” was expected. That the Trustees did not exercise such due and reasonable care is, I think, apparent from the facts stated by the noble and learned Lords who have preceded me. But there was a further cause contributing to the accident, namely, the inadequate buoying of the wreck. That the wreck was a danger to incoming vessels is not denied, and it was the duty of the Trustees until it could be removed to do their best to indicate its position by proper surface marks. This they failed to do. Reliance was placed on a regulation of the Northern Lighthouse Board, which provides that a wreck-buoy “shall when possible be laid near to the

side of the wreck next to mid-channel”; but this regulation, which evidently means that the buoy shall be placed between the wreck and mid-channel so that ships may pass on the far side of the buoy, was not complied with. It may be that the regulations was inapplicable to the present case, as there was not sufficient room for a buoy between the wreck and mid-channel, but if so it was the duty of the Trustees to mark the wreck effectively in some other way. Whether this should have been done by laying a buoy at each end or on each side of the wreck, or by laying three or more buoys, or by means of a wreck-marking vessel, is a matter on which the experts differed and on which I will not venture to pronounce an opinion. But I am confident that if any one of these methods had been adopted the accident would not have occurred, while to lay the buoys a cable away from the wreck and on the further side of mid-channel was to court disaster. I think that the position of the wreck was inadequately marked on the surface and accordingly that the Trustees were to blame on this account also.

If I am right in the above conclusions, then there is an end of this appeal. The accident was caused partly by the negligence of the respondents and partly by the negligence of the officers of the appellants, and if so the appellants cannot recover. I would therefore dismiss this appeal.

LORD DUNEDIN—I have considered these cases with great anxiety, not only because of their intrinsic importance, but still more because of the sharp difference of judicial opinion to which they have given rise. In such cases one can only make up one's own mind to the best of one's ability. While, however, it is the case that there is a difference of opinion as to what the result should be, I think it right at once to lay stress on the fact—for as owing to illness I could not earlier write my opinion I have had the advantage of reading all the opinions of your Lordships before writing mine—that there is absolute unanimity amongst your Lordships as to the negligence imputable to the Dundee Harbour Authorities. In that opinion I concur. I do not propose to go over the ground which has already been traversed. The Lord Ordinary, Lord Blackburn, to my thinking, took an accurate view of the case, which view has not in my judgment been disturbed, and on this part of the case I agree *in omnibus* with the remarks that have fallen from the noble Viscount on the Woolsack. Put in a single sentence, I think the harbour authorities published to the world that pilots would be in attendance outside the Fairway Buoy, and I think the non-attendance which took place in both the cases was not due to any personal negligence of a pilot for which the respondents would not be answerable, but was due to their laches in not seeing that a proper system was enforced. Further, I think their default was accentuated in the “City of Naples” case owing to the ample warning that had been given of the probable arrival of the ship.

As to buoying, I think the negligence was still more marked. Quite apart from the method of buoying employed, as to which I shall have to make a few remarks, the respondents, owing to their penurious equipment in the matter of buoys, never left the system alone, with the result that on neither occasion was the buoying *de facto* what according to the published charts it was held out to be. In the "Circassia" case the Fairway Buoy was doing duty as a wreck-buoy. In the case of the "City of Naples" it is not too much to say that although the probable advent of the ship was known, yet on the night before her arrival the authorities simply chanced it and left the wreck to be indicated by a single unlighted buoy instead of the two lighted buoys laid down in the most recent charts. This, too, when they had already had the experience of the "Circassia" to show them how easy it was for a ship to go astray. As to the system, I feel constrained to say something in the hope that the Board of Northern Lights may consider my remarks. Buoying is a practical matter and not one in which it is my province to lay down the law or even to make suggestions. But I am entitled to say this, that I think it most unfortunate that it should be possible for eminent persons in their profession to be able to give such contradictory evidence as was given in this case. According to the witnesses for the respondents the indication of the wreck by two buoys forming the base of a triangle, of which the wreck as marked on the chart was the apex, was everything that it should be. According to the witnesses for the appellants the so-called system was a mere trap, two buoys indicating that the wreck should be found between them. It is obvious that if buoys to mark a wreck do not speak the same language to all who see them they greatly fail in their object, and while again deprecating the idea that I am to lay down rules as to proper buoyage I do venture to lay down some propositions which do not require technical knowledge and are universally true. If there is plenty of sea room and one buoy only is used of an appropriate colour and marking then the nearer it is to the wreck the better, and the language it would speak would plainly be—"Give me a wide berth." When there is not ample sea-room then it is obvious that buoys which form a containing figure and have the wreck within that figure would give the easiest indication. A containing figure cannot be made by less than three points. If two only are used then the only territory that can be surely characterised is the territory between them. Lastly, when there is a channel, that is provided for by the rule formulated and published, namely, that "when possible the buoy shall be laid next to the side of the wreck next to mid-channel," I think that only one reading of this rule is possible. The channel is to be constricted to the extent of putting out of use all on the opposite side of the buoy from the mid-channel line.

It follows from the unanimous opinion to which I have alluded that the respondents being in fault the onus is on them to prove

negligence in the navigation of the respective ships, which negligence contributed to the catastrophe. In the case of the "Circassia" I agree with the opinion of my noble friend who has just preceded me and for the same reasons. I should only repeat what he has said if I said more. In the case of the "City of Naples" I agree with the noble Viscount on the Woolsack, and I am aware that the same view is shared by Lord Shaw. The sufficiency of look-out is a practical matter, and I am not satisfied that there was any necessity—still less do I think it the province of this House to lay down a hard and fast rule to that effect—for a special man on the fore-castle to act as a look-out. Further, I do not think that if the small buoy had been sighted by the captain it would have made the slightest difference. By their tampering with the system as shown on the chart the respondents had, I think, deprived the small buoy of all significance. Nay, further, if a boat had been lowered and the line of middle lights accurately observed, then, in accordance with the rule above quoted, the small buoy indicated that the wreck which it was there to mark was to the south and that the clear passage lay to the north.

On the whole matter I am of opinion that in the "Circassia" case the interlocutors appealed against should be affirmed; that in the "City of Naples" case they should be reversed and the Lord Ordinary's interlocutor restored. In the third case there must clearly be reversal, as there is unanimity as to fault on the part of the respondents, and an inquiry into the negligence of the captain of the "City of Naples" does not enter into the question.

LORD SHAW—So satisfied am I with the description, narrative, and conclusions made by the noble and learned Viscount on the Woolsack that I should have been well content merely to concur with his judgment. But in view of the difference of opinion in this House I venture, avoiding repetition, to indicate how the truth and substance of these appeals strike my own mind.

That the jurisdiction of the Dundee Harbour Trustees extends over the estuary and the *locus* of all these unfortunate occurrences is undoubted. This body, however, doubts, and in these cases has strenuously questioned, its own powers. These powers rest upon statute. The Dundee Harbour and Tay Fisheries Consolidation Act 1911 has to be read along with the Merchant Shipping Act of 1894 and the Pilotage Act of 1913. The Lord Ordinary expounds the relevant sections of these Acts and the interrelation of the statutes in a manner which humbly appears to me to be in all points correct. So far as fulfilling their statutory duty was concerned, the appointment of a pilotage committee was a judicious and natural piece of administration by the Trustees, but in so far as operating as either a complete fulfilment of that duty or an excuse for neglecting it that appointment signified nothing. The attempted limitation of these responsibilities to the extent of the expenditure which pilotage dues

would cover is also quite indefensible. Yet on both of these points a serious misapprehension of their statutory duties was persistently entertained and indeed showed itself in the evidence. An excellent illustration of their unfortunate sense of the limitation of their duties is furnished by what occurred after the torpedoing of the "Clan Shaw," which sank in the fairway of the river. The one thing confronting the Trustees was that every effort possible should be exerted to get that wreck out of the way. Submerged where it was it needed no alarmist to show that it was productive of a menace to the safe navigation of the Firth. In the year 1919 alone four vessels, to use the language of the evidence, struck the wreck and came to grief, the "Circassia" on 9th March, the "City of Naples" on 15th April, H.M.S. "Hearty" on 22nd April, and the "Kintoye" on 19th October. Mr John Hannay Thompson, the Trustees' general manager, a frank and intelligent witness, explains—"Having been sunk by an act of war, we did not consider it was our business to raise or remove the wreck at all." This was *pro tanto* an abrogation of the duty resting upon the Trustees as guardians of the safe navigation of the entrance to the estuary. The broad conclusion which I have further formed upon all this is that there was at that point a most serious peril to the ordinary navigator, and that if the Trustees would not remove the wreck the imperative duty lay upon them to make the sea safe at that point by the constant vigilance of pilotage and by the unmistakable accuracy of their buoyage both of the wreck and of the channel. But on all of these matters the Trustees' unfortunate view of being financially and otherwise crippled entirely prevented them from fulfilling in a reasonable sense the obligations resting upon them. Mischance after mischance did not change their view; it was maintained in the witness-box.

On the head of pilotage I agree with all of your Lordships, not merely that it was insufficient, but that so far as these vessels were concerned there was no pilotage at all. My view, I should explain, rests upon the statutes rather than upon the doctrine of invitation. I put it thus. When in the "North Sea Pilot"—an acknowledged guide known to all parties—the paragraph occurs—"The Tay pilot vessel, unless driven in by stress of weather, is always at anchor or under way near the Fairway Buoy," that was saying no more than the bye-laws under the Act said, and was going, in my opinion, no further than the statutory prescription of duty, especially under section 92 of the Act of 1911. This code, however—a good and safe and proper code—was under not merely an occasional but a pretty steady eclipse. I do not say that in every case a steam cutter is a necessity, but I incline to the opinion that in all the circumstances of the Tay estuary Mr Plenderleith was right when in November 1919 he stated in a Board of Trade inquiry—"It is absolutely necessary for the future that the pilotage service of the port of Dundee should be carried on by a steam vessel . . . those sailing cutters are

not carrying on and cannot carry on the efficient service which is required of the port of Dundee." *A fortiori* it was necessary in the spring of 1919. Failing a steam cutter, I think that the assiduous attendance of a sailing cutter was required, but that failed too. In the view which I take of these appeals I hold that the neglect of duty in the matter of pilotage was pre-eminently the cause of the disasters which occurred. This applies to both appeals. The absence of pilotage was a circumstance common to the entry of the "Circassia" and of the "City of Naples" into the Firth. But the buoyage was different in the two cases. In that of the "Circassia," entering the estuary on a morning when a patchy mist lay on the water level, she was confronted with a situation which no charts, not even the latest (of which so much is made) would have helped. She was looking for a pilot, but there was none. Then she looked for the Fairway Buoy—very properly looked for it; if she had failed to look for it as a sure and safe guide she would have been at fault; and in the mist she found the Fairway Buoy, yet almost in the finding of it struck a submerged wreck. The Trustees had not had in their possession the ordinary apparatus of emergency, namely, a spare buoy, and so they helped to buoy the wreck by removing the Fairway Buoy bodily from a place of safety to navigation to a place a danger to navigation. This was an operation so reckless as almost in such weather to invite disaster, and I cannot bring myself to blame the captain for the thought of such reckless displacement not having entered his mind nor for his trusting that, whatever other buoys were about, the Fairway Buoy was still a fairway buoy and that he was safe to make for it. In these circumstances I need say no more to show that in my view no case of contributory negligence is made out.

In the "City of Naples" case the captain had the latest chart. It indicated that there was a submerged wreck at a certain point and that there were two lighted wreck-marking buoys at two other points—all marked. But the two green lighted buoys as per the chart were gone—they had in fact been moved away and a little unlighted can buoy had been put down with "wreck" marked on one side of it. After the "Circassia" mishap one of the green buoys (the old Fairway Buoy) had been removed back to its old and proper position; then the light of the other buoy went out, and that buoy too was taken away and the little unlighted buoy was set up, apparently to do duty for the two lighted buoys marked on the chart. All this without any notification to the seafarer produced a situation for which only one excuse could occur to anybody's mind, namely, that the wreck was gone and the lighted wreck buoys had therefore also gone. The only reasonable alternative to that was that a puzzling and most dangerous alteration of the situation had been made—negligent and reckless of consequences. This alternative would not readily occur to the mind of those on board the "City of Naples," seeing that notwith-

standing notification by wireless and pilot flag and blue flare no pilot was on the spot. These facts must have swayed the balance of the judgment to the conclusion that the wreck had gone and the position had now become relatively safe. What the captain had done was, after waiting all night and getting no response to his appeals, to sail in with the Fairway Buoy to port, and turn to make substantially for the middle line of the fairway. He himself was on the bridge, and so was an experienced pilot who remained on board after his boat was passed at Berwick. I do not doubt that both of these experienced men exercised a good look-out. But it is said that a special look-out should have been appointed. That in my opinion is a generally safe position, but in entering the fairway of a river or estuary, the captain having himself taken the handling of the vessel, it must always be a question of circumstances whether anything more by way of a special look-out is required. On this point there are two witnesses in the case whose record and position and experience entitle their evidence to much respect, namely, Commander Mackintosh and Captain Metcalfe. The former emphatically negatives the idea that there was "from the point of view of seamanship, defective look-out on this vessel," or the suggestion that any special look-out was necessary, the captain being with the assisting pilot on the bridge as described. The latter, Captain Metcalfe, is equally clear. "If it had been thick weather," he says, "they would have had a look-out on the head, but the captain and pilot on the bridge were quite sufficient." Confronted with such evidence I do not feel myself in a position to differ from the verdict of the Lord Ordinary upon this matter of fact and impute blame to the captain of the ship. The fact in the present case is that while no one on board saw or could see—for that was made impossible by what had been done a few days before—the two green lighted wreck-marking buoys, those forward saw on the port beam one small can buoy. I am of opinion that even if there had been a special look-out, and he had seen what the others saw and had reported it to the bridge, this would in all probability have made no difference whatsoever. For according to the rules as I read them the true location of a wreck would have been to the south or shoreward of the buoy and not to the north and into the fairway of the estuary. I hold that if the course taken after that buoy was seen had been to avoid the fairway and enter southward of the buoy, then the ordinary and familiar rule of navigation would have been broken and broken inexcusably. No person in my opinion would have been justified in such a departure by putting forward a conjecture that in this case the small unlighted unmarked can buoy was meant to take the place of two lighted marked wreck buoys, and that therefore the true meaning of its being there was to make navigation shoreward instead of seaward. Such a conjecture would have been considered too extraordinary to be defensible.

But when a plea of contributory negligence is made it must be proved affirmatively by those putting it forward. Secondly, such proof becomes more difficult when the situation into which a person has been introduced by the negligent conduct of another is one of much difficulty and perplexity; and thirdly, when the danger is a freshly emergent danger altering the familiar and expected into the unfamiliar and unexpected the difficulty of establishing contributory negligence verges on the impossible. I think that this case falls within the third of these categories, and at least within the second. What then is demanded to support contributory negligence? What is demanded is proof that the contributor failed in ordinary care. Whenever the circumstances are and have been, it may be, suddenly rendered so extraordinarily puzzling and perplexing that it would require more than ordinary care to overcome them, then the contributory negligence is not proved. I think that in all such cases it would be unjust to deal out hard measure to a person innocently confronted with unusual and perplexing peril, and there is no law for such hard measure. The standard is ordinary reasonable care. Judged by that standard, I cannot see that the ship or its officers failed in duty.

I desire before closing to set down my sense of indebtedness to the Lord Ordinary, whose exposition both of the facts and of the legal principles involved leaves in my humble opinion nothing to be desired. I am further glad to be in the "City of Naples" case justified by the dissenting opinion of the learned Lord President. I agree.

In *Anchor Line (Henderson Brothers), Limited v. Trustees of Harbour of Dundee* their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants their costs here and in the Court of Session.

In *Ellerman Lines, Limited v. Trustees of Harbour of Dundee* their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants their costs here and in the Court of Session.

In *Thomson, Shepherd, & Company, Limited v. Trustees of Harbour of Dundee*, their Lordships ordered that the interlocutors appealed from be reversed, that the cause be remitted to the Court of Session with a declaration that the defenders are liable to the pursuers in such sum as may be found to be damages suffered through their fault, and with a direction to proceed with the cause as shall be found just, and that the respondents do pay to the appellants their costs here and below.

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COURT OF SESSION.

Wednesday, November 30.

FIRST DIVISION.

[Sheriff Court at Dumfries.

LOGAN v. FAIR.

Landlord and Tenant—Statute—Construction—“Landlord”—Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 and 11 Geo. V, cap. 17), secs. 5 (1) (d) and 12 (1) (f) and (g).

The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 enacts—Section 5 (1)—“No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejection of a tenant therefrom, shall be made or given unless . . . (d) the dwelling-house is reasonably required by the landlord for occupation as a residence for himself . . . or for some person in his whole time employment . . .” Section 12 (1)—“For the purposes of this Act, except where the context otherwise requires— . . . (f) The expressions ‘landlord,’ ‘tenant’ . . . include any person from time to time deriving title under the original landlord, tenant. . . . (g) The expression ‘landlord’ also includes in relation to any dwelling-house any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house, and the expressions ‘tenant and tenancy’ include sub-tenant and sub-tenancy, and the expression ‘let’ includes sub-let . . .”

Held that when a tenant sub-lets a house he is, after the termination of the sub-let, in his relation towards the sub-tenant still in occupation, a landlord within the meaning of the sections.

Crawford Logan, Gribton, Holywood, Dumfriesshire, pursuer, brought an action of removing in the Sheriff Court at Dumfries against William Fair, mason, Upper Cluden, Holywood, Dumfriesshire.

From the averments of the pursuer it appeared that he was tenant of the mansion-house and parks of Gribton, and as such had since January 1918 been tenant under certain trustees of a cottage known as Upper Cluden. When pursuer became tenant of the cottage his intention was to give the occupation to his grieve, but as that could not be arranged at the time he allowed the defender to become his sub-tenant for twelve months. The defender being still in occupation in 1920 and having informed the pursuer that he did not intend to cede occupation until he could obtain alternative accommodation, the pursuer, who required the cottage for his grieve, gave the defender formal notice to remove at Whitsunday 1921.

The defender pleaded, *inter alia*—“1. The pursuer’s averments are irrelevant. 2. The pursuer not being the landlord of the cottage has no title to sue this action.”

On 27th August 1921 the Sheriff-Substitute (CAMPION) pronounced an interlocutor in which he, *inter alia*, repelled the first and second pleas-in-law for defender.

Note.—“Despite an interesting argument to the contrary I incline to hold that the two first pleas-in-law stated for the defender fall to be repelled. The question to be answered is really whether the expression ‘landlord’ can for the purposes of this Act be held to include any person not the actual proprietor of the subjects let. For the purposes of this Act—except where the context otherwise requires—sub-section (f) of section 12 says—“The expressions ‘landlord,’ ‘tenant,’ ‘mortgagee,’ and ‘mortgagor’ include any person from time to time deriving title under the original landlord, tenant, mortgagee or mortgagor.” Now whether the Act has said it in so many words, I am of opinion that for the purposes of this Act the expression ‘landlord’ must be held to include one in the position of the pursuer in this action, the only person with whom the defender has any contract. To hold otherwise seems to me to leave a tenant who has sub-let without remedy and the restrictions on right to possession according to section 5 of no avail to him. It may be matter of indifference to the actual proprietor whether a sub-tenant goes or stays, and he may thus well decline to intervene with the risk of being found liable in expenses.”

The defender having obtained leave appealed to the Sheriff.

On 14th October 1921 the Sheriff (MORTON) sustained the appeal, recalled the interlocutor appealed against, and sustained the second plea-in-law for the defender, and dismissed the action.

Note.—[After a narrative of the facts]—“In the debate before me the argument turned entirely on the right of the pursuer to bring the present action of removing. The pursuer argued that in terms of section 5 (1) (d) of that Act he was entitled to have the defender removed from the house, and the defender replied that the pursuer had no title under the Act to pursue an action of removing. In my opinion the defender’s contention falls to be upheld.

“It was admitted by the pursuer that