after the Armistice, viz., on 28th November 1918. But an armistice does not mean the end of a war, nor is it equivalent to the conclusion of peace. At 28th November 1918 the Armistice merely involved a cessation of hostilities or truce which might very well have been exceedingly brief. It has never been held that the continuance of the war ceased in 1918 (see *Kotzias* v. *Tyser*, [1920] 2 K.B. 69). But the defenders cannot raise that point. If they had desired to do so they would have required to make averments sufficient to support such a plea and to have stated the necessary plea. I am not surprised that they have done neither.

The defenders averred that the free time allowed by the schedule to the Order was not reasonable. But there is nothing in the statute or regulation to the effect that the Board of Trade are to be restricted to allowing only such free time as the courts of law may regard as reasonable. In such a matter the Board of Trade are likely to be much better able to judge than the courts of law. However that may be, the regulations impose no such restraint on the discretion of the Board of Trade. I can find no ground to support the contention that it was *ultra vires* to authorise the Board of Trade to issue the Order in question.

In my opinion the judgment of the Lord Ordinary is right. The defenders have stated no relevant defence, and the reclaiming note should be refused.

LORD DUNDAS—I am of the same opinion. I can well understand that this case is regarded as an important one by the defenders and other traders, but I cannot say that in my judgment it is attended with much difficulty. From the time the case was opened I felt that the defenders had a very uphill task, and I think that they must fail for the reasons stated shortly by the Lord Ordinary and more fully by your lordship in the chair. At one time the defenders' counsel seemed disposed to tender some amendment of their pleadings, but they thought better of the idea and abandoned it. The pleadings unamended cannot be remitted to probation, and I agree that the Lord Ordinary's judgment must stand.

LORD SALVESEN—I agree with the Lord Ordinary. Regulation 7 B expressly authorises the Board of Trade to make orders to enforce the prompt loading or unloading of waggons "by prescribing the time after the expiration of which charges may be made by railway companies for the detention of waggons." The Order dated 28th November 1918 does not go beyond this authority. The defenders must therefore show that Regulation 7B was *ultra vires*. Their main if not their only averment is that "it was passed for the benefit of the railway companies." It may be conceded that incidentally an advantage would be secured by the companies if loading or unloading of waggons used on their lines were accelerated as the result of the Order. But this may equally be said of many orders, such as those by which the maximum rates for railway carriage were raised, and is not *per se* relevant to infer that the Order was *ultra vires*. On the face of the Order it is not apparent that it served no purpose in furthering the successful prosecution of the war or in securing the public safety and the defence of the realm. On the contrary, looking to the fact that the transport services, important at all times, are specially important in war time, I should readily infer that an Order which was designed to expedite the loading and unloading of waggons so that more goods might be conveyed in them might greatly assist the problem of supplying the troops with food and munitions of war. It is sufficient, however, to say that no averment to a contrary effect is made, and the averment which is made, that the Order deprived the defenders of their former statutory rights, does not supply the want, for the very object of such regulations as 7B was to enable the executive to modify or abrogate the pre-existing rights of individuals whether at common law or under statute. I am therefore for affirming the interlocutor appealed from.

LORD ORMIDALE was absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Macmillan, K.C.—Watson, K.C.—Graham Robertson. Agent—James Watson, S.S.C.

Counsel for the Defenders and Reclaimers—Mackay, K.C.—Aitchison. Agents—Drummond & Reid, W.S.

Saturday, November 27.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

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

Ship — Collision with Sunken Wreck — Liability — Buoyage — Failure to Observe Wreck Marking Buoy — Chart — Wreck-Symbol — Vessel Steered over Charted Position of Wreck in Absence of Charted Buoys.

A vessel was approaching the entrance to a buoyed fairway in an estuary leading to a harbour about 10·40 a.m. on 15th April 1919. Pilotage was not compulsory, and the master was navigating the vessel without a pilot. His only sources of information were his chart, corrected up to 14th January 1919 (three months back), sailing directions, and observation of sea marks afloat. Near the entrance to the buoyed fairway was a "fairway" buoy to guide vessels towards the entrance. Between the "fairway" buoy and the entrance to the buoyed 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. These buoys had been recently removed and a single green can buoy with "wreck" painted upon it, but unlighted, placed midway between their sites. It was visible from a distance of one or two miles. The master concluded from the absence of the charted buoys that the wreck had been dispersed, and failing to observe the single buoy steered the vessel over the position of the wreck charted by symbol. The vessel collided with the wreck and was badly damaged. It was broad daylight at the time, and the single buoy was seen from the vessel but was not reported to the master, who was on the bridge.

Held (*rev.* judgment of Lord Blackburn, Ordinary) that the master alone was responsible for the collision.

Observations per the Lord President and Lord Mackenzie as to (*a*) the duties of shipmasters with regard to navigation by means of charts and buoys, (*b*) the significance to be attached to wreck-marking buoys, and (*c*) the use of wreck-marking vessels.

Ship — Collision with Sunken Wreck — Liability — Pilotage Authority — Temporary Absence of Pilot Cutter from Station through Stress of Weather — Whether Collision the "Natural and Reasonable Result" of Cutter's Absence.

Harbour trustees, acting as a statutory pilotage authority, maintained a licensed pilot service at the entrance to an estuary and provided a sailing pilot cutter. Owing to war conditions the service became disorganised, and the pilot cutter was not always at her station, but the trustees had 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 expected arrival of a vessel was communicated to the harbour trustees. When the vessel arrived at the entrance to the estuary the pilot cutter was not at her station, having had owing to stress of weather to seek shelter inside the entrance. The master sent a wireless message for a pilot to the harbour trustees and hoisted pilot signals but got no reply. He then proceeded to navigate the vessel into the estuary without the assistance of a pilot. Pilotage was not compulsory. Owing to faulty navigation by the master the vessel collided with a sunken wreck lying near mid-channel.

Held that the collision was not the natural and reasonable result of the absence of the pilot cutter, and that the pilotage authority was not guilty of negligence.

Observations per the Lord President and Lord Mackenzie as to the duties and liabilities of harbour trustees acting as pilotage authority.

The Ellerman Lines, Limited, London, owners of the s.s. "City of Naples," brought an action against the Trustees of the Harbour of Dundee, concluding for payment of £250,000 damages in respect of the collision of the "City of Naples" with the wreck of the s.s. "Clan Shaw" in the estuary of the Tay.

The *facts* of the case as narrated in the opinion (*infra*) of the Lord President were as follows:—"The 'City of Naples' bound for Dundee arrived off the entrance to the Firth of Tay on the morning of 15th April 1919, anchored about 3 sea miles to the S.E. of the Fairway Buoy at 12·37 a.m. apparent ship's time, or 1·37 a.m. British summer time. The following local circumstances appear from the Admiralty chart, which was in the master's hands, and are necessary to the understanding of the incidents which led to the present action. The entrance to the Firth of Tay is opposite Buddon Ness, and is approached from the sea by a buoyed fairway whose general direction is E.S.E. from Buddon Ness, but inclining more to the E. as it proceeds, until about 1½ sea miles from Buddon Ness it turns due E. The buoys employed to indicate the limits of the fairway are black can buoys to the southward and red conical buoys to the northward. The furthest seaward pair of black and red buoys defines the entrance into the buoyed fairway from the sea. The entrance is ⅓ths of a sea mile (3400 feet) wide. Its middle point is distant from Buddon Ness 3 sea miles to the E.S.E., and is on the projection of a line known as the line of leading lights drawn through the high and low lights of Buddon Ness. On or just to the northward of the projection of this same line to seaward, at a point ¾ of a sea mile from the middle point of the entrance into the buoyed fairway, there is placed a lighted bell buoy painted in black and red horizontal stripes. This is what is known as the Fairway Buoy, or (on the chart) the Tay River Buoy. It will be seen that it is situated about 3¾ sea miles E.S.E. from Buddon Ness, and therefore about 13 sea miles from the port of Dundee. It is the first sea mark which presents itself to the eye of the mariner who approaches the Firth of Tay from the sea; and provided always that its local significance is known to him from prior experience of navigation in the estuary or from information gathered from charts or sailing directions it is an important aid to him in finding his way to the entrance of the buoyed fairway and so into the Firth. The bar of the Tay estuary, which connects the Gaa Sand and the Gaa Spit on the north with the Abertay Spit and the Abertay Sand on the south, crosses the buoyed fairway a little inside the entrance, diagonally from N.E. to S.W. The minimum depths of water on the bar occur on this diagonal, 20 feet of depth south of the line of leading lights, 23 feet of depth north of it. The master of the 'City of Naples' had never been up the Tay to Dundee before. Pilotage is not compulsory in the Tay, at any rate it was not compulsory in April 1919. But the master desired the services of one of the pilots licensed by the defenders under their statutory powers. At 10 o'clock apparent ship time, or 11 o'clock British summer time, the tide having begun to flow about an hour and a half before, and no pilot hav-

ing appeared in answer to the master's signals and wireless, he decided to find his way in himself. He accordingly hove anchor and proceeded full speed to the Fairway Buoy, passing round it by the northward at 10·40 apparent ship's time, or 11·40 British summer time. At this point the speed of the ship was reduced. Five minutes afterwards the 'City of Naples' struck a submerged wreck—the wreck of the 'Clan Shaw.' Having no knowledge of local conditions derived from previous experience of navigation in the estuary, the master was dependent on the information available to him (1) from study of his chart, sailing directions, and the like, and (2) from observation, particularly of the sea marks afloat, presented to his look-out. The information available to him in these ways with regard to the submerged wreck was as follows. *First (as regards chart, sailing directions, and the like)*—there was marked on the master's chart, which was corrected up to 14th January 1919 (three months back), the site of the wreck, indicated by the usual wreck-symbol with the words 'Wreck 1917' printed near to it. The site thus indicated was at a point between the Fairway Buoy and the entrance of the buoyed fairway, half a sea mile inside the Fairway Buoy, and less than a cable's length to the northward of the line of leading lights. There were also marked on the chart two wreck-marking buoys coloured green, the distinctive colour adopted for such buoys both by the Commissioners of Northern Lighthouses and by the General Lighthouse Authorities of the United Kingdom, and recognised in maritime usage (North Sea Pilot). These two wreck-marking buoys were shown as conical in shape and lighted, and as being placed on a line just to the southward of, and nearly parallel to, the line of leading lights. On the chart they formed along with the wreck-symbol an isosceles triangle, whereof the base (extending between the two buoys) was rather longer than the sides (extending between the wreck-symbol and the buoys respectively). The line on which the chart showed the buoys to be placed was distant (at the point on it nearest to the wreck-symbol, which point was approximately midway between their charted sites) a cable's length from the wreck-symbol. *Second (as regards sea marks presented for observation to the look-out)*, there were no buoys afloat on the surface of the water on the charted sites of the two buoys just referred to. But midway between those charted sites there was afloat on the surface of the water a single wreck-marking buoy painted in the distinctive green colour, and having the word 'wreck' painted in white on its upper part. It stood between 4 and 5 feet out of the water, and was visible without glasses from 1 to 2 miles away. It was larger than the wreck-marking buoys used by the Northern Lights and by the Trinity House. It was, no doubt, smaller than the lighted buoys shown on the chart would have been, because lighted buoys must be of a size suitable to admit of the lighting apparatus. For the same reason they are always, or usually, conical in shape. It was can-shaped and unlighted, but this was not inconsistent with the practice of the Northern Lights or with that of Trinity House. From his anchorage between 3 and 4 miles away the master looked by night for the lights of the charted wreck-marking buoys, but they were not, of course, visible. In the morning both he and Hiles, a pilot whose duties ended at the Fairway Buoy, but who assisted the master on the bridge until the disaster occurred, looked for the charted buoys on the surface of the water on their way to and past the Fairway Buoy, but the buoys were, of course, no more visible than the lights they carried. The conditions of visibility at the time left nothing to be desired. Yet both the master and Hiles unaccountably failed to see the single wreck-marking buoy which *was* afloat on the surface of the water only half a sea mile inside the Fairway Buoy and midway between the very points where they were looking for the charted buoys. Being satisfied, however, that the charted buoys were not to be seen, and having failed to pick up the wreck-marking buoy which was actually laid midway between their charted sites, the master jumped to the conclusion that the wreck marked on the chart had been dispersed at some time during the three months which had elapsed since his chart was brought up to date. So confident was he in the reliability of this conclusion that after passing the Fairway Buoy on his port hand, he starboarded his helm in order to get the ship down to the line of leading lights, and steered a course which took him right across the position on which the wreck-symbol was marked on the chart before him. The chief officer was on the forecastle head along with the carpenter all the way from the anchorage. They were keeping what the chief officer calls an 'ordinary general look-out' while getting the anchor and windlass ready for letting go on arrival at Dundee. The chief officer saw the single wreck-marking buoy, after the ship had passed the Fairway Buoy, two ships' lengths away (1½ cable lengths), 4 points on the port bow. The length of the ship was 418 feet. He saw it was green and had some lettering on it, but he did not report it though he mentioned it to the carpenter. The carpenter was busy with the anchor at the moment, but saw the buoy shortly afterwards when it bore abeam or a little before the beam. Neither the chief officer nor the carpenter knew anything about the existence, actual or probable, of a wreck in the vicinity, and they were not specially on the look-out for wreck-marking buoys. The result of the master's conclusion, and of the course he steered in consequence, was that the 'City of Naples' struck the wreck about the bilge on the port bow."

The pleadings of the parties sufficiently appear from the opinion of the Lord Ordinary (BLACKBURN), who on 4th June 1920, after a proof, pronounced the following interlocutor:—"Finds (1) that the s.s. 'City of Naples,' while navigating the fairway of the river Tay on 15th April 1919, struck a sunken vessel and suffered severe damage; (2) that the said sunken vessel was

the s.s. 'Clan Shaw,' which was sunk by a mine in January 1917; and (3) that the defenders are responsible for the buoying of the 'Clan Shaw' and failed to buoy the same properly, and are accordingly liable to the pursuers in the loss and damages caused to the 'City of Naples': With these findings continues the cause to allow the pursuers to lodge in process an account of the damages claimed by them, and grants leave to reclaim. . . ."

Opinion.—[*After narrating the facts*]—"It is under these circumstances that both parties to the action attribute the accident to the fault of the other, and I think it will be convenient to deal with the various questions raised in the case under the specific averments of fault to which these questions relate. The faults attributed to the defenders by the pursuers are set out in condescendence 12, and are—(1) That they failed in their duty to provide a proper service of licensed pilots, and in particular to see that the pilot boat was in attendance at the Fairway Buoy in accordance with their bye-laws; (2) that they failed in their duty to keep the approaches to the harbour safe for vessels using it, and in particular that they should have removed the wreck of the 'Clan Shaw,' or at all events should have marked its position in such a way that vessels would be able to recognise the safe course to follow and to avoid running into the wreck; and (3) that knowing as they did that the 'City of Naples' was due to arrive on the night of the 14th-15th April, that there would be no pilot to meet her, and that the position of the wreck was marked in a misleading and inaccurate manner on the Admiralty charts, they should have taken special steps to have informed the master of the true position of the wreck, and of the course he should steer to avoid it.

"The defenders' averments of fault are contained in their answer 11. They say that the master of the 'City of Naples' was to blame—(1) in entering the approaches of the Tay without a pilot, (*a*) in breach of an Order by the competent military authority dated 17th November 1917 declaring pilotage to be compulsory, (*b*) in breach of section 11 of the Pilotage Act 1913 in respect that there were passengers on board the ship, and (*c*) without the latest available chart of the area of the Tay where the wreck was situated; (2) in failing to keep a proper look-out whereby he would have seen the buoy marking the wreck, or at least in failing to accept the warning it conveyed; (3) in failing to keep his vessel to the south of the buoy marking the wreck; and (4) in failing to attend to the warning conveyed by the marking of the chart which he was using.

"*The Pursuers' First Averment of Fault.*—In connection with this averment the defenders raised the whole question of their duties and liabilities as the pilotage authority. In particular, they contended that the pilotage authority is a distinct and separate body from the Harbour Trustees, and that any liability for fault in connection with pilotage matters can only be met out of the pilotage dues and is not chargeable against them as Harbour Trustees. They further contended that the pilotage bye-laws only applied to the pilots, and that it was *jus tertii* of a shipowner to found on them, and in any event that if the bye-laws did create a duty on the pilotage authority to shipowners, the breach of that duty in this case was due to the fault and negligence of the pilots for which the defenders cannot be held liable.

"So far as this case is concerned I should have disposed of this contention very shortly, for even assuming that the defenders were in fault in failing to see that the pilot boat was at the Fairway Buoy on the night of the 14th-15th April, I should have been unable to hold that this was the immediate cause of the accident. It is, no doubt, true to say that if the pilot boat had been there the accident would not have occurred, but it does not follow that the accident was a necessary and unavoidable result of its absence. But the liability of the defenders for fault as pilotage authority may be of importance in the other cases, particularly in the cargo actions, and as the question was very fully argued before me I think I must deal with it.

"The defenders were incorporated as 'the Trustees of the Harbour of Dundee' by section 9 of the Dundee Harbour Act of 1911, and their whole powers are contained in that Act. Part XI of the Act, which includes sections 107 to 125, deals with pilotage. By section 107 the Trustees are appointed the pilotage authority within the meaning of the Merchant Shipping Act 1894, and with all the powers conferred by that Act. The section further provides that they 'may license pilots and make bye-laws. The remaining sections in this part of the Act, with the exception of section 113, which refers to the exemption of the Trustees from liability for an accident due to the fault of a pilot, and section 125, which provides that they may license pilot vessels of such size and description as they think proper for the purpose of having pilots constantly in attendance within the limits of the pilotage area, are mainly concerned with regulations affecting the pilots themselves and the financial administration of the pilotage dues.

"The defenders argued that under the statute the management of the pilotage business and its finances is treated as a separate and distinct business from the other matters placed under their control, and that consequently their duties and liabilities as pilotage authority, such as they may be, can only be met out of the funds contributed by the pilotage dues. They pointed out, as is the fact, that they have always administered the pilotage on this basis, that the funds have always been kept separate, and that the whole affairs of the pilotage are managed by a committee appointed under section 44 of their Act. The minutes of the pilotage committee, however, have always been reported to the Harbour Trustees and are subject to their approval. There is no doubt that if the defenders had been appointed the pilotage authority with no

other duty than that of managing the pilotage affairs, there would be no funds other than the pilotage dues out of which they could meet their liabilities. But where, as here, they are incorporated by Act of Parliament with the general control and management of the whole port and harbour, including therein the control and management of the pilotage, I am unable to hold that, apart from express provision in the Act, their appointment as pilotage authority is to be treated as separate and apart from their appointment as Harbour Trustees, or that their general funds are not available for all the purposes included in the Act. Neither the fact that pilotage affairs are dealt with in one fasciculus of sections nor that the defenders have power to appoint a committee to manage pilotage affairs appears to me to amount to a provision that the pilotage is to be treated as a separate entity. In section 113 of their Act, which deals expressly with liability for accidents arising when a pilot is in charge of the ship, it is 'the Trustees' who are exempted from liability and not the pilotage authority, and by section 8 'the Trustees' is defined to mean the Trustees of the Harbour acting in execution of the Act. I am accordingly of opinion that while the defenders were fully justified in trying to make the pilotage self-supporting and in managing its affairs by a separate committee, any liability for breach of duty on their part as the pilotage authority attaches to them also as the Harbour Trustees.

"They next maintained that their duty as pilotage authority was confined to licensing pilots and managing the pilotage funds, and that they had no duties to shipowners other than in connection with the licensing of pilots. This argument, as I understood it, was based on the limited matters dealt with in Part XI of their private Act. But these do not exhaust their powers or duties. By section 107 of their Act they are given all the powers conferred upon pilotage authorities by the Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60). A reference to that Act (Part X, secs. 572-633) makes it clear that their jurisdiction is wider than they contend for, and undoubtedly imports certain duties to shipowners other than the mere licensing of pilots. The Merchant Shipping Act, section 584, recognises among other things the right of shipowners by appeal to the Board of Trade to have bye-laws that have been passed by the pilotage authority, and which are objectionable to the shipowners, varied, or to have additions made to the existing bye-laws. A similar provision appears in the Pilotage Act of 1913 (2 and 3 Geo. V, cap. 31, sec. 18), which is incorporated with the Merchant Shipping Act of 1894. This appears to me to dispose of the argument of the defenders that shipowners are not concerned with the bye-laws, and that it was *jus tertii* for the pursuers to found on their bye-law No. 12, which provides that the pilot boat shall, weather permitting, always be in the neighbourhood of the Fairway Buoy. This, the defenders said, was merely a regulation for the pilots, but it is, I think, difficult to conceive any bye-law in which shipowners could have a greater interest than one fixing the place at which they might expect to meet a pilot. Had the pilotage authority not passed any bye-law at all, or had they fixed some other meeting-place which was not approved of by the shipowners, the latter might have appealed to the Board of Trade to have matters regulated to meet their convenience. Accordingly, although section 107 only provides that the defenders 'may' make bye-laws, I think this power imposed upon them a duty to make such bye-laws as might be necessary in the interests of shipowners (see *Julius* v. *Bishop of Oxford*, 5 A.C. 241). Further, I think that having made a bye-law, which it must be assumed was satisfactory to the shipowners, there was a duty on the defenders to see that it was observed effectively.

"Now I do not think that the defenders took sufficient steps to ensure the carrying out of the bye-law. The evidence in the case makes it clear that the reason of the pilot boat not being in its place was that the pilots have for a long time deliberately neglected it, and have been in the habit of retiring to an anchorage above Buddon Ness whenever they preferred to do so and independently of weather conditions. The practice began before and became a regular habit during the war. It appears from the log of the pilot vessel and the evidence of Reid that on the nights of 9th and 10th April the cutter was anchored up the river between the black buoys Nos. 4 and 5. On the 11th she was near the fairway buoy, and Reid says she was at the same anchorage on the 12th and 13th, but on the 14th she was even further up the river than she had been on the 9th and 10th. There is, I think, little doubt that the reason of the pilot's action had connection with the fact that the pilot vessel provided for their use by the defenders was a sailing cutter instead of a steamer. It is because of this attitude of the pilots that the defenders maintain that the failure of the pilot vessel to be at its advertised post was due to fault on the part of the pilots for which they are not responsible. On this point I was referred to section 113 of their Private Act, and to the cases of *Holman* (4 R. 406) and *Shaw Saville* (15 A.C. 429). These two cases are difficult to reconcile on the question whether a pilotage authority, being a statutory body, has power to enter into a contract of pilotage, but they both affirm the proposition that a pilotage authority is not liable for the fault of a licensed pilot after he has been engaged by the ship. This proposition, which is well established, is based on the fact that the engagement of the pilot constitutes a contract of service between the shipowner and the pilot. The provisions of section 113 of the defenders' Act also appear to me to be confined to fault on the part of the pilot while in employment by the ship. But in this case the pilots had no contract with the ship and were under the control and management of the defenders at the time when their failure to observe the bye-law took place. I think that a question of some difficulty might arise were

the absence of the pilot boat from its station due to an isolated instance of failure by the pilots to observe the terms of the bye-law. But in this case it was the result of a long-continued practice of which the defenders were well aware. In giving evidence at a Board of Trade inquiry at Dundee on 17th November 1919, Mr Plenderleath, convener of the Pilotage Committee, made it clear that the pilotage system had broken down owing to their inability to provide a steam vessel. Now I do not think that under such circumstances the defenders can shelter themselves behind the pilots in order to avoid liability. They should either have taken steps to enforce obedience to the bye-law or have withdrawn it and advertised to shipowners that they could no longer expect to find a pilot waiting at the Fairway Buoy. The bye-laws are published by the Board of Trade, and this accounts for the statement in the 'North Sea Pilot.' In my opinion the defenders were in fault in not taking action one way or the other, and would be liable for damages arising immediately from the fact that the pilot boat was not at its advertised station, but as I have already said I do not think that the accident in this case can be attributed to this fact.

"This being my opinion on this matter it is unnecessary to consider whether the state of the weather on the night in question was such as to justify the pilot's failure to keep station. The impression formed on my mind by the evidence was that it did not provide a sufficient excuse, though probably the statement by the witness Reid that it was 'rather a dirty night' was justified. But had the weather been worse than I think it was there was no evidence to show that on the morning of the 16th it was too bad to prevent the pilot vessel making an earlier start so as to get down to the Fairway Buoy on the ebb tide, although the witness Reid does say that he would not have risked the men's lives on the ebb.

"*The Pursuers' Second Averment of Fault*—

"I do not think it is doubtful that it was the duty of the defenders to keep the approaches to the harbour safe, and that the most effective way in which they could have done so would have been by removing the wreck. It was in close proximity to the fairway, and its size constituted it a serious danger to navigation. They have power to remove wrecks in terms of the Harbours Act 1847, section 56, and the Merchant Shipping Act 1894, sections 530-534, and also power to light and buoy a wreck until 'the raising, removal, or destruction thereof' (section 530 (2)). These powers are expressed permissively, but there can be no doubt that they import a duty, although there is no compulsion on a harbour authority to adopt the one method of protecting navigation rather than the other. If a wreck is so marked as to provide an unmistakeable warning to mariners, then in my opinion that would be sufficient to protect the authority from liability. Accordingly the first question to be considered here is whether the wreck was sufficiently marked, and on this question there is such a conflict of expert evidence that I regret that I did not have the assistance of a nautical assessor.

"The only recognised system of buoying wrecks appears to be contained in certain resolutions adopted at a conference of lighting authorities held in 1883, which are far from being exhaustive. They refer to the marking of a wreck by means of a wreck vessel without any indication of the circumstances in which this method should be employed. The only references to buoys which appear to have a bearing on this case are two, which provide that wreck buoys shall be coloured green with the word 'wreck' painted on them in white letters, and that in the case of a wreck in an estuary, 'when possible the buoy shall be laid near to the side of the wreck next to mid-channel.'

"Now I understand this last resolution to mean that when possible the buoy should be placed between the wreck and mid-channel, and I think this was agreed to by all the witnesses. In this position the marking would indicate that the wreck was lying between the buoy and the nearest adjacent side of the channel. But the wreck of the 'Clan Shaw' was lying so close to mid-channel that it was not possible to place a buoy between it and the leading line, and a buoy placed on the south of mid-channel would be as appropriate to mark a wreck lying between the buoy and the south shore of the estuary as it would be to mark the 'Clan Shaw' lying to the north. Accordingly it appears to me that the marking of a vessel in the position of the 'Clan Shaw' is unprovided for so far as the regulations are concerned, and that to attempt to mark it by buoys placed to the south or even quite close to the leading line might, so far as surface indications were concerned, mislead a navigator as to the true position of the wreck.

"The defenders altered the buoying of the wreck repeatedly, and I refer to Commander Mackintosh's evidence for the changes which were made, and which are conveniently shown by the chartlets produced by him. No. 289 corresponds to the marking of the chart and shows two green-lighted conical boys placed to the south of the leading line. But these buoys were removed in December 1918, shortly before the 'City of Naples' left England, and one green-lighted and one red-unlighted buoy took their place. Another change was made on the 7th of March, two days before the 'Circassia' ran on the wreck, and on 31st March 1919 the wreck was for the first time marked with a single green-lighted buoy. On the 14th April 1919 the light on this buoy went out and it was temporarily replaced by a dumb green can buoy which was in position when the 'City of Naples' came to grief. Now all these buoys were to the south of the leading line, and Commander Mackintosh, who was a witness for the pursuers, is emphatic that at no time was the wreck of the 'Clan Shaw' properly marked. Even Mr Dick Peddie, Secretary of the Northern Lights Commissioners, who appeared as a witness for the defenders, says—'I don't think anyone coming in from

sea and not knowing a wreck was there would know what these buoys mean'; and again when asked what he would infer from finding two green buoys situated with an intervening space, he says—'I should infer there were two wrecks,' and adds that he would expect to find the wrecks further from mid-channel than the buoys.

"But while these two witnesses agree that the buoys by themselves gave no clear indication of the position of the wreck, they differ diametrically as to the purpose of buoying a wreck which is already marked by a symbol on the chart. They are each supported in their divergent views by the other expert witnesses on the same side as themselves. All the witnesses agree that an unbuoyed symbol is not itself recognised as a danger to navigation, that it gives no indication of the size of the wreck or of the position in which she is lying relatively to the channel, and that it may not even mark quite accurately the site of the wreck. In this very case it had been discovered just before the accident that the 'Clan Shaw' was lying 300 feet from the spot marked by the symbol on the chart. But according to Mr Peddie and his school the moment a wreck-buoy is anchored in the vicinity of a charted wreck the symbol becomes of the greatest importance, and it is to the symbol that the navigator must look to find the position of the wreck. The information on the chart being somewhat scanty and not very reliable, he is expected to launch a boat and row round till he has located the wreck for himself. This, according to Captain Ewing, is the usual practice if the navigator is in unfamiliar waters. Holding this opinion it is not surprising that the defenders' witnesses concur in thinking that a charted wreck is quite sufficiently marked by a single buoy anywhere in the neighbourhood, and as I understood them, while the buoy should preferably be green its colour or shape is not very material—a buoy of any kind near a charted wreck should put the navigator on his guard. It is apparently only in very exceptional circumstances that the Northern Lights Commissioners mark a wreck with more than one buoy, and a similar practice seems to prevail in the pilotage district of the Port of Bristol. On the other hand, Captain Mackintosh and the pursuers' witnesses say that the wreck symbol signifies nothing except a warning against anchoring in the neighbourhood of the symbol, and that the moment a wreck is buoyed it is the buoys which mark the position of the wreck and indicate to the navigator the course which he should follow. They agree that a wreck lying to the side of a channel can be marked by one buoy which then locates her as lying between the buoy and the near side of the channel, but they say that if she is towards the centre then at least two buoys and possibly more are required to locate her. If two are used they should be placed at the bow and stern of the wreck respectively. They, like the master of the 'City of Naples,' read the chart as indicating that the true position of the 'Clan Shaw' would be between the two buoys shown on the chart. Captain Metcalfe and Captain Peel, who are both at present engaged in connection with pilotage on the Mersey, say any method of buoying to be effective must cover the wreck, and that on the Mersey three and sometimes four buoys are used for the purpose. The advantages of such a method of buoying are obvious. So enthusiastic did some of the witnesses become in support of their rival theories that Captains Hart, Jones, and Thomson said they had never seen or could not recall having ever seen a wreck marked with two buoys, while Captain Mackintosh could only remember one case of a wreck marked with a single buoy. In view of the whole evidence as to the practice of buoying in different localities I find it difficult to credit these statements. I am glad that I am not required on this evidence to lay down any general proposition as to the proper way of marking wrecks.

"But this is an exceptional case, and appears to me to require exceptional treatment. Mr Peddie admitted in his evidence that such cases migh occur, and he gave two instances where exceptional marking was resorted to. In 1906 the 'Skulda' was sunk two miles above the Forth Bridge near mid-channel and directly in the usual path of traffic. As soon as possible a wreck-marking vessel improvised out of a fishing smack was moored on the north of the wreck and remained there for ten days, when the danger was removed. During the war a collier, the 'Bedale,' foundered in one of the principal lines of anchorage at Rosyth. She was marked for five months with buoys at her bow and stern, and, in addition, a wreck-marking vessel was anchored at the spot. At the end of that time she was removed. These were not cases where the wrecks were marked by a symbol on the chart, but they are examples of what is required in exceptional circumstances, and the second case shows that there are circumstances in which the indication of a wreck by means of a wreck vessel is not in itself considered a sufficient protection, but the exact position of the wreck is also marked by buoys. It may also be observed that section 530 of the Merchant Shipping Act does not appear to contemplate that a dangerous wreck such as the 'Clan Shaw' undoubtedly was could be protected by a chart entry. The harbour authority is directed in such cases 'to light or buoy any such vessel until the raising, removal, or destruction thereof.' In my judgment the position of the 'Clan Shaw' required that her exact position should be clearly shown on the surface apart altogether from any indication conveyed by the wreck symbol in the chart. I think the original Order of the Admiralty on 5th February 1917 that the wreck should be marked by two buoys, one on each side, is conclusive evidence that it was not a case where one buoy was considered sufficient. I do not understand how the position in which the two buoys were placed could fairly be described as 'on each side' of the wreck. The correspondence suggests that the defenders selected the position of the buoys, and that the Admiralty merely approved by the letter of 8th

February, but Mr Hannay Thomson says that there had been no communication between the defenders and the Admiralty prior to the receipt of this second letter, which was accepted as an order. But whoever may have been responsible for placing the buoys, it seems to me possible that a navigator reading the chart might be misled into thinking that the true situation of the wreck was between the buoys. The conclusion I have come to is that the wreck was never at any period buoyed in an effective or otherwise than a misleading manner, and that the defenders were at fault in this matter,

"With one exception the changes in the buoying of the wreck were made after the Armistice had been declared, and were not due to caprice on the part of the defenders but to a shortage in the supply of buoys. During the war a number of lighted buoys had been withdrawn from their charted positions by orders of the Admiralty, and were then available for marking the wreck. But after the Armistice they had to be restored to their former places, and as it appears to have been impossible to obtain new buoys at that time, the defenders were faced with considerable difficulties as to what they should do. But a shortage of buoys did not in my opinion relieve them from their duty of marking the wreck so as to warn navigators both by night and day until it was removed—*Dormont*, 11 Q.B.D. 496; '*Utopia*' 1893 A.C. 492. When the 'City of Naples' arrived at the Fairway Buoy on the night of the 15th April, the wreck, so far as a navigator could see in the dark, was unmarked. That the defenders considered it necessary that the 'Clan Shaw' should be removed is clear from a correspondence between them and the Board of Trade which commenced immediately after the Armistice, and in which they contended that the duty of removing the wreck rested with the Government. Had they realised or admitted that the obligation was on themselves, the removal of the wreck would probably have been undertaken before this accident occurred.

"The defenders aver that they adopted a single buoy on a suggestion by the Northern Lighthouse Commissioners that they should do so. They had applied to the Commissioners for two lighted buoys, and in his reply intimating that the Commissioners had no buoys to spare, Mr Peddie suggests that 'after due notice it might be found possible to mark it efficiently with one buoy.' This is a very different thing to saying that the wreck *should* be marked with one buoy, and Mr Peddie repudiates the suggestion that he had any intention of giving such advice.

"But another question is raised in connection with this averment of fault, as the defenders also plead that the wreck was marked in accordance with the instructions of the Admiralty which absolves them from liability. The Senior Naval Officer at Dundee from 1917 onwards was Captain L. Gartside Tippinge, who was called as a witness for the defenders. On being asked in cross-examination whether the statement on which this plea is founded was true, he says, 'Well, no, I should say it is not quite true,' and he goes on to explain that the marking of the wreck in the first place by unlighted buoys (10th February 1917), and then by two lighted buoys (14th March 1917), were both by Order, but that all the alterations subsequent to the Armistice and commencing in December 1918 were submitted by the defenders to him for approval and were approved. It is right to say that the witness was placed in a somewhat delicate position, as the Admiralty are themselves suing the defenders for damage in connection with the cargo of the 'City of Naples,' but I think his evidence is fully corroborated by the correspondence produced passing between him and the defenders with reference to the alterations in the buoys.

"The first Order was issued by the letter dated 5th February 1917, and the second by a letter of 2nd March 1917. Apparently at that date the immediate lighting of the buoys was considered a matter of such importance that on 9th March 1917 Captain Tippinge communicated a third Order to the defenders that the Tay was closed for traffic during the hours of darkness until the marking light buoys were placed in position. In contrast with this procedure the proposal for the next change, in December 1918, emanates in a letter from the defenders in which it is stated that the Northern Lighthouse Commissioners 'suggest that in their opinion one buoy would be sufficient to mark the "Clan Shaw"'—a suggestion which I have dealt with already. The letter ends, 'I shall be glad to hear whether you approve of this.' The proposal was approved by Captain Tippinge apparently, as I understand his evidence, on no other authority than his own and because the hydrographer had intimated that 'he had no objections.' Somewhat similar negotiations passed with reference to the later changes, but no approval was asked or given to the substitution of a dumb buoy for a lighted one on 15th April 1919.

"Now it appears to me that it is impossible to hold that these later changes were made by directions of the Admiralty to which the defenders were bound to conform, merely because they were allowed by the naval authority to carry out their own proposals, rendered necessary by other demands on their stock of buoys. Accordingly I think their fifth plea-in-law cannot be sustained.

"*The Pursuers' Third Averment of Fault*—

"Although Mr Hanny Thompson denies that he knew that the "City of Naples' was expected on the night of the 14th, it is proved that in passing Flamborough Head she had signalled her destination to be reported. It was also proved that the pilots were aware that she was expected. The witness Reid says 'I was expecting a vessel but didn't know her name'; while Gall when asked if he was aware that the 'City of Naples' was expected, says 'Yes, we had word of her being due.' He adds that a watch was kept for her, but that while

they could have seen a blue flare they could not have seen the ship's lights from the position in which they were anchored. There is no evidence as to the source of the pilot's information, but it is clear that the ship's expected arrival must have been communicated to the defenders. Now knowing as they did that the wreck was for the first time marked with a single dumb buoy, that the 'City of Naples' must have left England before she could have received any notice that the two lighted buoys shown on the chart had been removed, that the 'Circassia' had run on the wreck very shortly before, and that the pilots were in the habit of anchoring at night up the river, I think they should either have tried to communicate in some way with the 'City of Naples' or have made some special endeavour to persuade the pilots to keep their advertised station on that night. The pilots were not even informed that a dumb buoy had been substituted for a lighted one on that day, and Reid says he was unaware of the fact. Nothing whatever was done or appears to have been attempted, and in my opinion this was a culpable neglect of a very clear duty.

"Accordingly I think the pursuers have proved fault against the defenders on all the three grounds which they aver. It remains to consider the averments of fault against the pursuers before deciding where the blame for the accident must rest.

"*The Defenders' First Averment of Fault*—

[*This ground of fault was abandoned in the Inner House.*]

"*The Defenders' Second Averment of Fault*—

"The disposition of the crew on the ship is criticised by the defenders' witnesses, who say that there ought to have been a special look-out on the forecastlehead in addition to the chief officer and the carpenter who were engaged there with the anchor. One of their witnesses, however, Captain Ewing, does not seem to think that there was much to complain about on this score, and with this I agree. It seems to me that, it being proved that the weather was clear, a look-out on the bridge was all that was requisite under the circumstances.

"How the occupants of the bridge failed to see the green buoy marking the wreck is difficult to understand, but I believed both the master and Hiles when they say that they did not see it. It was maintained that a buoy standing only five or six feet above the water was too small for the important duty which it was expected to discharge and might not attract attention if dragging at its cable. It is proved that similar sized buoys are used by the Northern Lights Commissioners, but that larger buoys showing about 16 feet above water are used on the Mersey. That the buoy in question was large enough to attract attention is proved by the fact that the chief officer and the carpenter saw it, while the fact that it made no particular impression on their minds suggests that it was either too small for its purpose or partially submerged. There is no reason to doubt that if they had seen the word 'wreck' on it or realised that it was a wreck buoy they would have reported it. They say that they did not see the word 'wreck,' and I think this is quite possible as the word was not painted right round the buoy and very few of the letters would be visible in some positions of the buoy. Other excuses are offered for the failure of the master and Hiles to see the buoy. The sun and the position of the ship relatively to the buoy are blamed, and Captain Mackintosh is prepared to attribute it 'to some freak of the sea or something of that sort.' The opinion I formed was that the master and Hiles seeing no lighted buoys during the night had come to the conclusion before they started that the wreck had been removed and the buoys withdrawn or that the lights of the buoys had gone out. To satisfy themselves about this, in the morning they looked for the two conical buoys shown on the chart as they came round the Fairway Buoy and very quickly ascertained that they were not there, and accordingly assumed that the wreck had been removed. Thereafter I think it is probable they were more concerned in watching the distant pilot boat which was endeavouring to attract their attention than in looking for another buoy different to those which they thought might mark the wreck. It was a somewhat unfortunate moment for the pilot vessel to appear in the offing, particularly as she had sighted the 'City of Naples' as early as 8·30 in the morning, but I do not think this or any of the other explanations suggested provide a sufficient excuse for not seeing the buoy. I have no doubt that the master was keeping a good look-out, but I am not prepared to hold that he was not in fault in failing to pick up the green buoy.

"But a question which I have found one of great difficulty is whether if he had seen the buoy the accident should have been avoided by ordinary care and skill on his part. I do not think that even if he had recognised it immediately as a wreck buoy he would have been bound to conclude that it marked the wreck of the 'Clan Shaw.' This would entail the assumption that the defenders had left the wreck which they had advertised on the chart as marked by two lighted buoys totally unmarked at night and only marked by one buoy during the day. I do not think that any reasonable man could be expected to make such an assumption, and in my opinion the master would still have been justified in concluding that as the two buoys shown on the chart had been taken away the wreck had been removed. I have already referred to the evidence led for the defenders that in the case of a charted wreck a buoy has no definite meaning as to the position of the wreck and that it was the master's duty to lie to and launch a boat to investigate the locality. But the buoy in this case might have indicated a wreck lying between it and the south side of the channel. It was can-shaped, which is consistent with a direction to a ship passing up the estuary to keep it on the port hand. In either event the ship could have passed it in safety on the course on which she was being steered. I cannot reach the conclusion that ordinary care and skill would have required the

master had he sighted the buoy to ignore its possible meanings and to take the steps advocated by the defenders' witnesses to satisfy himself whether it was placed there for the possible purposes indicated or for some other purpose which he might not understand. In these circumstances I am not prepared to hold that the accident was the necessary result of the master's failure to observe the buoy, or that had he done so ordinary care and skill would have required that he should have steered a different course than he did.

"*The Defenders' Third Averment of Fault*—

"As it is clearly proved in the case that there was room on the north side of the channel for the ship to ascend without touching the wreck, I do not see how the selection of this side of the channel can in itself be characterised as a fault on the part of the ship. The north side of the channel was not shown as closed either on the chart or by the buoy marking the wreck, and the starboard side of the channel was the proper side on which to pass a descending ship.

"*The Defenders' Fourth Averment of Fault*—

"This averment again depends upon the importance to be attached to a wreck-symbol. I have already explained that I do not think any of the witnesses regarded an unbuoyed wreck-symbol as a danger to navigation, and if I am right in thinking that the action of the defenders in removing the buoys shown on the chart misled the master into believing that the wreck had been removed and was no longer a danger to navigation, then he was justified in disregarding the symbol. As I think that steps ought to have been taken to remove the wreck immediately after the declaration of the Armistice—six months before—I do not think that it was unnatural for the master and Hiles to assume that this had been done, and that the symbol no longer signified a danger to navigation.

"In conclusion, then, I am of opinion that the master should not be held to have been guilty of contributory negligence, which is, I think, in the long run the point of the whole case.

"If it be (1) that he was not entitled to think that the removal of the lighted buoys shown on the chart signified the removal of the wreck, or (2) that if he had seen the single dumb buoy, he ought to have assumed that the wreck was still *in situ*, and ought to have taken some action other than he did, then I think I should have been bound to hold that the accident was the immediate result of want of ordinary skill and care on his part.

"These are questions with regard to which I should have derived much help from the assistance of a nautical assessor. Being deprived of that assistance I have, after giving this part of the case repeated consideration, come to the conclusions which I have indicated. It appears to me that the removal of the two lighted buoys shown on the chart was apt to mislead and did mislead the master of the 'City of Naples,' and that the marking of the wreck on the 14th April by a single green can buoy was also misleading as well as being ineffective. This was, I think, the direct cause of the accident, and for this the defenders are responsible.

"I shall accordingly pronounce a finding for the pursuers substantially in terms of their fourth plea-in-law, leaving decree to be pronounced when the amount of the damage is ascertained."

The defenders reclaimed, and the case was heard before the First Division on 27th to 29th October, and on 2nd, 5th, 9th, and 10th November 1920.

Argued for the defenders and reclaimers—1. The defenders were not liable for faul[s] of the pilotage authority. The Harbour Trustees and the pilotage authority were two separate bodies with separate funds—Pilotage Act 1913 (2 and 3 Geo. V, cap. 31), secs. 21 and 22). 2. There was no case of fault on the part of the pilotage authority—(*a*) The duty of the pilotage authority was merely to license pilots. There was no duty to see that the pilot cutter was at her post. The bye-laws were only for regulation of the service. It was *jus tertii* for shipowners to found on the bye-laws. (*b*) The pilot cutter provided by the pilotage authority was in accordance with the statutory powers (Dundee Harbour and Tay Ferries Consolidation Act 1911, sec. 125). There was no duty to provide a steam or motor pilot vessel. (*c*) The pilotage authority had done all that could reasonably be required to see that the pilot cutter was at her station. If there was fault, it was fault on the part of the pilots for which the pilotage authority was not liable—Pilotage Act 1913, sec. 19; Dundee Harbour and Tay Ferries Consolidation Act, sec. 113). The evidence did not show that the pilotage authority knew that the pilot cutter was not at her station. In the absence of such knowledge there was no duty to send a special warning. 3. There was no fault on the part of the pilots. The bye-laws did not impose on the pilots a duty to be constantly at their station. They were entitled to take shelter, and it had been necessary to do so. They had maintained a good look-out, had observed the pursuers' vessel in good time, and at once proceeded towards her. 4. If there was any fault on the part of the pilotage authority or of the pilots, the collision was not the natural and reasonable consequence of such fault—Pollock, Law of Torts, 11th ed. pp. 39-40). 5. The Lord Ordinary was wrong in holding that the defenders had failed to mark the wreck sufficiently. (*a*) The buoy was sufficient to warn vessels of the danger, and to indicate where they were not to go. Its position was in accordance with the regulations of the Northern Lighthouse Board regarding buoying of wrecks, and the system of buoyage adopted by the general lighthouse authorities. The use of buoys was conventional, and there was no recognised practice to which the defenders were bound to conform. Buoys did not require to be self sufficient. They were merely aids to navigation. A shipmaster was bound to navigate by his chart, and in this case had done so. It was irrelevant to postulate a vessel without a chart. (*b*) There was no duty on the

defenders to use a wreck-marking vessel or to remove the wreck if they had buoyed it sufficiently. Wreck-marking vessels were merely temporary expedients. There was no case on record that defenders were in fault in electing to buoy the wreck. 6. The Admiralty had intervened in connection with buoyage, and the defenders had acted under instructions, or at all events in accordance with suggestions of the Admiralty. They were bound to do so, and were not liable for the results—"*Utopia*," (1893) A.C. 492; Defence of the Realm Regulations Consolidated 1919, 36 and 37. 7. The collision was due to the fault of the master of the vessel. (*a*) He failed to keep a proper look-out, and was therefore in fault—*The* "*Batavier*," 1854, 9 Moore P.C. 286, at p. 300; Marsden's, Collisions at Sea, 7th ed. pp. 453, 454, 457. (*b*) He was not entitled to conclude from the absence of the charted buoys that the wreck had been dispersed. (*c*) He should have navigated by means of his chart, and was in fault in disregarding the wreck symbol and steering a course over the charted site of the wreck. If there was anything he did not understand he should have stopped and investigated. (*d*) He should have waited longer for a pilot.

Argued for pursuers and respondents—1. The defenders were the statutory pilotage authority, and could not separate themselves from that body in a matter of negligence. The pilotage authority was a committee of the defenders. 2. As pilotage authority the defenders were bound to maintain an efficient pilot service and had failed to so. The system was defective, and the defenders were liable. They knew that the pilots were not always at their station. It was not enough to remonstrate with the pilots. They were bound to provide a vessel which would enable the pilots to be at their station in all weathers—"*General Palmer*," 1828, 2 Hag. Ad. 176—and they had not done so. Having failed to maintain an efficient service they must have anticipated that a vessel not getting a pilot would be injured—Pollock, Law of Torts. The collision was a reasonable and natural consequence of the defenders' failure. The pilotage authority could not expect vessels to wait outside the port because of failure to obtain a pilot—*Clayards* v. *Dethick*, 1848, 12 Q.B. (A. & E.) 439; *Phillips* v. *Headlam*, 1831, 2 B. & Ad. 380, *per* Lord Tenterden, C.J., at p. 382. 3. The defenders had neglected their duties as to buoyage. They were bound to make the harbour and its approaches safe for vessels entering. The statutes contemplated the use of the port as a harbour of refuge and by vessels from long distances. It followed that the entrance must be marked so as to be intelligible to shipmasters without charts. The defenders were not entitled to rely on charts being correct. They had power to remove the wreck. If they did not do so it was their duty to mark the wreck so as to indicate the way to pass safely, either by a wreck-marking vessel or by a buoy at each end of the wreck. The buoyage must be self-sufficient. The rule as to buoyage of wrecks relied on by defenders did not apply to a wreck near mid channel. Further, the buoy used by the defenders was not a proper one for marking wrecks—Dundee Harbour and Tay Ferries Consolidation Act 1911, secs. 92 and 94; Merchant Shipping Act 1894 (47 and 48 Vict. cap. 60), sec. 530; Harbour Clauses Act 1847 (10 and 11 Vict. cap. 27), sec. 56; *Dormont* v. *Furness Railway Company*, 1883, 11 Q.B.D. 496; "*Utopia*," 1893 A.C. 492. 4. Having been negligent the defenders could not throw blame on the Admiralty. No orders were issued under the authority of the statute (Defence of the Realm Regulations (Consolidated) 1919). 5. The defenders being aware that the wreck was insufficiently marked, and that the pilotage service was disorganised, should have sent a special warning to the pursuers' vessel when they learned that she was making for the estuary. 6. The collision was not due to fault on the part of the master of the vessel. (*a*) Having failed to get a pilot he was entitled to enter the estuary without one—*Phillips* v. *Headlam*; *Clayards* v. *Dethick*. (*b*) The look-out was not defective. They were looking for two buoys. The single buoy was so far from the wreck that those who saw it did not think it of any importance. The failure of the master to observe the buoy did not cause the accident. It would have conveyed no information to him about the wreck. The most it could have done was to create a puzzle which the course the master took would have been a reasonable attempt to solve. Having created a puzzle the defenders could not complain that the master had failed to solve it—"*Utopia*." (*c*) The master was entitled to expect that the entrance would be properly buoyed—"*Forto*," 1915 S.C. 743, 52 S.L.R. 537—and to assume from the absence of the charted buoys that the wreck had been dispersed. He was not negligent in sailing over the position marked by the wreck symbol. The proper reading of the chart was that the wreck lay between the two charted buoys. The defenders also referred to *Owners of* "*Thames*" v. *Owners of* "*Lutetia*," 1884, 12 R. (H.L.) 1, 21 S.L.R. 716, and the "*Gala*," 1920, 57 S.L.R. 260, as to the limitation of the arguments to the cases made on record.

At advising—

LORD PRESIDENT—[*After the narrative quoted supra*]—In this state of the facts the inference that the look-out was faulty is irresistible. I think that was the result arrived at by the Lord Ordinary notwithstanding the qualified expression he employs in his opinion. Further, unless the master's conclusion, based on the results of faulty look-out, and the action which he took in consequence, can be otherwise justified, it is to that faulty look-out, and to the errors which flowed from it, that the mishap to the "City of Naples" must be directly attributed.

The pursuers sought to justify the master's conclusion on two grounds. First, they said that the wreck-buoyage, as charted, implied that the wreck lay between the buoys, and that accordingly the wreck-symbol on the chart was deprived of its ordinary function of

marking the surveyed position of the wreck. Therefore they said, secondly, the absence of the charted buoyage from the surface of the water implied the dispersal of the wreck at some date subsequent to January. The charted buoyage was originally adopted by the Harbour Trustees during the war in communication with the Admiralty, and admittedly it did not conform with any recognised practice in the mercantile marine. But the contention that it deprived the wreck-symbol of its definite local significance breaks down in the proof—indeed I think it hardly survived the cross-examination of Hiles on the point.

The Lord Ordinary thought the master's conclusion to be a justifiable one, even on the hypothesis that he had duly observed the wreck-marking buoy which was actually afloat. I think it might at a stretch be conceded that even if the master had observed that buoy he would not have been necessarily bound to conclude that the wreck marked by the symbol on his chart was still *in situ*, but that is a very different thing from saying that the master was warranted in concluding that the wreck charted was no longer *in situ*. There was, however, just the possibility that since January the wreck so marked might have been dispersed and the two wreck-marking buoys shown on the chart removed, and that another wreck had occurred in the same vicinity, though not necessarily on the identical site, and had been marked by the single wreck-marking buoy actually afloat. This is perhaps far-fetched, but it is not an impossibility. And such a conceivable contingency if it had occurred to the mind of the master might have added to his difficulties in finding his own way safely into the buoyed fairway. I shall have something to say about that later. But as has just been pointed out it could not afford any warrant for the conclusion that the wreck shown on the chart by the symbol was no longer *in situ*—and that is the conclusion which the master not only made but acted on. The Lord Ordinary thought that no reasonable man could assume that a wreck-marking buoy, *which was not lighted*, indicated the same wreck as that which the chart showed as being indicated three months previously by two wreck-marking buoys *which were lighted*. I do not myself see anything beyond the limits of reasonable possibility, or even probability, in it. But however that may be, the hypothesis that the master had seen the single wreck-marking buoy leaves him without excuse for concluding that no wreck (old or recent) lay on or near the position occupied by the wreck-symbol on the chart.

It is true that the symbol reveals neither the size nor the orientation of a wreck. But it does identify with close approximation its site. It is laid down from survey, which is of the same accuracy as that of the other markings of submerged objects and depths on the chart. In the present case the hull of the wreck, 360 feet in length, lay roughly N.E. and S.W., and the base line of the symbol if laid down with perfect accuracy would have run across the hull right amidships. But the hull had in fact moved by the time the "City of Naples" came on the scene in a southerly or south-westerly direction, somewhat nearer to the line of leading lights. The Lord Ordinary is in error in saying that the purpose of the symbol is merely to warn mariners against anchoring in its neighbourhood. His Lordship is, I think, misled by a confusion in the passage from the cross-examination of Captain Mackintosh which he quotes, between (1) the form of wreck-symbol shown on the master's chart, which is used to mark a wreck lying at such a depth as constitutes it a danger to navigation, and (2) another form of wreck-symbol, consisting of a small circle of dotted lines which is employed to mark a wreck lying at such a depth as to be a danger not to navigation but to anchorage only. The hydrographer's evidence clears this up. Captain Mackintosh is the pursuer's principal expert witness, and he gives no countenance to the view that a charted wreck-symbol (of the former kind), even if no wreck-marking buoys are to be seen on the surface of the water near by, can be disregarded by the mariner. On the contrary, he says the mariner should keep well clear of it. I am accordingly unable to agree with the Lord Ordinary in holding that the master's assumption and consequent action were justified, and I am compelled on the evidence in the present case to attribute the disaster directly to the faulty look-out and the master's consequent failure properly to navigate his ship.

The pursuers seek to fix liability for the disaster on the Harbour Trustees on one or more of the grounds set out in the exhaustive and illuminating opinion of the Lord Ordinary. We were told that the present is only one of several actions by the owners of cargo as well as of the ship in which similar questions may be presented for decision. This circumstance, and the conclusion at which I have arrived earlier in this opinion, make it necessary to emphasise what is otherwise obvious, that such observations as I shall make on the grounds of the Lord Ordinary's opinion are strictly limited to the evidence led in the present case. I make them out of deference to the care and anxiety with which the case has been treated both by the Lord Ordinary and by counsel who argued it, and in view of the possibility that if the case goes further its ultimate decision may turn on some other issue than that which appears to me to be decisive.

First, then, as to the failure of the pilot cutter to be in attendance at the Fairway Buoy in the early morning hours of April 15th, the accident was not in my opinion the natural and reasonable result of that failure. Here I understand myself to be in substantial agreement with the Lord Ordinary although he has used the words "necessary and unavoidable" I think erroneously, instead of the words "natural and reasonable." I agree also with the Lord Ordinary in thinking that there is no difference as regards liability for fault in the discharge of pilotage responsibilities between the

Pilotage Committee and the Harbour Trustees. Further, I agree with the Lord Ordinary that if the Harbour Trustees found it to be their duty, as I have no doubt it was, to make bye-laws regarding the pilots' duties and the proper station for the pilot cutter, it would be a fault on the part of the Harbour Trustees if they allowed those bye-laws to fall into desuetude or neglect, unless indeed a change of circumstances had superseded the necessity for them. I refer particularly to bye-laws 7 and 12. The publication of these bye-laws warranted the insertion of the statement in the *North Sea Pilot*, which the master had in his possession and to which he refers in the proof. Now it may well be that a pilotage authority which publicly offers the services of its licensed pilots to mariners coming into its port, and professes to supply those services at a particular station, makes itself liable for mishaps which are the natural and reasonable consequence of its acquiescence in the desertion of that station by the pilots. But I am not able on the evidence in this case to agree with the Lord Ordinary that the Harbour Trustees committed such a breach of duty with regard to the "City of Naples." War conditions, and the interference with the ordinary performance of the pilots' avocations which those conditions entailed, appear to have seriously disorganised the pilotage service, and that service did not by any means recover itself in the months immediately succeeding the Armistice. But so shortly before the mishap to the "City of Naples" as 9th April, the pilots had been definitely instructed that they must keep station outside the river, and this was done until the very evening of the 14th, when the cutter, exposed to heavy weather in St Andrews Bay, made for shelter, and anchored for the night at a point near the black can buoy numbered 5 on the chart (S.W. of Buddon Ness). In point of fact the look-out on the mast of the cutter picked up the "City of Naples" on the morning of 15th April at 9 o'clock (British summer time), two hours before the "City of Naples" left her anchorage about 7 sea miles away, and though the cutter was unable owing to adverse conditions of wind and tide to get further out than the neighbourhood of the second red conical buoy from the entrance into the buoyed fairway numbered 2 on the chart, *i.e.*, about three-fourths of a sea mile distant from the scene of the mishap, she was seen from the "City of Naples" from a greater distance, even before that vessel reached the Fairway Buoy, and was recognised as the pilot cutter by those on board. I am not in this state of matters able to conclude, as the Lord Ordinary does, that the Harbour Trustees were allowing the pilots to neglect the bye-laws in April 1919 and were therefore at fault. Nor am I prepared, on the evidence led, to hold that they were at fault in not having provided at the date of the mishap a steam or motor pilot boat under the powers of section 125 of the Harbour Act. That step would certainly have improved the efficiency and promptitude of the pilotage service, and might have averted the accident. Further, it may be that the time will come, or for aught I know may have come by the time this opinion is delivered, when the provision of such a pilot boat may be incumbent on the Harbour Trustees. But the practice of similar important and reputable authorities spoken to in the present case as existing at the date when the "City of Naples" arrived off the Firth of Tay would not, in my opinion, justify the imputation of failure in duty to the Harbour Trustees on that score.

Next, as to whether the wreck-marking buoy which the master of the "City of Naples" failed to observe constituted, even on the assumption that he had timeously seen it, an adequate discharge of the Harbour Trustees' duty to mark the wreck—1. The Harbour Trustees contended that the Admiralty and not they was responsible for the laying of this buoy. The evidence shows that war conditions and consequent Admiralty interference had introduced considerable confusion into the organisation of the buoyage department, as of the pilotage department, of the Harbour Trust. Even after the Armistice, and up to the time when this mishap occurred, the Trustees appear to have devolved their buoyage duties on the general manager, and the general manager seems to have regarded responsibility for buoyage as having been assumed generally by the Admiralty. As it happened, the single wreck-marking buoy which was afloat on the morning of 15th April had been laid only the day before, 14th April, in substitution for a single lighted green buoy which had marked the wreck since 31st March. This lighted buoy had gone out prematurely owing to the weather, as such buoys sometimes do, and had been taken into Dundee for re-charging or repair. Now the evidence affords, in my opinion, no ground for attributing responsibility for the laying of the single unlighted buoy on 14th April to the Admiralty. Either the pursuers have proved that that buoy did not constitute an adequate discharge of the buoyage duty incumbent on the Harbour Trustees, or they have failed so to prove, but the Harbour Trustees alone are answerable.

2. The mishap occurred in broad daylight, and that fact makes it impossible to attribute the mishap which occurred to the absence of a *lighted* buoy. The evidence is that wreck-marking buoys are not always or even usually lighted buoys; and the note on buoys and beacons in the North Sea Pilot shows that in maritime practice implicit reliance is not placed on such lights. The most that can be said in this case is that the absence of the two lighted buoys shown on the master's chart may have predisposed him towards the idea that observation in daylight would not reveal any wreck-mark at all. But it does not excuse the unaccountable failure of the look-out to pick up the unlighted buoy which was actually afloat on the morning of the 15th at something more than a cable's length from the charted site of the wreck, and something less than a cable's length from

the actual site as at that date. The usual distance in practice, as spoken to in evidence, ranges from about ¾ of a cable's length to 1½ cables.

3. The central argument of the pursuers was that the buoy was inadequate because it was not "self-sufficient" and "self-interpreting," that is to say, they maintained that the duty of the Harbour Trustees was so to buoy the wreck as not merely to give the approaching mariner warning of its near presence, but also to convey to him unmistakable sailing instructions as to the course he should steer in order to get safely past it. No buoy, they said, which was not "self-sufficient" and "self-interpreting" in this sense could constitute an adequate discharge of the duty of wreck-buoyage incumbent on the Trustees. The case was put of a mariner who had no local knowledge available to him, by which is meant knowledge of the position of the wreck derived from prior experience of navigation in the water in which it lies or from charts or from published notices. Admittedly, to such a mariner the wreck-marking buoy would be an efficient danger signal; but it would not disclose the situation or dimensions of the wreck with such precision as to provide *per se* unmistakable sailing instructions how to get past it in safety. From this the deduction was made that if a duty to convey such sailing instructions by means of the buoy be owed to a mariner who has no local knowledge, the mariner whose local knowledge is derived only from a chart three months old is entitled, equally with the former, to rely on the "self-sufficient" and "self-interpreting" qualities of the buoyage. Now buoyage in general and wreck-marking buoyage in particular is a matter which involves high technical skill and experience; and an argument of this kind can only receive effect in a court of law if it is founded on evidence of maritime practice and corresponding maritime convention or understanding whereby wreck-marking buoys can be and are by such practice and understanding made the vehicles of sailing instructions in addition to a warning to keep at a respectful distance. The conflicting views expressed in the proof are in my opinion negative of any general practice or accepted understanding of this kind, so far at least as this case is concerned; and accordingly the argument fails for want of sufficient foundation in evidence. Apart from such evidence it appears to be true of all buoys (wreck-marking and other), and indeed of all sea marks, including even the lights shown from beacons and lighthouses at night, that *per se* and apart from local knowledge derivable from prior experience or from charts or (at least) from correlating the buoys or lights with other sea marks or land marks if such happen to be visible, they do no more than warn the mariner that somewhere in their neighbourhood there exists something—an obstruction or a passage—which may concern him in some particular as a navigator. As Mr Dick Peddie puts it more than once in his evidence, buoys are at best only aids to navigation.

4. The pursuers also presented a narrower version of the same argument based on Regulation No. 2 of the Northern Lights, which corresponds with paragraph 16 of the Buoyage System of the General Lighthouse Authorities of the United Kingdom —"When possible the buoy shall be laid near to the side of the wreck next to mid-channel." Although the wreck of the "Clan Shaw" lay about 1½ cables length to seaward of, and therefore outside, the entrance of the buoyed fairway, both parties regarded the water between the Fairway Buoy and the entrance as a channel whereof the "mid-channel" was defined by the line of leading lights. Now the wreck-marking buoy was in fact laid so as to comply with this regulation. It was near (*i.e.*, a cable's length or thereby) to that side of the wreck which was nearest to mid-channel (*i.e.*, the south-western extremity of the wreck). Now to a mariner like the master of the "City of Naples," who knew that a wreck was charted as lying in the position shown by the wreck-symbol, the buoy did in effect give sailing instructions how to get past safely; all he had to do was to keep the buoy between his ship and the charted site of the wreck. But in presenting their narrower argument, as in presenting their broader one, the pursuers figured the case of a mariner with no local knowledge and no chart. They admitted that if a wreck lay so much aside from "mid-channel" that its wreck-marking buoy (when laid on the side of the wreck nearest to "mid-channel") occupied a position observably to the same side of "mid-channel" as the wreck, the buoy (even though unsupplemented by any local knowledge on the part of the mariner) might give him both warning and sailing instructions. To take a clear example — if the wreck of the "Clan Shaw" had occurred well inside the entrance of the buoyed fairway and at a point distant (say) a cable's length from the line formed by the red conical buoys on the northward, and if the wreck-marking buoy had been laid (say) a cable's length from the wreck on its side nearest mid-channel, then a mariner coming in from the sea, though destitute of the means of local knowledge, would by reference to Regulation No. 2 receive both (*a*) warning that a wreck lay between the buoy and the northern limit of the Fairway Channel, and (*b*) sailing instructions to avoid it by keeping the buoy between his ship and the inferred locality of the wreck. In the local circumstances figured the wreck-marking buoy in relation with the red conical buoys might be said to have the effect of indicating a temporary constriction of the fairway (or channel) which put the locality of the wreck outside it. The pursuers said that the buoy in those circumstances would meet their requirements of "self-sufficiency" and "self-interpretation," notwithstanding that even in the case figured these qualities would depend on the mariner's knowledge (necessarily acquired otherwise than from the wreck-marking buoy *per se*) of the line of "mid-channel." But they argued with justice, and I thought

with success, that the nearer the site of the wreck is supposed to be towards "mid-channel," the less clear do the implied sailing instructions become to a mariner with no local knowledge; and that when, as in the present case, the result of laying the buoy as directed by the regulation is to make it occupy a site on the *opposite* side of "mid-channel" from that on which the wreck is lying, the implied sailing instructions become to such a mariner ambiguous. It is impossible, in short, for him to infer from the buoy *per se* on which side of "mid-channel" the wreck lies.

I am impressed by the peril which attended the particular situation of the wreck in this case, especially as knowledge of its existence and position made safe entry into the buoyed fairway a simple affair. The witness Ashton who knew where the wreck was, acting on a hint given him by the pilots, kept the leading lights a little open to the southward (*i.e.*, kept the high light a little southward, in his sight, of the low light) on entering, and was perfectly safe. The Lord Ordinary thought that in the case of this wreck at any rate the buoyage should have been such as to be "self-sufficient" and "self-interpreting" in the sense contended for by the pursuers; and he came to the conclusion accordingly that the wreck was inadequately buoyed. But for reasons which I have already indicated, the practicability of adopting in any particular set of circumstances a particular form of buoyage intended to be "self-sufficient" and "self-interpreting," *without at the same time introducing new sources of perplexity and confusion*, is a matter of expert skill and experience, and therefore of evidence; and upon the evidence led in this case any judgment I can form on the expediency, and consequently on the duty, of adopting any particular system of buoyage must depend. The pursuers' witnesses advocate the use of two wreck-marking buoys, one off the stern and the other off the bow of the sunken wreck. They claim for this method the implication of an unmistakable sailing direction to the approaching mariner not to sail between them. If this had been proved (1) to be a recognised method, (2) to be applicable to the particular local circumstances of the wreck of the "Clan Shaw," and (3) to accord with maritime convention and understanding, it might well have been the duty of the Harbour Trustees to adopt it. But it is the subject of unending conflict between the experts; and it is objected to on the formidable ground that to multiply the wreck-marking buoys would perplex, not enlighten, the observer, whether he had local knowledge or was destitute of it, by suggesting the presence of more wrecks than one. There remains outstanding the salient fact that out of forty-seven wrecks marked by the Northern Lights since 1877 (when their own buoyage system and that of the General Lighthouse Authorities of the United Kingdom were published) forty-four have been marked by one buoy. Several of these were in the Firth of Forth, and the buoys used were mostly unlighted. Further, only one of these wrecks, that of the "Bedale," was marked by two buoys; and it was a unique case, in respect that the wreck occurred in one of the principal lines of anchorage of H.M. ships at Rosyth. I do not find in the case evidence sufficient to support any practised and understood method of buoyage which, applied to the particular circumstances of the "Clan Shaw," would have been "self-sufficient" and "self-interpreting" in the sense of the pursuers' contentions. I cannot therefore sustain their narrower argument any more than I was able to sustain their broader one.

It is necessary at this point to recur to the difficulty which the pursuers suggested might have presented itself to the master of the "City of Naples," on the double hypothesis that (1) he had seen the buoy, but (2) had conceived the possible contingency that the wreck of the "Clan Shaw" had been dispersed since January, and that another disaster had occurred in the same vicinity before April 15th. While the buoy as laid constituted an unmistakable warning of the near presence of the wreck, it was inadequate on the double hypothesis suggested to convey any *unmistakable* sailing instructions to the master of the "City of Naples" even with such local knowledge as his three-months-old chart supplied to him. Now, for reasons already explained, I think it is not proved that, supposing he had conceived the possibility of the dispersal of the "Clan Shaw" and the occurrence of a further disaster, he would have got any more precise information as to the site and dimensions of the obstruction with which he was confronted from two buoys than from one. He says himself that he preferred to enter the buoyed fairway by the north, because his chart showed more depth of water over the bar on that side. So it did, the tide had only recently begun to flow, and the draught of his ship was 23 feet 6 inches. He says that his first idea, when passing the Fairway Buoy, was to keep close to the red conical buoys on the north, thus keeping the wreck symbol at a respectful distance on his port hand. Unhappily he abandoned the idea very soon after, and starboarded his helm in reliance on his conclusion that the wreck was no longer *in situ* and, as we have seen, steered across its charted site. But if he had seen the buoy actually laid—or two buoys if two had been actually laid—and had, in view of the possible contingency referred to, thought it doubtful whether any, and if so what, part of the entrance into the fairway was safe, his proper course in that case would have been not to risk an attempted entry, but to wait a little longer while the pilot, whose cutter was in sight only 1½ sea miles away, reached the ship by boat, especially as the recent turn of the tide left plenty of time to get to Dundee. At the very worst, his safe and proper course would have been to lower a boat and examine the *locus*. The tidal current produces an observable disturbance on the surface of the water near the wreck. In point of fact its higher parts were only 12 or 15 feet under water at low tide.

5. The pursuers further argued that, if

the buoyage could not be made "self-sufficient" and "self-interpreting," it was the duty of the Harbour Trustees to have maintained a wreck-marking vessel at the site of the wreck until its dispersal, or to send out a tug-boat when they learned from the shipping information that the "City of Naples" was due. According to the evidence, wreck-marking vessels are only used in practice during the interval which must elapse between the occurrence of a wreck and the correction of charts and sailing directions through the regular machinery employed by the Admiralty for that purpose. No evidence was adduced to support the demand as a practical proposal for the maintenance by the Trustees of a wreck-marking vessel with its crew for a period of two years (the "Clan Shaw" had gone down in 1917) in so exposed a situation as that with which we are here concerned. It is true that the dissemination of chart corrections and amended sailing directions by means of "Notices to Mariners" necessarily lags behind the events, more or less. But I am saved the necessity of forming an opinion in this case on the question whether the failure of the Trustees to send out a special warning by tug-boat caused or contributed to the mishap, by the double consideration that the mishap occurred in the full light of day; and that on the best judgment I can form on the evidence in this case it is not proved either that the failure of the pilot cutter to be on the spot —the best of all possible modes of special warning — was due to the fault of the Harbour Trustees, or that the wreck buoyage as laid on the morning of 15th April was inadequate.

LORD MACKENZIE—In this case a number of topics have been discussed and more than one ground of liability explored. It was maintained that the defenders had failed to provide an efficient service of pilots, and that it was to be held a natural and reasonable consequence of this that a ship although navigated with due care would meet with disaster. It was maintained that the defenders' buoying was deficient and misleading, and that in the circumstances they should have given special warning. At each stage of the argument, however, the case was always brought back to the point — Who was to blame for the collision? Accordingly I proceed to consider, first, how the master of the "City of Naples," a ship of over 5000 tons, navigated her when he collided with the sunken wreck of the "Clan Shaw." The collision occurred at 10·45 a.m. on 15th April 1919 in the fairway of the river Tay. The master had a chart of this locality corrected down to 14th January 1919, which marked with the appropriate wreck-symbol, viz., a line and three diagonals, the position of the wreck of the "Clan Shaw" with the year 1917, when the wreck took place. The wreck-symbol was a cable's length to the northward of the line of leading lights bearing on Buddon Ness light. This line is shown on the chart in the middle of a channel six cables across from the red conical buoys to the north to the black can buoys to the south. The "Clan Shaw" was lying in 30 feet of water. The "City of Naples" was drawing 23 feet. There was a green can wreck-buoy placed about 800 feet to the south of the position of the wreck, *i.e.*, 200 feet to the south of the mid-channel. The "City of Naples" was moored during the night about three miles south of the Fairway Buoy at the entrance to the Tay. The Fairway Buoy is as near as may be on the leading lines. The master, who had not been up the Tay before, failed to get a pilot. He had sent up a flare the night before. He hoisted the pilot jack and sent a wireless in the morning. He hove up his anchor at 10·13 a.m., and decided to go up to Buddon Ness in order to get a pilot to take him up to Dundee. This he was entitled to do, the area not being one of compulsory pilotage, and there was the risk of mines. He passed the Fairway Buoy on the port hand a ship's length to the northward. The length of his ship was 418 feet. This though not according to practice he was entitled to do. On passing the Fairway Buoy he went from full speed to slow. He was then steaming 6 knots. The morning was fine. As the master puts it, he was gradually getting down to the line of leading lights. The helm was put to starboard, but the precise point at which this was done and the reason for doing it are not made clear in the proof. She was then steadied on her course. Five minutes after passing the Fairway Buoy the collision took place at or at most 300 feet from the exact position of the wreck marked by the symbol on his chart. The master had failed to see the green wreck-buoy.

It was the duty of the master to keep a good look-out. The Lord Ordinary has held that he failed to discharge this duty. I agree with this conclusion. The pursuers' own witnesses are unable to suggest how with a good look-out the green wreck-buoy was not sighted. It is proved that it was easily visible. It could be seen a mile away. In point of fact it was sighted by the chief officer on the forecastle-head broad on the port bow. He kept looking at it but did not report it to the master. The chief officer had not been instructed by the master that there was a wreck in the vicinity. The master, who was on the bridge with a Trinity House pilot (only licensed as far as Berwick), failed to see it. The case must be taken on the footing that the master ought to have seen the wreck-buoy. His failure cannot in my opinion be excused upon the ground that the buoy did not present the necessary characteristics of a wreck-buoy. It was green, with the word "wreck" painted on one side. The buoy was 5 feet 6 inches to 5 feet 9 inches out of the water and was 3 feet 6 inches in diameter. It was larger in size than the wreck-buoys used by the Commissioners of Northern Lighthouses. Captain Ruthven, who has been for thirty-five years a younger brother of Trinity House, says it had nearly two inches more diameter, and it was 74 per cent. longer, than the regular type of buoy used by Trinity House for the same purpose. It was a can buoy, but there is no hard-and-fast rule for the shape of a wreck-buoy.

A wreck-buoy is one of the aids to navigation. It is a warning to mariners. If a mariner has no local knowledge, if he has no chart of the waters he is navigating, then a wreck-buoy is a warning of a danger which the dictates of prudence will compel him to locate. He may have to lower a boat if the easiest way of finding the wreck is not available, *i.e.*, by observing the ripple of the tide. In 5 fathoms there is a strong ripple. If he has local knowledge, or if he has a chart upon which the danger is marked, then he may be in safety to proceed. But the green wreck-buoy is not *per se* more than a hand held up. It is not a pass-on signal. At attempt was made to establish the proposition that there was a duty on the defenders to put down buoys, which should be surface marks self-sufficient to give the direction to mariners and discharge them from the duty of looking at the chart. The weight of the evidence negatives this idea, and supports the view of Captain Ewing, captain of the Northern Lighthouses s.s. "Pharos," a skilled navigator of great experience in this branch of the service. He says that the wreck was perfectly marked, and that there should have been no difficulty in entering the Tay with the symbol of the wreck marked on the chart which the master had. This means that the purpose of the surface mark is to enable a mariner to read his chart intelligently, not to dispense with his chart altogether.

If the wreck-buoy had been seen, then the master's duty would have been to keep it between him and the wreck-symbol on the chart. He ought to have kept the buoy on his starboard hand going up the channel. This is the proper reading of the regulations of the Northern Lighthouse Board regarding buoying of wrecks and system of buoyage adopted by the General Lighthouse Authorities at a general conference. These provide—"(2) When possible, the buoy shall be laid near to the side of the wreck next to mid-channel." This case has been taken by counsel and by the witnesses on both sides as one in which the wreck was lying in a defined channel. The channel for a ship going up is indicated by the red conical buoys to starboard and the black can buoys to port. The master did not keep to port of the green wreck-buoy. According to his evidence he steered a course which brought him within 800 feet of the buoy he did not see, and which led exactly on to the charted position of the wreck, and got the wreck in the identical position shown on his chart. It was pointed out that this is not literally correct, as subsequent to the date down to which the chart had been corrected the wreck (which was of a vessel 360 feet long) had shifted some 300 feet farther to the south. This, however, does not affect the point. The duty of the master was to steer a course south of the wreck-buoy and thus keep the buoy between him and the wreck-symbol on his chart. He steered a course north of the wreck-buoy and struck the bow of the wreck. No intelligible explanation was given of why he went right over the point marked danger. As the pursuers' leading witness, Captain Mackintosh, says—"My observation is this—that if the symbol had been there and no buoy there, one would give a wide berth to the symbol." It is then put to him—If the wreck-symbol marks 30 feet of water and the ship is drawing 23 feet (which is the case of the "City of Naples"), with that knowledge and nothing else would a prudent seaman avoid the locality? and his answer is Yes. This is what the defenders' witness Captain Hart says—"(Q) Was the master, in your opinion, justified in assuming from the absence of any visible buoys that the wreck had been dispersed?—(A) No, a prudent man would not do it. (Q) There is known to all seamen—and it is stated in the Sailing Directions—that implicit reliance is not to be given to buoys; that they are merely aids to navigation; and that they may break adrift or get displaced?—(A) That is so, and they do break adrift. (Q) Even if he acted upon the assumption, do you think it was prudent navigation to steer a course which took his vessel right over the *locus* in which the wreck-symbol was marked upon the chart?—(A) Decidedly not." The passages in the evidence of Captain Mackintosh on this point do not bear out the view of the Lord Ordinary that an unbuoyed symbol is not itself recognised as a danger to navigation, or that the wreck-symbol signifies nothing except a warning against anchoring in the neighbourhood of the symbol. Therefore, even if the master had been justified in keeping the north side of the leading line of lights, he did not navigate his ship with prudence when he steered over the wreck-symbol. This is the view taken by the Trinity House pilot, Hiles, who was with him. This is his evidence—"(Q) The master having elected to enter by the starboard channel, Was there plenty of room entering by the starboard side to keep well clear of the wreck?—(A) Yes, there was. (Q) And that would have been a prudent thing to do?—(A) Yes."

The justification pleaded on behalf of the master was that his chart showed two green lighted buoys placed parallel to the line of leading lights. His case on record is that as no green-lighted buoys were seen he was entitled to assume that the wreck had been removed. This, I think, is not supported by the evidence. The green wreck-buoy that was there had been put down between the situation of the two buoys as shown on the chart. Upon this point I take the evidence of Captain Jones, the superintendent of charts at Rosyth. He says that a wreck-symbol shows there is a wreck or wrecks in that position, and that it remains until such time as the Notices to Mariners enable the chart to be corrected and the wreck expunged from the chart. A prudent seaman goes entirely by the chart until the Notices to Mariners make an alteration on it. The Notices to Mariners contain this word of caution as regards buoys and beacons—"Wrecks have occurred through undue reliance on buoys and floating beacons always being maintained in their exact position. They should be regarded simply as aids to navigation and not as infallible marks,

especially when placed in exposed positions." The master's assumption that as he did not see the two buoys the wreck had been removed seems to depend upon the theory that he was entitled to regard these two buoys as covering the wreck, one at the bow, the other at the stern. This theory is, however, far from being made out in the proof. The two buoys were the suggestion of the Admiralty, but no one is brought to explain what the ratio of the two buoys was intended to be to the symbol. They were an innovation on the general practice, which was to put down one buoy. This is proved by Mr Dick Peddie and Captain Ewing, who have never known a wreck marked by two buoys except in one very exceptional case. It is a simple rule that a vessel must keep the wreck-buoy between her and the wreck-symbol, and one which, if attended to, is free from danger. This, in my opinion, is the effective answer on the evidence to the pursuers' contention that the defenders made a puzzle and are not entitled to turn round and blame the master if he failed to solve the puzzle correctly. The simple answer is that if the master had seen the wreck-buoy there would have been no puzzle, for it would have enabled him to read his chart intelligently. This view necessarily negatives the pursuers' contention that the buoy was misleading because it was placed to southward of mid-channel. That contention is, in my opinion, founded on a misconstruction of the regulation. The side of the wreck nearest mid-channel was the stern, and the wreck-buoy was placed on that side of the wreck. This was not a case of a wreck lying athwart the line of mid-channel, a situation which presents its own difficulties. The weight of the evidence does not support the pursuers' contention that the proper practice in dealing with a wreck in the position of the "Clan Shaw" would have been to put down two buoys, one at the stem, the other at the stern. The problem these would have presented would not have been different in kind from that presented by one buoy. The difficulty would still have been in regard to the proper way of reading the wreck-symbol on the chart. The defenders' witnesses say this would indicate to them two wrecks. They deny it would transfer the wreck from the position of the symbol to a point between the buoys. As regards the contention that a lightship should have been posted, it is evident that this is regarded as a temporary expedient in exceptional cases and is continued only until the position of the wreck is marked on the chart.

There is no doubt that when this unfortunate collision took place the dumb wreck-buoy that was being used was an emergency buoy. One of the two lighted buoys shown on the chart had been removed because of a demand for the restoration of the Fairway Buoy. The other lighted buoy had blown out and had to be taken away to be recharged. The defenders had no other spare lighted buoy. They reported on 12th April to the senior naval officer that the wreck was marked by a dumb buoy and no objection was taken.

I hold (1) that the master was in fault in not seeing the wreck-buoy; (2) that if he had seen the wreck-buoy his chart was an indication to him to keep to port of the wreck-buoy; (3) In any event it was an indication of danger to him; (4) That he disregarded without sufficient reason the wreck-symbol on the chart; and (5) that the collision was due to bad navigation on the part of the master of the "City of Naples."

This is sufficient for the determination of the present action, which is at the instance of the owners of the "City of Naples." The ground of judgment is not that there was contributory negligence on the part of the master. It was his negligence that was the sole cause of the accident.

Nothing said in this case can prejudge any question which may be raised upon evidence of a different character in proceedings which may be instituted by other parties, *e.g.*, the owners of the cargo on board the "City of Naples." Nor can the fact that other vessels collided with the "Clan Shaw" affect our judgment upon the evidence led in this case. As, however, it was urged upon us, especially by counsel for the pursuers, that the primary question to be determined was whether the wreck was properly buoyed, I am of opinion that the pursuers have failed to prove in this case that the wreck was buoyed otherwise than in accordance with practice. Their contention is based upon the view that the master of the ship was entitled to assume that the channel was buoyed for a ship without a chart. As their witness Captain Mackintosh puts it, it was all right for the master to go full speed ahead on his course. This view I reject. I accept the view spoken to by Mr Dick Peddie, that the wreck of the "Clan Shaw," which lay a little short of half a cable north of the line of leading lights, was marked in accordance with the practice of the Northern Lighthouses Commissioners by a green wreck-buoy half a cable to the southward of the stern, which was the nearest part of the wreck. The Lord Ordinary has held this was an exceptional case requiring exceptional treatment. The pursuers in my opinion have failed upon the evidence in this case to prove this. It does not seem to me fairly comparable with the very exceptional case of the "Bedale" spoken to by Mr Dick Peddie, which foundered in one of the principal lines of anchorage of His Majesty's ships at Rosyth. The "Bedale" is the only case where in Scottish waters a wreck was marked by two buoys.

The defenders maintained that they were to be absolved because what they did was under the order of the Admiralty. There is no sufficient proof of an order by the Admiralty. The most that can be said is that the senior naval officer was made aware of what the Harbour Trustees proposed to do and intimated that he had no objection. I should have difficulty in taking any other view than this, that what the naval authorities were concerned about was defence only. Nothing short of a direct order would absolve the Harbour Trustees from the

duty of applying their own minds to the matter of what was necessary for the mercantile marine. To my mind there is much force in the strictures passed by pursuers' counsel on the attitude taken up by the Harbour Trustees, that they had no responsibility. The important matter, however, is not the manner in which the Harbour Trustees went about their duties, but what it was that they did. That brings the matter back to this—Did they give a warning sufficient to a reasonably careful navigator? To this an affirmative answer has already been given.

The pursuers further argued that the defenders ought to have known that the wreck was not effectively marked, and as they knew the "City of Naples" was coming in they should have given a special warning. The assumption upon which this argument proceeds fails for the reasons already given.

There remains the contention of the pursuers that the collision was due to the fault of the defenders in not having a pilot at the Fairway Buoy. The master had a copy of the North Sea Pilot which contains sailing directions, and this stated "The Tay Pilot Vessel unless driven in by stress of weather is always at anchor or under weigh near the Fairway Buoy." The view of the Lord Ordinary is that the accident cannot be attributed to this cause. In this I agree. But further, it does not appear to me that the Harbour Trustees failed in their duty in regard to this matter. I think there was a duty on the defenders to take reasonable steps to provide a sufficient service. This does not depend upon the bye-laws. What the evidence comes to is this, that whatever the practice may have been during the continuance of hostilities the Harbour Authorities had taken action by the 7th of April 1919 when a complaint was made to them. The pilots were convened and instructions were given to them to keep at sea. They did keep at sea until they came in to shelter at Buddon Ness owing to stress of weather on the 14th of April. There was a watch kept all night, and with the first chance of visibility the "City of Naples" was sighted. The pilot cutter started one hour before dead low water, but the wind fell when they had been only one hour under weigh. The pursuers failed to show that there was any obligation to provide a steam service. In order to make this point it would have been necessary for them to prove that the pilotage authority at Dundee had failed to do what was usually done as a reasonable precaution. This they have failed to prove. It was unnecessary for the master of the "City of Naples" to start so soon as he did in order not to lose the tide. Under the circumstances he went in at his own risk. Even if there had been any failure on the part of the pilots on this particular occasion that would not make the Harbour Trustees liable. What is charged against them is a defective system, and the pursuers have failed to prove this. The Lord Ordinary expresses the opinion that the defenders should have made some special endeavour to persuade the pilots to keep their advertised station on the night in question. I do not think there is sufficient evidence to found a case upon this ground.

I am of opinion that the interlocutor of the Lord Ordinary ought to be recalled and the defenders assoilzied.

LORD SKERRINGTON—The collision between the pursuers' steamship "City of Naples" and the sunken wreck of the "Clan Shaw" had for its proximate cause the deliberate act of the pursuers' shipmaster in starboarding his helm after rounding the Fairway Buoy. By so doing he abandoned the course upon which he had started and which would have kept his vessel at an absolutely safe distance from the position of the wreck as indicated on his chart, and he set her upon a new course which, upon a correct reading of his chart, and also upon his own incorrect reading of it, led in the direction of and near to the site of the wreck. The master admitted that he would not have altered his course if he had known that the wreck was still *in situ*. "I took the two green buoys [on the chart] to mark the wreck. . . . I have already explained why I assumed that the wreck had been removed. If I had known that the wreck was still there I would have gone close up to the red buoys on my starboard hand side as I intended to do had I seen the wreck buoys." I hold it proved that he changed his course because he believed that the wreck had been cleared away some time during the preceding three months and that it therefore no longer obstructed the entrance to the fairway. That is also plainly implied in the pursuers' averment in condescendence 7. I do not think that it is stating the case unfairly against the master to say that according to his own account of the matter he unnecessarily staked the safety of his ship on the correctness of this opinion. His opinion proved to be wrong and his vessel was seriously injured. The defenders cannot in my judgment be held responsible for the consequences of this unfortunate mistake.

The following passage in the cross-examination of the master states compendiously all that can be urged in favour of his action in changing his course—"I took the course I did take because I inferred the removal of the wreck from not noticing any wreck-marking buoys, no pilot out, and not receiving any answer to our wireless." Even if the premises upon which the master reasoned had been in all respects beyond criticism I do not think that it would have been natural for an ordinarily prudent shipmaster to act upon an inference of this kind as if it was equivalent to a positive representation by the Harbour Trustees that the wreck had been cleared away, unless of course he had some cogent reason for doing so, and in the present case no such reason is even suggested. Though it was obviously "very unlikely" (to use the master's own expression) that two buoys should "go out of order at once" the thing was not impossible, and if so he was not entitled to make up his mind as he did that he was not "risking anything." It now appears, however, that

he was mistaken in supposing that there were no wreck-marking buoys anywhere near the charted position of the wreck. There was on the surface of the sea one buoy which ought to have been seen from the ship and reported to the master in ample time to enable its significance to be appreciated if only a proper look-out had been kept. No doubt it differed from the two lighted buoys depicted on the chart in respect that it was only a single buoy and also in respect that, unlike them, it was a "dumb" buoy (*i.e.* not carrying or adapted for carrying a light). None the less I hold it proved that its character and situation were such that if seen it ought to have been recognised as a buoy which was intended to mark a wreck and which possibly might be intended to be a substitute for the two wreck-marking buoys depicted on the chart. I attach no importance to the fact that this dumb buoy was actually seen by the chief officer from the forecastle-head and was neither recognised by him as a wreck-buoy nor reported by him to the master. The chief officer did not know that the chart indicated the proximity of a sunken wreck, and having other duties to attend to he did not see the buoy until he was about two ship's lengths from it.

The Lord Ordinary expresses the opinion that if the master had seen the dumb buoy he would not have been bound to conclude that it marked the wreck of the "Clan Shaw." So far I do not disagree, but that is not the point. The question is whether if the buoy had been seen and reported at the proper time the master would, as a prudent man, have assumed that it certainly was not meant to mark the wreck of the "Clan Shaw" and would have altered his course as and when he actually did. The master does not say so. Being shown a drawing of the dumb buoy he was asked—"If you had seen a buoy anything in the least like that, what would you have done?—(A) If I had seen a buoy anything like that I do not know what I would have done, but I did not see a buoy so I cannot say what I would have done."

For these reasons I hold that the pursuers have failed to prove that the collision was a natural consequence of any act or omission on the part of the defenders. On the contrary, I think that it sufficiently appears from the evidence that the collision was solely due to bad navigation. In the view which I take of the manner in which the disaster actually took place I do not think it desirable to express any opinion as to the liability which the defenders might have incurred if the circumstances had been essentially different.

LORD CULLEN—The case for the pursuers is that the collision in question arose from the negligence of the defenders in one or other of the following respects—(1) in failing to have a pilot in attendance near the Fairway Buoy at the time when the "City of Naples" came up the channel; (2) in failing sufficiently to mark the wreck of the "Clan Shaw" for the guidance of vessels navigating the channel; (3) in failing to send special information to the "City of Naples" as to the existence and *locus* of the wreck. The defenders deny negligence in these respects. They contend that the cause of the collision was faulty navigation of the "City of Naples." On a consideration of the evidence I am of opinion that this last proposition is established.

While the evidence is conflicting as to the adequacy of the single buoy as a wreck-mark, it is undoubted that the presence of that buoy in the channel was an essential factor to be taken into account by a prudent navigator in directing his course along the channel. Although a single buoy, it was on the face of it a wreck-buoy, and it indicated the presence of a wreck in its vicinity. The master of the "City of Naples," however, negligently took no account of this essential factor, and he thus proceeded on wrong data in fixing his course which led to collision with the wreck. The reason was that he did not notice the buoy. This is no excuse if he should have noticed it. And the evidence in my opinion affords no justification of his failure to notice it. It was visible for a sufficient distance under the weather conditions then prevailing. The only conclusion one can come to is that his look-out must have been defective. It does not seem to the point to argue that if he had noticed the buoy he would not have derived from it the fulness of guidance which according to the evidence of witnesses for the pursuers a competent wreck-mark should give. It is impossible to know what inference he would have drawn from the presence of the buoy if he had noticed it; but on no reasonable view would it have been, to the best of my judgment, otherwise than a gratuitous acceptance of a grave risk that, having before him the chart containing the wreck-symbol and seeing a wreck-buoy situated about the same place as the two buoys marked on the chart, he should have steered as he did over the very *locus* of the wreck indicated by the symbol on the chart. I do not leave out of account the fact that the master looked for the two buoys shown on the chart and on finding them absent concluded that the wreck of the "Clan Shaw" had been removed. But he reached this conclusion on false premises, inasmuch as he failed negligently, *ex hypothesi*, to notice and take account of the single buoy which had replaced the two shown on the chart and which was a relevant and important factor. Nor do I leave out of account the pursuers' contention that, according to a proper reading of the chart, the *locus* of the wreck was thereon indicated as being not where the wreck-symbol was laid down on the chart but between the two buoys marked thereon. This contention however, is, in my opinion, not made good by the evidence.

The faults alleged against the defenders are these—In the first place, the defenders are said to have omitted to enforce their bye-laws requiring pilots to be in attendance near the Fairway Buoy. I think that this charge fails on the facts. It would appear that during the war there had been slackness in the pilotage service. But so near

the date of the collision in question as the 9th of April 1919 the defenders had taken the matter up, had taken the pilots to task, and had obtained from them an undertaking to be duly in attendance as the bye-laws required. This undertaking seems to have been fulfilled until the night before the accident, when the pilots came in and lay at Buddon Ness. Their course of action in so doing was not known to the defenders. Even if the defenders had known of it, I should have doubted whether this would have made a material difference, in respect (1) that the pursuers' complaint is not merely one as to delay, and that when the "City of Naples" began to move up the river she had been sighted, and a pilot boat, seen and recognised as one, was on its way to meet her, and could have put a pilot on board in time to bring her up the river without loss of the morning tide if she had waited a little longer than she did, and (2) that while with the aid of a pilot the collision would not, presumably, have happened, it does not seem to me to be a natural consequence of the want of a pilot, reasonably to be anticipated by the defenders, that the master of the "City of Naples" should, with the information available to him through his chart and the buoy, have steered over the *locus* of the wreck as shown on his chart. The pursuers seek to give the alleged fault of the defenders in the matter of pilotage another aspect by contending that the defenders should have provided pilot boats with steam power, instead of the sailing boats employed. The defenders' duty in this respect must, I think, be judged of according to current usage in such matters, and the evidence on this head does not, in my opinion, substantiate the pursuers' contention.

In the second place, the defenders are accused of fault in respect that at the time of the accident the wreck was not, the pursuers say, adequately marked in order to provide for the safety of vessels prudently navigating the channel. The defenders ought, it is said, to have marked the wreck either by means of a wreck-ship or, alternatively, by a plurality of buoys so laid down as to define unmistakably the *locus* of the wreck without the need of resorting to a chart marking the *locus*, with which ships navigating the channel might not be equipped. This topic which relates itself to maritime usage is the subject of very conflicting evidence in which theory does not seem to me always to take very close account of practicability. I do not think that the evidence establishes the requirement, according to usage, of a wreck-marking ship in a case when, as here, the *locus* of the wreck has been duly charted. As to the alternative of buoyage I prefer not to express an opinion as to the sufficiency of the actual buoyage in relation to all vessels, whether equipped with charts marking the *locus* of the wreck or not, because to do so is not, according to the views I have already expressed, necessary for the decision of this case, and because the question may, we are told, be coming up before us hereafter in other cases on other evidence. The particular case we have to deal with is that of a vessel not compelled to rely solely on the buoy but equipped with a chart showing the *locus* of the wreck; and I do not think that that vessel is entitled to complain of the single buoy if the information it gave was, as I think it was, sufficient, had it been duly used along with the information on the chart to warn a prudent navigator against steering the course which the master of the "City of Naples" took. In point of fact, as already observed, the master of the "City of Naples" did not find the buoy misleading, ambiguous, or perplexing. He negligently omitted to notice and consider it.

On this branch of the case I should add that I agree with the view expressed by your Lordships that as the case has been presented to us the defenders have not shown that the action of the Admiralty authority in connection with the buoying of the wreck relieved the defenders of responsibility therefor. At the same time I think that the action of that authority is relevant for consideration on the sufficiency of the buoying in relation to accepted standards.

In the third place, the pursuers allege that, looking to the very grave danger arising from the presence of this large wreck near the middle of the channel and to the change in the mode of buoying it which, through emergency, had been resorted to on the occasion in question, there was a duty on the defenders, in which they failed, to send a special message to the "City of Naples" as to the existence and position of the wreck. This allegation seems to assume knowledge on the part of the defenders that no pilot was in attendance near the Fairway Buoy. For with a pilot in attendance there such special message would not have been called for. And if I am right in the view of the facts in this connection already expressed, the defenders did not know that the pilots had deserted the Fairway Buoy for the shelter of Buddon Ness, nor had they reason to suspect this to be the case so as to raise the duty of sending a special message.

On the whole matter I am of opinion that faulty navigation of the "City of Naples" was the cause of the collision in question, and I accordingly concur in the judgment which your Lordships propose.

Their Lordships recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

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Counsel for the Defenders and Reclaimers—The Solicitor-General (Murray, K.C.)—Sandeman, K.C.—Ingram. Agents—J. K. & W. P. Lindsay, W.S.