

Friday, June 4.

## SECOND DIVISION.

[Lord Stormonth Darling,  
Ordinary.]

## NIVEN v. AYR HARBOUR TRUSTEES.

*Reparation—Negligence—Harbour—Ship  
Injured while in Berth in Harbour—  
Dammum fatale.*

The master of a vessel which had finished loading, not being desirous of putting to sea in the state of the weather, was directed by the harbour-master in charge of the harbour to remove his vessel to another berth. It was proved that this berth 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. It was proved that the probability was that, unless the storm abated, it would veer to the W. or N.W. This was what happened, and during the night the wind increased to a storm of exceptional violence from the N.W. with the result that the vessel sustained severe injury, and that most of the other vessels in the harbour sustained some damage. *Held* (rev. judgment of Lord Stormonth Darling) that there was no want of reasonable care on the part of the harbourmaster in charge, and that the harbour trustees were not liable for the injury to the vessel.

Walter Bain Niven, steamship owner, Glasgow, registered owner of the s.s. "Denia" of Troon, an iron screw steamer of 248 tons gross and 97 tons net register, raised against the Trustees of Ayr Harbour, incorporated under the Ayr Harbour Act 1855, an action of damages for £1100 on account of injuries received by the "Denia" while lying in Ayr Harbour on the night of 21st and morning of 22nd December 1894.

The defenders pleaded—“(2) The damage sustained by the pursuer having been caused, or at all events materially contributed to by the master or other persons in charge of the 'Denia,' the defenders ought to be assolizied, with expenses. (3) The damage sustained by the 'Denia' not having been caused by any fault of the defenders, or those for whom they are responsible, the defenders ought to be assolizied. (4) *Separatim*, the accident condescended on being the result of a *dammum fatale*, the defenders are entitled to absolvitor.”

The Lord Ordinary (STORMONTH DARLING) allowed a proof, which disclosed the following facts:—On 21st December 1894 the "Denia" loaded a cargo of coals for Belfast in a crane berth on the north side of the river at Ayr Harbour. She finished loading at 9:20 p.m. Everything was made ready for sea, but as the master thought the night looked threatening and the barometer was falling, he decided to re-

main in harbour. The loading-berth was required for another steamer expected to arrive, so in accordance with the custom of the harbour, Sloan, the assistant deputy-harbourmaster, a man of 68, ordered the "Denia" to be removed from that berth to another. Sloan's evidence was that he had given the master of the "Denia" the choice of two berths, one in the dock basin and the other at the slip dock, and that the master chose the former. The master on the other hand stated that he had got no choice, that he was ordered by Sloan to take his vessel to the dock basin. The dock basin was a safe berth except in the case of a storm from the W. or N.W. It then became dangerous, as the wind drove a heavy sea into the harbour, and the dock basin received no protection from the breakwater. The "Denia" was berthed in the dock basin at eleven o'clock. At that time the wind was blowing from the S.S.E., and the berth was quite safe. Evidence was led for the pursuer showing that if the wind arose in the S.S.E. in all probability it would go round to the W. and then to the N.W.

In regard to this matter Dr Alexander Buchan, secretary to the Scottish Meteorological Society, who was examined for the defenders, and whose evidence was based upon observations taken at all the Scottish lighthouses and recorded in the journals of the society for a period of 20 years, deponed as follows:—"I have gone into the question of the course pursued by the storms on the west coast of Scotland beginning between S.E. and S.W. with special reference to the numbers that veered and the direction in which they veered, and the length to which they veered. (Q) Can you give us your results upon that? [Question objected to; objection repelled.]—(A) I simply speak here of the facts reported, and give no opinion. The question is, what proportion of storms beginning from S.S.E. round to S.S.W. veered round during their continuance to N.W. The following is a summary of the cases examined during twenty Decembers ending 1894. The two lighthouses examined were the two nearest to Ayr, Turnberry and Pladda. In all, 96 storms were reported on by the lighthouse keepers. Of these 41 began from S.S.E., S., or S.S.W. Grouping these 41 cases, the following are the results: (1) Storms not attended with any change of direction of wind at all, 6. I am not speaking of the veering of the wind generally, but strong winds rising to storms. (2) Storms which did not veer but backed to east, 4. (3) Storms which veered from the southward only to the S.W., and did not go further to the north, 9. (4) Storms which veered from the southward only to west, 11; that is to say, 30 did not get beyond west. (5) Storms which veered from southward to N.W., 10; and 1 got to north. [Thus in 22 cases out of 41, storms beginning in the S.S.E., S., or S.S.W., veered to the W. and N.W.] *Cross*.—I have also looked into the question of the storms which commenced in the S.W. Of these

five veered to west, two veered to N.W., and three veered to north—in all ten beginning at S.W., all the storms that began in the S.W. veered to W. and N. (Q) Is it a matter of familiar experience that storms that begin in the S. or S.W. veer westward and blow themselves out in the N.W.?—(A) Some do and some do not. I have stated the proportion as nearly as I can. From the facts which I have collated I would say that by far the most of the storms that begin in the S.W. finish off in the W. or N.W. I cannot at the present moment point to one contrary instance. *Re-examined.*—Of the four storms which began at S.S.E., S., or S.S.W., and backed to E., two began from S. to S.E. The great majority of those that moved westward did not get beyond west. In fact there is a common proverb in the west of Scotland that 'the west wind is a gentleman and goes to bed.' It is familiar to us that when the wind goes to the west it tends to fall. I put in tables showing the classification of the ninety-six storms of which I have spoken."

During the night the wind veered round to the west and north-west, and increased to a violent gale. Between 2 and 3 a.m. the "Denia" began to suffer in consequence of being exposed to the gale. The storm increased in violence, so that between 5 and 8 the vessel was bumped and dashed against the quay wall where she was lying and sustained serious damage. The tempest was so violent that nearly all the vessels in the harbour that night sustained some damage.

On 5th February 1897 the Lord Ordinary decreed against the defenders for payment of £750.

"*Note.*—There can be no doubt about the proposition in law on which this claim of damages rests. It is, that managers of a harbour who provide accommodation for shipping, and invite vessels to use it, are bound to use reasonable diligence to prevent the occurrence of injury to the vessels. They do not insure against accident, but if they fail in using reasonable diligence to prevent it they are liable in damages.

"This claim, accordingly, is laid on *culpa*, and the *culpa* alleged is that on a stormy night in December 1894 the assistant-deputy harbour-master, an old man named Sloan, ordered the pursuer's steamer the 'Denia' (248 tons gross register) out of a safe berth into an unsafe one, where she was exposed to the full force of wind and sea, and thereby sustained very serious damage. The defenders say that there is no case in the books in which managers of a harbour have been made liable for injuries arising from stress of weather. That may be; the cases under this head are not very numerous altogether. But I see no difference in principle between liability for a careless order which, for example, sends a vessel aground, and liability for a careless order which deprives her of the very protection against the elements which harbours profess to afford.

"Of course it must be shown that the order was careless, and one element of the carelessness must necessarily be that the

harbourmaster could have done better for the ship. In this case it is certain that he could not have done worse, for the proof establishes beyond all doubt that the dock basin berth is the most dangerous berth in the harbour when the wind blows strong from the west or north-west. It was abandoned principally for that reason by the Ayr Shipping Company in 1892; and Mr Bain, one of the partners of that company (as well as one of the harbour trustees), admits that 'it is not a regular berth, but is only used for putting a vessel into before or after loading.'

"Now, the 'Denia' had just completed her loading, and if she had been waiting in the harbour for any other reason than stress of weather it might have been quite safe to put her there. But her skipper told Sloan that he was not going to sea because of the gale, and nobody says that he was wrong in that decision. There were all the indications of a dirty night—a rapidly-falling barometer and an increasing gale from the south. Moreover, the scientific and seafaring witnesses are agreed in saying that when these conditions exist there is a strong probability of the wind getting more and more westerly until it dies away in the north-west.

"There is evidence to the effect that about 11 P.M., when the change of berth took place, the dock basin was safe enough, for the wind was then from the south. But probability must be the guide of harbourmasters as of other people, and it seems to me that Sloan ought to have anticipated that the probable course of the storm would make that berth the worst in the harbour.

"What, then, ought Sloan to have done? The pursuer's case on record is, that he ought not to have moved the 'Denia' from the berth where she loaded. If he had left her there, she would probably have fared just as the 'Kathleen' did, which took her place, and that would have meant receiving very little injury. But I do not think it can be said that there was negligence in the mere act of moving her, so long as she was given an equally safe berth elsewhere. Sloan acted as he did from pure routine, without, I believe, bestowing a thought on the prospects of the night; and it was according to strict routine that a vessel having completed her loading should give place at a crane berth to another vessel which was expected to arrive for the purpose of unloading.

"But in my view of the evidence it is vain to say that Sloan might not have found a much safer berth for the 'Denia.' Indeed, his own evidence is conclusive on that point. He says that he offered the master of the 'Denia' a berth in the slip basin on the south side of the harbour, and that the master preferred the other. I have great doubts whether any such choice was distinctly offered. If it had been, I think it would have been averred on record, and it is not. That the slip basin was mentioned as a possible berth either by Sloan or by one of the pilots I do not doubt, but Sloan himself does not profess that he either thought or said that the

slip berth would be the safer of the two, and I have no idea that a harbourmaster can evade responsibility for his berthing orders by throwing alternatives at the head of a shipmaster without explanation, and letting him please himself. If he tenders two berths, and does not indicate a preference for either, he must be taken as representing that both are suitable and safe. While, therefore, the rather unsatisfactory evidence as to the offer of the slip berth does not avail to relieve the defenders of responsibility, it helps the pursuer by showing that there was at all events one vacant berth where the 'Denia' would have been in comparative safety. I think there was at least one other, because the evidence shows that there were six berths on the north side of the river, and only four of these were occupied on the night in question. A fifth was retained for the 'Carrick,' which did not come in that night, but room might quite well have been found for the 'Denia' in the sixth if Sloan had wished to do so. The truth is, that he never applied his mind to the subject, because he did not expect the night to turn out so bad as it did. I confess to learning with some surprise that the management of Ayr Harbour admits of an old man like Sloan being left in sole charge during what the defenders themselves describe as 'one of the most violent storms which have been experienced in Scotland for many years,' and that no provision is made for summoning the harbourmaster, or even the deputy harbourmaster in such an emergency.

"This leads me to notice in a word the defence of *damnum fatale*. That defence is never effectual in questions of negligence, unless the act of God is such that no human prudence could have foreseen it, or have averted the consequences. In this case the storm was violent, but it was not unprecedented. The statistics kept at Glasgow Observatory show that during the last twelve years there have been eight gales of greater velocity. . . . I am therefore of opinion that the defenders' representative was in fault in ordering the 'Denia' to a berth which was likely to become, as it did become, dangerous in the course of a few hours." . . .

The defenders reclaimed, and argued—Ayr Harbour was an open harbour exposed to all kinds of weather. The "Denia" was placed in a regular berthing-place, a berth safe in all except exceptional circumstances, and safe at the time the vessel was put into it. The wind veered round and a storm arose six or seven hours after the vessel had been berthed, but there was no liability upon harbour trustees to guarantee safe mooring for vessels in all weathers. All that they had to do was to provide reasonably safe accommodation in ordinary circumstances. The Lord Ordinary founded his judgment on the assumption that Sloan should have foretold the change in the wind and the coming of the tempest. But that was an impossibility, and the harbour authorities while bound to see that the men whom

they placed in charge of the harbour were skilled and experienced seamen, could not be expected to supply servants who were skilled meteorologists. The trustees of the harbour had taken all reasonable means to provide for the safety of vessels berthed therein, and there was no fault or negligence proved on the part of themselves or their servants—*Thomson v. Greenock Harbour Trustees*, July 20, 1876, 3 R. 1194; *The "Excelsior,"* 1868, 2 A. & E. 268, Sir R. Phillimore's opinion, pp. 270, 271.

Argued for pursuer—The berth was dangerous on the night in question. It was the invariable rule in the south-west coast of Scotland for a gale which commenced in the S.S.E. to veer round into the W. or N.W. before dying down. No option had been given to the master of the "Denia;" he had been assigned this dangerous berth. The statement by the defenders that a choice of two berths was given to him was incorrect and an afterthought; there was no reference on record to such a choice having been given. A shipowner paid dock rates for safe accommodation, and was entitled to expect that his ship should not be exposed to danger while lying in the berth for which he had paid—opinion of Blackburn, J., in the *Mersey Dock Trustees v. Gibson*, 1866, L.R., 1 E. & I. App. 107. The damages should not have been modified by the Lord Ordinary. If the harbour authorities put a ship into a dangerous position, and the ship was injured, they could not be allowed to plead in defence that if something had been done by those in charge of the ship the damage would have been less.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary in this case has decided that the vessel belonging to the pursuer was damaged through the fault of the defenders. Although he did not hold them liable for the whole damage, he held that a very large proportion was due to the pursuer—as his Lordship says, sitting as a jury, he assessed a certain amount of the total damage. I have considered the case with some care—it is an interesting case in some ways—and I have come to the conclusion that the Lord Ordinary's interlocutor cannot be sustained. The pursuer's vessel was loaded at an ordinary berth and was ready for sea; and according to the usual practice in that harbour, and indeed in harbours generally, she being ready for sea and wishing to remain in the harbour, it was quite appropriate that she should be removed from the loading-berth and placed in another berth. In ordinary course she would have gone to sea, and we have evidence that one of the vessels in the harbour did go to sea that night. This vessel had the choice of two berths—one at the slip dock, and the other that which she did get. I find from the evidence that the master said that he took that berth in the dock basin provided that when the dock gates were opened he would be

allowed to go into the dock and rest there. After he was placed in the dock basin and moored, the wind veered round a considerable number of points from the direction it had been at the time he was placed there, and a violent storm arose. The storm was so violent that, as we are informed, every vessel within the harbour that night suffered more or less injury, and of course however safe any berth might be in ordinary circumstances, it might be a berth in which a vessel would suffer more damage than a vessel in some other berth. The fault alleged against the Ayr Harbour Trustees is based upon the fact that John Sloan, who is what is called berthing-master, and who had charge of the department for berthing vessels, was an old man, the suggestion being that he was no longer fit for his duty. There is no evidence of that kind. At the time he was doing this work he was sixty-eight years of age. One would have thought that was a very suitable duty for a man who was well accustomed to the sea, had long years of training at the sea, but who was no longer fit for the rough severe work of managing a vessel at sea. As experience leads one to know, there are men of that age fulfilling such duties—not requiring great bodily strength, but only requiring that a man shall still have possession of his faculties and judgment. There are many men of such age in similar situations. Nothing is said by any of the witnesses against Sloan's capacity for work or want of experience. Therefore I take it that nothing can be said as regards the defenders having a man in their service unfit to do the work. Now, he selected that berth, and I shall assume for a moment there was no choice given to the master of the vessel—that Sloan said that was the berth he was to go to. What do we find as regards the master himself, who was a man of experience? The fault attributed to Sloan was that he ought to have formed a judgment that a storm was coming from a direction that would be dangerous to a vessel lying at that berth. The master himself entertained no such idea. The berth was one which was used regularly for loading purposes, although not for loading such a cargo as he had, and it was used in all ordinary weathers. Now, the master was put there, and he says distinctly in his evidence when he is asked why he did not pass a five-inch warp across to the other side of the dock basin—"We did not require it when we went into that berth; the berth was quite safe, and therefore we did not require it till the wind shifted. When the wind began to veer and got somewhat into the west, there was no possibility of getting a rope across. The wind shifted suddenly,"—and then he says that at the time he went to the berth he did not consider he was in any danger. Now, that being so, I do not understand how it can be held that this deputy-assistant, whose duty it was to berth vessels, was in fault because he placed this vessel at a berth which no seaman at the time thought was an unsafe

berth. The master did not foresee that any such thing would happen, otherwise he would have taken steps to prevent it. The storm seems to have been of an exceptional character, because we have evidence from Dr Alexander Buchan, secretary to the Scottish Meteorological Society, the most experienced man probably in Scotland, that such a wind as they had here was in ordinary circumstances likely to die down. In the words of this witness "the west wind is a gentleman and goes to bed." Therefore, upon the whole matter, I have come to the conclusion that the injury to this vessel, as to other vessels in the harbour, was caused by the exceptional circumstances of that night, which there was no reason to anticipate, and which indeed appears not to have been anticipated by anybody at the time. Upon the whole matter I have come to the conclusion that the judgment cannot be sustained and that we ought to assoilzie the defenders.

LORD YOUNG—The issue upon which this case was tried, and without any miscarriage whatever, before the Lord Ordinary, as appears from the plea-in-law for the pursuer, is whether the pursuer sustained loss and damage from the fault of the defenders or of those for whom they are responsible. Upon that issue the Lord Ordinary found for the pursuer and assessed the damages at the sum which he states. Upon a re-trial of the case before us on the same evidence, I am of opinion that the verdict ought to be for the defenders. I think there is no evidence before us in the proof that the pursuer sustained damage through any action or fault on the part of the defenders or of any of their servants for whom they are responsible. I only hesitate arriving at that conclusion because it differs from the conclusion of the Lord Ordinary before whom the evidence was taken. I am always disposed to give great weight to the consideration of the case by the Lord Ordinary. I recognise the inexpediency upon many views, which I need not express, of interfering with a verdict or conclusion in point of fact of the Lord Ordinary before whom the witnesses were examined, if there is reasonable evidence to support it. I have often expressed the opinion, as many other judges have done, that it is not enough or even generally sufficient that you would probably have arrived at another conclusion yourself. I think the case against the Lord Ordinary's verdict must be stronger than that. Having that in view, I am of opinion that the verdict of the Lord Ordinary cannot be sustained, and that his judgment should be recalled.

LORD TRAYNER—The evidence in this case is, on some points, conflicting, but the facts material to the issue seem to me to be well established.

I have no doubt that Sloan in ordering the master of the "Denia" to change his berth was acting within his right, and

indeed in the proper discharge of his duty. The berth in which the "Denia" lay was a loading-berth; she had finished loading and was ready for sea, and that berth was wanted for another vessel which was known to be coming in (and in point of fact came in) that night to load. In these circumstances it was quite right in Sloan to order the "Denia" out to make way for the coming vessel, and his doing so was in accordance with the general practice which prevails at Ayr Harbour as elsewhere. The master of the "Denia" was made aware of this practice, and he says nothing against it. Having determined not to put to sea that night, the master of the "Denia" was supplied with another berth. The pursuer says it was a dangerous one, and therefore one into which the "Denia" should not have been put. But there was nothing dangerous in the berth itself. It became dangerous only if a storm came on from the west or north-west. Now, on the night of the 21st December there was a storm threatening. The wind began to blow from the S.S.E. accompanied with rain, and there is evidence to show that in such circumstances there is a great probability that the wind will go round to the west and north-west. Certainty of that there could not be, but, according to experience, a great probability. And it so happened upon this occasion. The result was that through the violence of the storm the "Denia" was bumped up against the quay wall where she was lying, and received the damage, or part of the damage, for which compensation is here demanded. For that damage, in my opinion, the defenders are not responsible. As I have said, the berth itself was in no way objectionable. It was a perfectly safe berth in ordinary states of the weather. More than that, according to the evidence of the master of the "Denia," himself, it was a perfectly safe berth at the time he went into it (about 11 p.m. of the 21st), and but for the subsequent violence of the storm, was a berth in which the "Denia" could have remained safely until she went to sea. It was only about two or three o'clock a.m. of the 22nd that the master of the "Denia" found any inconvenience from the "wind going round;" and it was between that time and five o'clock of the same morning that the storm attained such violence as to cause the damage complained of. It was the storm and not the berth which was the proximate cause of the damage, and for that the defenders are not responsible. That the wind would go round to the north or north-west was perhaps likely, but there was no certainty that it would increase to such a force as it did. On this matter of the probable change of wind it is worth noticing that the master of the "Denia" says, "At the time when we shifted I could not tell which way it would go." Could Sloan be expected to be better informed than the master of the "Denia."

I think it proved that Sloan gave the "Denia" the best berth at his disposal, and that there was no berth on the north side

of the river available. If necessary, I should also be prepared to hold it proved that the "Denia" had the choice of two berths, and that the master chose the one in which his ship was damaged. But my opinion, in giving judgment for the defenders, is chiefly based on this,—that the storm, and not the berth, caused the damage; that the berth was safe in the opinion of all concerned at the time it was assigned to and taken by the "Denia," and that subsequent events imposed no liability on the defenders. It is not immaterial to remember that on the occasion in question scarcely a vessel in harbour on the Ayrshire coast escaped damage that night irrespective of the kind of berth she occupied.

LORD MONCREIFF—I agree with all your Lordships that the proof does not warrant a verdict against the defenders.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for the Pursuer—Salvesen—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Sol-Gen-Dickson, Q.C.—Hunter. Agents—Gordon, Falconer, & Fairweather, W.S.

## HIGH COURT OF JUSTICIARY.

Monday, June 7.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Low.)

SIME v. LINTON.

*Justiciary Cases—Suspension—Process—Accidental Visit of Judge to Locus.*

A party was tried before a magistrate on a charge of malicious mischief committed by marking certain doors in a particular street. The case was adjourned after hearing the evidence and counsel for the parties, and the magistrate, happening accidentally to be in the neighbourhood of the street in question, examined the doors alleged to have been marked. He afterwards convicted the accused. The Sheriff, to whom it was remitted to inquire into the facts, reported that the magistrate had, at the close of the trial, made up his mind to convict, but had not determined upon the sentence. *Held* that there was no sufficient irregularity to justify a suspension of the conviction.

David Sime, dairyman, Haymarket Terrace, Edinburgh, was found guilty, by the presiding Magistrate in the Edinburgh Police Court (Baillie GULLAND), of malicious mischief, committed by making certain marks on the door of 14 Manor Place, occupied by James Boyd Fleming, and sentenced to a fine of ten pounds with the alternative of sixty days' imprisonment.