

Friday, May 13.

(Before the Lord Chancellor (Halsbury) and
Lords Herschell, Macnaghten, Morris,
and Shand.)

NIVEN v. AYR HARBOUR TRUSTEES.

(*Ante*, June 4, 1897, 34 S.L.R. 660, and
24 R. 883.)

Reparation — Ship — Harbour — Ship Injured while Lying in Berth Assigned by Harbourmaster — Negligence or Damnum fatale.

The master of a vessel, after finishing loading at a loading-berth in a harbour, not thinking it safe to put to sea in the state of the weather, was directed by the harbourmaster to remove his vessel to another berth, as the loading-berth was required for another vessel. It was proved that the berth to which the vessel was ordered was a safe one except in the case of a storm from the W. or N.W. When the order to change berths was given there was a strong wind from the S.S.E., and the barometer was falling. There was evidence that the usual course was for a gale beginning in the S.S.E., unless it abated, to veer to the W. or N.W. The master of the vessel did not anticipate that this would happen, although he objected to moving his vessel on the ground of the trouble it involved.

During the night the wind increased to a storm of exceptionable violence from the N.W., with the result that the vessel received severe injury, and that most of the other vessels in the harbour sustained some damage.

In an action of damages by the owner of the vessel against the harbour trustees on the ground that the harbourmaster ought to have anticipated that the storm would become exceptionally violent, and would veer to the N.W. so as to make the berth to which the vessel was ordered dangerous, *held* (*aff. judgment* of the Second Division) that no want of reasonable care was proved such as to render the harbour trustees liable.

The case is reported *ante ut supra*.

The pursuer appealed to the House of Lords against the judgment of the Second Division.

At delivering judgment—

LORD CHANCELLOR—If this was a question depending upon a conflict of evidence in which the conduct and demeanour of the witnesses were susceptible of being considered by the tribunal before whom the case originally came, I should have placed very great weight upon the decision of the learned Judge of first instance who found in favour of the plaintiffs in this case. But I cannot help thinking that the facts in this matter speak for themselves.

When it is sought to make the Harbour Trustees liable for the damage to this ship because of some negligence or other in the

performance of some duty, I ask myself what is the duty and what is the breach of duty suggested? The duty, I suppose, is that in the directions given to this vessel, and the various vessels that come into the harbour, reasonable care should be taken in providing, as far as it is possible, safe berths for them. I do not know now what the breach is supposed to be, because really if one looks at what one might call the absolutely uncontradicted testimony in this case there is no doubt that on the night of the 21st or on the morning of the 22nd a most unusual and extraordinary storm arose, and whatever effort has been made to minimise that state of things, it stands now, I think, beyond all question that the state of the weather on that night was extraordinary and unusual. I think one of the learned Judges pointed out what is perfectly true, that hardly any vessel in the harbour that night escaped absolutely unharmed, and not only in that harbour but in various ports of the west coast of Scotland great damage was done by the storm of that night.

Then it is suggested that the harbourmaster, in doing what was his ordinary duty after the vessel was loaded, in taking the vessel away to make place for other vessels that were entitled in their turn to go and load, three vessels being expected to load that very night, was guilty of a negligent breach of the duty to take reasonable and ordinary care, because some hours later than the time that the direction was given an extraordinary storm arose. The mode in which that contention is sought to be established is to say that the harbourmaster ought to be so perfectly accurate a prophet of the weather that he ought to have been able to foresee what happened in the state of the weather as it then was, the wind having been east-south-east originally, and the ordinary course being, as it is alleged when a storm begins in that way, that it would gradually go round to the north-west, the north-west wind being one which renders this particular berth hazardous to the vessel which occupies a position there.

I can only say about that that it is very easy after the event has happened to speculate upon it, and to say the harbourmaster ought to have foreseen it. It is an ordinary condition of mind I suppose. People feel a strong temptation to say "I told you so" when a calamity has happened. But looking at what took place at the time when they were not rendered wise by the event afterwards, it appears to me that there is no foundation at all for the complaint against the harbourmaster. That the master of the vessel himself did not want to move—that he did not want to take the trouble to move away from the berth in which he was then lying is true. He was reluctant to move—so far I agree that the evidence establishes that, but I think it was only that it was inconvenient to move, and that he did not want with the wind blowing hard to have the trouble of moving. But the notion that he was going to encounter some extraordinary change of

weather which would expose his vessel to damage never appears to have occurred to him or to anybody else at that time. And it seems to me that what he did not say, and what he admits he did not say, is much more important here than what he did say, because if anything of the sort that is now suggested had then occurred to him or to anybody else on the vessel, that there was going to be a particularly violent storm, and that the particular berth to which his vessel moved would be exposed to the storm, according to the statistics which at that time had not been fetched from the Glasgow Observatory, it is inevitable that he would have said something to the effect "You know this is a very bad berth for my vessel to lie at; you see what the state of the weather is; the wind is east-south-east, and it is now veering to the west, and in the course of the night it may end in a storm;" or without going through all that catena of possible changes of the weather he would have said something to the effect "It is going to be a storm and I shall be in danger." It would have been almost inevitable that he should have said something like that if the state of his mind had been what he now suggests it was.

All that was done was done in the ordinary and regular course of the harbourmaster's duty, and at the time, so far as I can see, there was no reason why the harbourmaster should not have done what he did. And as regards what happened afterwards, without going into any matter of defence and what might have been an answer if there had been some initial negligence on the part of the harbourmaster, I cannot help saying that the course pursued that night on the part of those who had the care of this vessel was a little singular. But inasmuch as I think that initial step is not reached, that there is to my mind no reasonable evidence that ought to be submitted to a jury or to any tribunal of any breach of duty which the harbourmaster himself was bound to exhibit at that time or any neglect in reasonably looking after the safety of vessels which in one sense were under his charge because they were under his direction, it seems to me one need not inquire further into the matter seeing that the case fails. It would be perfectly monstrous in the case of an extraordinary storm to suggest that because a vessel was not allotted by the harbourmaster to remain in a particular berth, and afterwards by reason of an unusual storm injury was inflicted upon the vessel, therefore the Harbour Trustees are to be held responsible for the injury to that vessel and I suppose to all the vessels in the harbour because they were all more or less injured.

Under those circumstances it appears to me that the judgment of the Court of Appeal ought to be affirmed, and I move your Lordships that this appeal be dismissed with costs.

LORD HERSCHELL—I am of the same opinion. The plaintiff can only recover, as
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it seems to me, by showing that any reasonable man in the position of the harbourmaster on the night in question would have anticipated that the wind would veer round to the west or north-west and that in that direction it would blow with such force and fury as to cause damage, or be likely to cause damage, to this vessel. I do not think that that case is made out; no such idea seems to have occurred to anybody on the spot, whose experience had been acquired in visiting that harbour. The master and mate of this vessel knew the harbour well, they had been constantly there, they knew the weather as well as the harbourmaster did. To my mind it is proved clearly that no such idea ever occurred to them. Their whole conduct is to my mind absolutely inconsistent with it, and I think the action of the master of the "Mona" makes it also clear that he thought what he says he thought—that there was not that danger to be anticipated which afterwards proved in the result to be the case.

For these reasons I entirely agree with the judgment which has been proposed.

LORD MACNAGHTEN—I concur.

LORD MORRIS—I am of the same opinion.

LORD SHAND—I also am of the same opinion.

Appeal dismissed with costs.

Counsel for Appellant—Walton, Q.C.—Aitken. Agents—Downing, Bolam, & Co., for Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Balfour, Q.C.—Hunter. Agents—Grahames, Currey, & Spens, for Gordon & Falconer, W.S.

COURT OF SESSION.

Saturday, May 14.

FIRST DIVISION.

[Kilmarnock Dean of Guild Court.]

LINDSAY v. DUKE AND OTHERS.

Dean of Guild—Petition for Lining Refused without Stating Reasons.

Where the Dean of Guild refuses a petition for lining, upon statutory grounds, it is proper for him to explain the precise nature of the objections to the petitioner's proposals.

The Dean of Guild having refused to grant a lining, without assigning any reasons for doing so, except that he "was not satisfied that the plans provide for the buildings being suitably lighted and ventilated," the petitioner appealed, and no appearance was made to oppose the appeal.

The Court recalled the interlocutor appealed against, and remitted to the Dean of Guild for further procedure.

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