

## HOUSE OF LORDS.

Tuesday, February 15.

(Before the Lord Chancellor (Halsbury),  
Lords Watson, Herschell, Morris,  
Shand, and James.)TAYLOR (OWNER OF "TYNE") v.  
BURGER AND ANOTHER (OWNERS  
OF "TALISMAN")

(Ante, vol. xxxiv. p. 360.)

*Shipping Law—Collision—Vessel Entering  
and Vessel Emerging from Lock.*

A collision occurred between two vessels, one of which, a screw steamship, was about to enter, and the other, a steam-tug, was about to come out of, a lock leading from the outer basin of the harbour to the inner dock.

Evidence on which it was held by the House of Lords (*reversing* the judgment of the Second Division) that the collision was due to the initial fault of the steamship in approaching too close to the mouth of the lock, and her subsequent failure to go astern in accordance with the order of the harbourmaster, and not to fault on the part of the steam-tug, which was entitled to leave the lock before the other vessel entered it, and was in the course of doing so when the accident occurred.

The case is reported *ante*, January 29, 1897, vol. xxxiv. p. 360.

The owner of the "Tyne" appealed to the House of Lords against the judgment of the Second Division.

At delivering judgment—

LORD CHANCELLOR—I confess I have had some difficulty in arriving at any reasonable explanation of how this case was decided as it was before the Second Division, because with the utmost respect to the learned Judges who have decided this case, it seems to me, taking it as a collision case, or as a running-down case, it is singularly clear of a great many of the contradictions which one is familiar with in cases of that class; and I think that Mr Pyke was quite right in pointing out that the Lord Justice-Clerk's judgment in the matter was founded on a total misapprehension of the dimensions of the place where the accident happened and of the proximity of the vessels to each other at the time the accident happened.

The broad lines upon which this case must be decided appear to me to be very plain indeed. The two vessels which were in collision are respectively 28 feet beam and 36 feet beam; the passage of the lock through which they were respectively to go is 60 feet across; therefore if the vessels were exactly parallel to one another, there nevertheless would be less space than is necessary for them to lie by 4 feet, and no one can reasonably suggest that they

should have tried the one to come out and the other to go in at the same moment—that is manifest. Well, then, one question immediately arises—which was to give way to the other? It was, I think, suggested at one time, though very faintly, that the "Talisman" had as much right to go in as the other vessel, the "Tyne," had to come out, but I think that suggestion has been dropped for many reasons; I should, indeed, take it to be the universal rule that when vessels are coming out of a lock they must be allowed to come out before another vessel attempts to go in; but it is not necessary to lay down so broad a proposition as that, because by the conduct of the parties at the time it is quite clear that the "Talisman" recognised the fact that she was to wait until the "Tyne" came out. Therefore you have the vessels in this position; that the one was waiting for the other to come out before it attempted to go in. Speaking upon matters that are not open to controversy, it is quite clear that but for the position in which the "Talisman" was at the time of the collision the accident could not have happened if she had been a comparatively short space away from where she actually was. Well, then comes the question whose fault it was that the vessels ultimately did come into collision.

The facts which up to this time I have referred to are not open to dispute. The dimensions of the vessels, the dimensions of the aperture through which they were respectively to come in and go out, are matters about which there can be no doubt. The position of things is this—There are two tugs coming out, and the "Talisman" waiting for them to come out before it goes in. Now, although I quite admit that it is open to the learned counsel who appeared for the "Talisman" to take an alternative case, your Lordships are not able alternately to accept as true one view of the facts and then another, the two views being in contradiction of each other; and therefore I think the first thing one must do is to ascertain which view of the facts one is to adopt—Was there plenty of room, and in spite of there being plenty of room was the collision attributable to bad steering; or was there too narrow a space in which to manœuvre at all, and whosever's fault it was, were the facts which did occur attributable to the attempt to get through too narrow an opening? An alternative view of the facts may be very well in argument, but your Lordships must come to a conclusion one way or the other as to what is the fact in regard to that matter.

So far as I am concerned I entertain not the smallest doubt in the world that there was too small a space for the vessels to execute the manœuvre which it was intended to execute. I think that is so for several reasons. In the first place, I think the facts speak for themselves. Why was it that the "Fiery Cross" put on full speed? That is not a thing which is thought of afterwards, to fortify the case which has been made, but it is an act done at the time—and why did she do it? We have a competent seaman, contrary to the regulations, putting on

full speed—what other explanation can be given except that which the man on his oath does give himself, viz., that it was a “narrow shave,” and that by putting on full speed he did escape the difficulty which otherwise he would have been in. That seems to me to be a very obvious thing to recur to as being a fact occurring at the time, and from which only one inference can be drawn, viz., that there was at that time but little space for him to avail himself of.

Then there is another fact which cannot be denied, and which also seems to me to be fraught with the same consequence. The harbourmaster himself, when he gives his account immediately after the accident, draws a plan to show that there was perfect space to go through, but his conduct at the time is exactly the opposite to that which would have been the case if there had been the complete space which there is alleged to have been. I will deal presently with the question, what the effect of his words was, but what he said was, “Why don’t you come on?” What can that mean but this,—that the master of the “Tyne” must come on at once in order that the vessels may clear each other, and the urgency of that order would not have been such as it was unless the harbourmaster had himself seen that there was a necessity, by reason of the narrowness of the space, to give the order. Then he gives another order (the effect of which also I will deal with in a moment), which was this—that the “Talisman” was to “go astern.” What can all that mean but this, that to the mind of everybody who was there at the time the space within which the vessels were to pass each other was too narrow.

I come, therefore, to the undoubted conclusion that for all these reasons it is hopeless to contend that the alternative case of there being plenty of room and of bad steering being the cause of the collision, can be maintained; and therefore we must take the other view, viz., that there was but a narrow space.

The question then remains, of course, whose fault it was that in that narrow space the thing was done that led to the collision. As to that we have two, as it were, subordinate issues. In the first place (though this also was but very faintly contested) we have the question, whether the master of the “Tyne” came on of himself without orders and took his own risk, or whether he was acting under the orders of the harbourmaster. As I say, that question was but faintly contested, and I am not surprised that it was so, because to suggest that the exact words of an order of the harbourmaster under such circumstances are to be scanned as if you were looking at the recital of an Act of Parliament is too ludicrous to be contended. That is not the business of life. Harbourmasters, like other people, I suppose, use language according to the exigencies of the moment, and not with reference to exact precision. Is it to be contended that what he meant was, You must consider for yourself whether you have space enough, and

if you have space enough you must come on? It is too ludicrous, if you look at the language and the circumstances in which it was used, to suggest that such a meaning is to be implied on the part either of the harbourmaster who gives, or of the tugmaster who is to obey the order. What he says is, “Why don’t you come on?” which in the ordinary use of language, and applying one’s mind to what was going on at the time, means a remonstrance to the master for having stopped at all, and an urgent command to him to come on at once. That is the obvious meaning of it, and I think that nobody can seriously contend that it means anything else. That being the first subordinate issue, whether there was an order or not, as I say, I regard it, and should think the master of the “Tyne” also regarded it, as an order to come on, and as a remonstrance for having stopped at all.

But then it is said—and that is another subordinate issue—assuming it to be an order, you must also remember this, that a man is not blindly to run into danger, or to encounter wilfully what will cause a collision if he sees that it must take place. I suppose that nobody would gravely dispute that if it was perfectly certain that obedience to an order would result in a catastrophe, even obedience to the order would not shield a person who wilfully encountered such a danger. The broad proposition, of course, must be admitted that you cannot justify the wilful encountering of danger or catastrophe by the orders of a harbourmaster or any other superior authority. But, of course, that assumes the fact that it is absolutely certain that the catastrophe will happen; and I entirely adhere to what I believe I said myself in the case of *Reney v. The Magistrates of Kircudbright* [1892], A.C. 264, that if it were once supposed that a person acting under the orders of a harbourmaster in going in or out of a port is to exercise himself a judgment as to whether or not the harbourmaster’s orders are most consistent with prudence and skill, and whether he will obey the order that the harbourmaster has given, I think it would lead to very serious consequences indeed; and I think it would be a very grievous burden thrown upon a person who is obeying the orders of the harbourmaster if it is to be supposed that he is to sit in judgment upon the order given to him and consider whether or not the order can be safely followed. It is obvious that the primary duty is obedience to the order, and where the question of a foot or two may make the whole difference of there being a catastrophe or not, it would be fatal to the authority of the harbourmaster and to his usefulness if such a latitude were to be given to the obligation to obey his order as to enable anybody to sit in judgment upon the propriety of the order at the time.

If, then, it was an order, and if the circumstances were such as to render it doubtful whether or not the order might not properly be obeyed, it was obviously the duty of the master of the “Tyne” to

obey the order as he did. But then we have this curious position of things to deal with—the order was accompanied by another order that the vessel was to “go astern,” and that the other vessel was to “come on.” Now, it cannot be doubted if one looks at the position of the two vessels, their proximity to each other, and the apparently slight injury that was done—the slightness of the collision as it did take place—that it was a very near thing—that a foot or two would have made all the difference; and if instead of obstinately remaining stationary, as I will assume for the moment that she did, by the motion of her engines, the “Talisman” had moved back two or three feet, no collision would have taken place. The harbourmaster might, I think, in all good faith have supposed both his orders would have been obeyed. An artificial meaning has been given to the words “go astern.” I am not prepared to admit that that is the proper interpretation of the words, but it is said that the meaning of those words was only that the engines should be reversed to such an extent as to bring the vessel to a stationary position. Two observations arise upon that. Even if you did take the motion off the vessel so far as the vessel was being propelled by her steam machinery, yet if you left her exposed to the action of the wind and tide, however little that might be, in dealing with a foot or two it is quite clear that the mere fact of bringing her to a stationary position would not have avoided the accident unless one also did enough to check the effect of the wind upon her in bringing her towards the north. And throughout the whole of the evidence I do not find a single witness who pledges himself to the statement that the “Talisman” ever did move in fact astern at all. What is said was that she did reverse her engines, which brought her to a stationary position. That appears to me to be decisive of the case in respect of the obedience to the order, and that which in fact produced the collision, the one vessel coming on as she was ordered to do and obeying, and the other vessel not going astern, but forging gradually ahead. That is manifestly how the collision occurred.

The alternative view is this, that for some reason or another the “Tyne,” having sufficient room to pass, suddenly, and without any particular reason—following the sketch that the harbourmaster makes the day after the collision happens—goes to starboard, almost at right angles, and runs right into the other vessel. No one has suggested any conceivable reason why the master of the “Tyne” should have done that. That he was at his post, that he was anxious about it, that he was looking to see how he could get by, were all manifest by what he in fact did at the time, and that, as I say, to my mind is one of the strongest things one can look at in a case of this sort. What did he do at the time? Why, he stopped, and only went on under the orders of the harbourmaster.

I cannot help saying that, in so far as

there is any conflict in the evidence between the statements of the different persons and the statement of the harbourmaster, two observations, as I think, properly arise. In the first place, although in a certain sense the harbourmaster's order was right if both orders had been obeyed—that is to say, if the one vessel had gone back and the other vessel had come forward—yet undoubtedly that which immediately led to the catastrophe was the harbourmaster's own act. It was he that ordered the “Tyne” to go on; it was his conduct which led to the “Tyne” going on and coming into collision with the “Talisman;” and therefore he is to some extent a person who has to justify himself in giving the order, and I think that ought to some extent to qualify the reliance which one places upon his testimony. But apart from that there is this proposition, which has been more than once mentioned by some of your Lordships in the course of the argument, and which, I think, has been over and over again pointed out, that where there is conflict of evidence, and the question is which of two set of witnesses you will believe, the greatest weight surely ought to be given to the judgment of the learned Judge who heard and saw the witnesses. I think, as Sir John Coleridge once said in a case before the Privy Council, it is a very different thing to read the evidence which is given dealing with such a question as this, and to have the life and spirit of the evidence which the person has who sees and hears the witnesses and observes their mode of answering and their demeanour at the time the evidence is given. I should therefore entertain no doubt whatever that, dealing with this question simply as a question of the credit due to the witnesses on one side or the other, it would be improper to disregard the view of the learned Judge who heard those witnesses and to take the evidence simply as it is printed, although if you look at it as a mere question of the evidence given on the one side and the other, without reference to the demeanour of the witnesses, you might think that the learned Judge who tried the case was outweighed by the evidence on the other side, because, as I have said, it appears to me to be an essential condition of any judicial determination that the credit due to a witness must in a great measure be qualified by the mode and manner in which the witnesses give their evidence.

Under these circumstances it appears to me that the master of the “Tyne” can in no way be blamed. I cannot conceive what it is suggested the master of the “Tyne” did that was wrong. We have had indeed, as I think one of my noble and learned friends pointed out, a third case suggested to-day by the learned counsel for the respondents, that, given all the rest of the case against the “Talisman,” yet the master of the “Tyne” was to blame for not stopping and reversing his engines in time. It is quite right for the learned counsel to argue anything he can; it is a plank in a shipwreck I daresay; but as a matter of

fact, when one has to look at the value of it, the whole argument must turn upon the exact point of time at which the obligation to stop and reverse arose. And although, as I say, it is quite right for the ingenuity of the learned counsel to suggest that at the last moment, I cannot find that in the argument or in any of the judgments of the learned Judges any such point is raised; and I do not wonder at it, because in truth the whole question arose about what happened in the course of about a minute; and if it is to be contended that the master of the "Tyne," having gone, as he did, as close to the north wall as he could, and then starboarded his helm a little to avoid the projections of the flood-gates, although all that was right to be done, yet having obeyed the order to that extent, in the position in which the vessels were, was to blame, because he did not stop and reverse in time, the fact being that he did stop and reverse immediately before the collision—why, if that is the contention, you must have a stop-watch in your hand to determine at what particular moment he ought to have executed that manœuvre.

It seems to me quite out of the question to suggest that any such obligation was laid upon the master of the "Tyne" to do other than what he did. That he was at his post, observant, that he was doing what he could, no one can possibly deny. Under these circumstances the attempt of the "Talisman," who created the whole difficulty in that she did not obey the order, in the sense in which I understand the order of the harbourmaster, and was at the moment forging ahead—whether by the action of her paddles or by the action of the wind is perfectly immaterial—to throw the blame upon the unfortunate master of the "Tyne," is about one of the boldest efforts, if not the most audacious, which has in the course of my experience ever been made.

It seems to me, upon the pure question of fact which your Lordships have to determine, the judgment of the Lord Ordinary is perfectly satisfactory, and I think that what he said and did is exactly what ought to have been done. I therefore move your Lordships that this appeal be allowed, and that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellant the costs both here and below.

LORD WATSON—I shall endeavour to state generally but shortly the considerations which have influenced my judgment in this appeal.

The case must in my opinion assume different aspects according as an affirmative or negative answer is given to the question whether at the time when the tug "Tyne" left the lock there was sufficient room for her to pass clear of the "Talisman."

It does not admit of doubt that the "Tyne" was, if not ordered, at least invited by the harbourmaster to leave the lock.

If there was room for the "Tyne" to pass out, it appears to me that the collision with

the "Talisman" must have been attributable to the master's fault or want of nautical skill, and in that case the interlocutor of the Second Division of the Court would be right.

On the other hand, if the space left between the course of the "Tyne" and the hull of the "Talisman" was insufficient to admit of her getting out clear, I think that the master of the "Tyne" was justified in obeying the order or invitation of the harbourmaster. Had he acted upon his own initiative, his proceeding would have been negligent and wrongful, but to my mind there is nothing in the circumstances proved which suggests that the invitation to proceed was so obviously and necessarily attended with peril that he ought to have declined to comply with it.

On the best consideration which I have been able to give to the evidence, I have come without difficulty to the conclusion that there was not in point of fact sufficient room left for the "Tyne" to pass out of the lock into the dock basin. I do not wish to suggest that the harbourmaster did not at the time honestly believe that there was, but I think he was mistaken. I do not agree with Lord Young that his opinion ought to be accepted as evidence of fact because he was an official, and I am confirmed in that view by the circumstance that the Lord Ordinary, who saw the witnesses, was of the contrary opinion.

The question remains, whether in these circumstances the view taken by Lord Moncreiff, to the effect that the "Talisman" as well as the "Tyne" was acting under the directions of the harbourmaster, is the right one, and therefore that both vessels are protected from liability.

It appears to me to be proved that the "Talisman," without any directions from the harbourmaster, advanced so near to the west-end of the lock as to become a possible source of danger to vessels leaving it owing to the fact of her tendency to sag and forge still further ahead under the influence of a very weak tide, and a breeze moderate to fresh from W.S.W. That such tendency existed is shown from the fact that the master of the "Fiery Cross," a tug which passed out of the lock before the "Tyne," put on full speed, contrary to the harbour regulations, in order that he might get into the outer basin before the "Talisman" came any nearer to the lock, and also that after the "Fiery Cross" had passed out, the harbourmaster, who was at that time in the immediate neighbourhood of the "Talisman," in order to prevent her sagging, ordered her to "go astern."

The master of the "Talisman" did not move her astern, but he gave her engines a "touch" or backward turn, which he says stopped her way, and she became stationary. The harbourmaster also says that she became stationary, and that after the collision with the "Tyne" she remained in the same position. But there is no evidence to show that after the sagging was checked, and she was for the time stationary, the influences of tide and wind must have ceased to operate as they had done

previously, and it must be borne in mind that when he invited the "Tyne" to proceed, the harbourmaster had not the same opportunity of observing any forward movement of the "Talisman," and that her position after the collision was not necessarily the same as at the moment when it occurred.

I am satisfied upon the evidence that the collision which ensued was due to the original error of the "Talisman" in approaching too near to the entrance of the lock, with a tendency to approach still nearer, and I am unable to come to the conclusion that the unsuccessful attempt made by the harbourmaster to counteract the possible consequences of that error can be regarded as amounting to such control or direction by him as would relieve the "Talisman" from responsibility. I therefore think that the interlocutor of the Inner House ought to be reversed and that of the Lord Ordinary restored.

**LORD HERSCHELL**—I am of the same opinion, and were it not that we are differing from the judgment of the Inner House I should add nothing.

The questions, which have to be determined are, Whether the "Talisman" was to blame, or whether the "Tyne" was to blame for the collision, or whether it was due to the fault of both vessels?

Now, dealing first with the case of the "Talisman," I can entertain no doubt that the "Talisman" was in a position in which she ought not to have been—that she had come too near to the entrance of the lock. No sort of reason has been suggested why she should not have been further back towards the pier entrance. Whatever errors of judgment or errors of navigation there may have been, the whole disaster arose from her taking up a position in which she ought never to have been found. The initial fault at all events was hers. I say that, because I have come to the conclusion that there was not, as has been suggested, but for wrong manœuvring, ample room for the "Tyne" to pass out. I think the distances as given by the witnesses who have been called on behalf of the "Talisman" go far to establish that. I think there are certain undoubted facts which are overwhelming in support of the same view. In the first place, the fact which has been alluded to, of the manœuvre of the "Fiery Cross;" next the fact that the master of the "Tyne" stopped the vessel, hesitating to go on, not of his own will, having an inclination to try to come out; next the accident itself, because it is not questioned that the master of the "Tyne" was a competent sailing master of many years' experience—many years' experience even in command of a tug; it is not questioned that he was there in his proper place navigating his vessel. He unquestionably was trying to keep to the north side as close as he could, and only starboarding to avoid the immediate danger of collision with the projections near the entrance of the lock. Why did he suddenly swerve round, as it is suggested, and come into the other vessel when

it was perfectly possible for him to keep clear of it? I have heard no reason suggested, and I am always in a case of this sort, I suggest, very much guided by what a person is likely to do. When one sees no reason for a competent man, who is watchful, performing an absolutely wrong manœuvre, I doubt whether that manœuvre, wrong as it was, was performed, unless there is some very distinct and pointed evidence on the other side. All these circumstances satisfy me that the "Talisman" was to blame in being where she was, because she was so situated that sufficient room was not left for vessels leaving the lock.

But then it is said she is not to blame because she was under the orders of the harbourmaster, inasmuch as she was where she was with his approval, and his approval is equivalent to an order. I am quite unable to adopt such a proposition. She had not been ordered to come where she was, she had come there of herself. It was entirely her business if vessels were coming out of the lock to leave room for them, and if she was drifting towards the lock, to go further back, so as to make that room amply sufficient. The only order given her by the harbourmaster at all was to "go astern." I do not care what the meaning was with which he uttered those words, it was her business to go astern if he had given no such order. And the fact that that was the only order he gave, and that she came where she did without any direction by the harbourmaster, seems to me to put an end altogether to the contention that she can be exonerated from blame because she took up the position she did with his approval, which it is said is equivalent to his order. Therefore I think it is clear the "Talisman" was to blame, and that there is nothing to exonerate her from liability for her default.

Then was the "Tyne" to blame? I have already said that I do not believe the case suggested that there was this sudden wrong manœuvre on the part of the master of the "Tyne," and that this led to the collision. Everything in the case seems to me to prove that the master of the "Tyne" was acting prudently and cautiously. He stops, he doubts whether there is room to get through; he only comes on when the harbourmaster says, "Why don't you come on?" He would not, it may be, have been justified in going on even upon such an order if it was obvious that an accident was absolutely inevitable, but in judging whether he acted in any way imprudently you must look at the circumstances. The harbourmaster was on the spot, nearer the "Talisman" than he was; the harbourmaster calls to the master of the "Tyne" to come on; the harbourmaster could at any time order the other vessel to go back, or the other vessel seeing the "Tyne" could have gone back of its own accord? What was there which constituted in the slightest degree want of care or skill or judgment in his coming on when the harbourmaster told him to do so? Then he comes on, and it is said that he ought to have stopped and reversed sooner than he did.

I confess if I thought he had not done the very best thing under the circumstances which the most prudent and skilful man would have done, I should have been far from ready to hold him in default at the instance of the vessel which has caused the whole of the difficulty by taking up a wrong position and creating danger; it does not lie in the mouth of those who have created a difficulty of that description to say, You ought under the circumstances to have shown the utmost conceivable skill which the most skilful and cautious and calm-headed person could have displayed in such circumstances. That has been said more than once, and I think it is good sense. In this case I confess that I see no want of skill on the part of the master of the "Tyne," and therefore I think that the "Talisman" was to blame, and that the "Tyne" was not to blame.

LORD MORRIS—I am of the same opinion.

LORD SHAND—Notwithstanding the full opinions which have fallen from some of your Lordships, I venture, as we are reversing the decision of the Second Division of the Court, to add a few words on my own account.

I entirely concur with those of your Lordships who have said that the "Talisman" was undoubtedly in fault in this case, whatever may be said as to the "Tyne." The "Talisman" was approaching a lock 60 feet in width with an entrance of about the same breadth. She had no intention of entering into the lock till the "Tyne" was out—indeed until both the steamers which have been mentioned were out of the lock. Why, then, should she come so close to the entrance to that lock as to create risk of collision with those steamers coming out? I have heard no answer to that question. She came very near the entrance, and she came very near stopping, with a wind that was driving her towards the lock, towards the very place which ought to have been kept clear, and which was so narrow. She had no purpose to serve in doing so. Care for others would have suggested that she should keep well back, and even if there had been no order from the harbourmaster upon the subject warning her to keep back or asking her to turn back, I should have held her responsibility to be the same—that she at least was in fault, or those in charge of her were in fault, in placing her in the position in which she was.

But in addition to the fact that she was in this place improperly, as I think, with a wind that was causing her to "sag" towards the narrow entrance of this place, we have the fact that she was expressly requested not to do so by the harbourmaster. The harbourmaster used the expression "go astern." Well, I cannot doubt that that means that you are not to stay where you are with the vessel. It does not mean that you are to take off way and stay where the vessel is. "Go astern" means to back the vessel and get her out of that place. I am clearly of opinion from

the evidence that that order was not obeyed. There were one or two turns of the engine given, with the result that this steamer, which had no right to be there at all, was left in the same place instead of being backed out of a place where she was causing danger to the other.

I observe that Lord Moncreiff, who finds that the "Tyne" was not to blame, was also of opinion that the "Talisman" was not to blame, and he came to the conclusion accordingly that both parties should be turned out of Court. His Lordship says—"As regards the 'Talisman,' the harbourmaster, as she approached the entrance to the lock, ordered her to stop and remain in the position in which she was, and this order was obeyed by the vessel reversing her engines. After that the vessel did not go ahead by means of her engines, but I think it is proved that owing to the wind she 'sagged' or drifted to a greater or less extent towards and across the mouth of the lock. In so acting I think it may be held, although the matter is not free from doubt, that the 'Talisman' was absolved from responsibility, as she obeyed the orders of the harbourmaster." I respectfully differ entirely from Lord Moncreiff's view of the evidence. I do not think that the order was obeyed in the spirit in which it was given. I think the order was not an order to let the vessel stay where she was with the risk of what "sagging" would produce, but the order was to back the vessel and get out of that place, which she never did. Therefore I am quite clearly of opinion that the "Talisman" was to blame.

The only question which remains is, whether there is a divided responsibility. If, of course, those who pursue this action on behalf of the "Talisman" could show that the "Tyne" was also to blame, the legal result would also be different, but I entirely agree with your Lordships in holding that the "Tyne" was not in any way to blame for this result. If those in charge of the "Tyne" had seen in proper time that by going on a collision was certain or probable, of course they would have been responsible in going on as they did, but having heard the evidence very fully read and commented upon, I am clearly of opinion that those on board the "Tyne" acted reasonably and, as I should have said, properly at the time. The "Tyne" was at such a distance from the "Talisman" that she could not know exactly what was being done at the quay side where the "Talisman" was. Those on board the "Tyne" were too far away to be able to tell whether the "Talisman" was about to back or whether there was a "sagging" action going on which was bringing her forward.

Those in charge of the "Tyne" started, and having thought for a moment that if they went on steadily there might be a collision they stopped, but in the meantime the harbourmaster, who was in a far better position to see how matters stood, who had command of the situation, was entitled to order the other vessel to go

back, called to them, "Why don't you come on?" Was not that practically a statement that there was plenty of room for them? And if those on board the "Tyne" were told by those in authority to come on, what had they to do but to obey that order or to yield to the suggestion which was so made. Supposing it had not been the harbourmaster at all, but a stranger, a man of some skill, who had stood in the position where the harbourmaster was, and who had shouted "You are all right, there is plenty of room" (which was practically what the harbourmaster did), the "Tyne" would have been quite right in acting as she did. It is, no doubt, quite true that as the "Tyne" came further on they found it was not possible to avoid a collision. The moment they found that, the master of the "Tyne" reversed his engines. What more could he do? I agree entirely with what my noble and learned friend opposite (Lord Herschell) has said on this point. I think they acted reasonably and prudently, and I also agree in thinking that even if in the flurry of proceedings such as then occurred it could have been said that everything was not done that a careful and prudent man would have done, the result would not have been different.

Looking at the whole case, I agree with your Lordships in thinking that the decision of the Lord Ordinary, who saw the witnesses and was well able to judge of the value of the evidence and the testimony of the harbourmaster where it differed from that of other persons, was sound, and I give great weight to the circumstance, as your Lordships have done, that he saw the witnesses and could judge from their demeanour and their mode of giving evidence in deciding as to the value to be put upon their testimony.

LORD JAMES—For the reasons which have been very fully stated I concur in the view that the decision of the Court of Session should be reversed and judgment given for the appellant.

Ordered that the judgment appealed from be reversed, and that the interlocutor of the Lord Ordinary be reversed.

Counsel for the Appellant—Pyke, Q.C.—Aitken. Agents—Pritchard & Sons, for Wallace & Pennell, W.S.

Counsel for the Respondents—Aspinall, Q.C.—Salvesen. Agents—Thomas Cooper & Co., for Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, February 22.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Herschell, Shand, and James.)

CALEDONIAN RAILWAY COMPANY  
v. TURCAN AND OTHERS.

*Railway—Acquisition of Lands Forming Private Road or Access—Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 19), sec. 90—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), secs. 42, 46, 49, and 60.*

The Lands Clauses Consolidation (Scotland) Act 1845, by section 90, provides—"No party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or building or manufactory if such person be willing and able to sell or convey the whole thereof."

Certain warehouses and other business premises abutting on a courtyard had an access from the public street owned and used in common by the proprietors of the buildings.

The promoters of a new railway served a notice to treat upon one of the proprietors for the acquisition of the access only.

Held (aff. the judgment of the Second Division) that the access was not a road within the meaning of the Railway Clauses Act 1845, sec. 46, but was part of the "house or building or manufactory" of the proprietor to which the provisions of section 90 of the Lands Clauses Act 1845 as to severance were applicable.

*Railway—Severance—Assessment of Compensation where Promoters Agree to Grant Servitude of Access over Lands Acquired—Caledonian Railway (Edinburgh, Leith, and Newhaven Extension Lines) Act 1890 (53 and 54 Vict. c. clvii.) sec. 13.*

The Caledonian Railway Special Act of 1890 provides by section 13 that notwithstanding the provisions of section 90 of the Lands Clauses Consolidation (Scotland) Act 1845, the owners of scheduled lands of which a portion only is required for the purposes of the undertaking, may be required to sell or convey that portion only, "if such portion can, in the opinion of the jury, arbiters, or other authority to whom the question of disputed compensation shall be submitted, be severed from the remainder of such properties without material detriment thereto."

The Caledonian Railway Company, under powers conferred by the above Act, served a notice to take a part of certain lands consisting of a private road or access, 70 feet long by 30 feet wide, to warehouses and other buildings, the owners of which were also owners in common of the access.

Question—Whether in determining if the access could be severed from the