Monday, May 2.

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

GLEBE SUGAR REFINING COMPANY, LIMITED, AND ANOTHER *v.* TRUSTEES OF PORT AND HARBOUR OF GREENOCK AND OTHERS.

(In the Court of Session, March 31, 1920, 57 S.L.R. 374, 1920 S.C. 470.)

Harbour — Powers of Harbour Trustees — Lease--Ultra Vires--Harbours, Docks, and Piers Clauses Act 1847 (10 *Vict. cap.* 27), *sec.* 23—*Greenock Port and Harbour Consolidation Act* 1913 (3 *and* 4 *Geo. V, cap. xlii*), *sec.* 109.

The Greenock Port and Harbour Consolidation Act 1913 (3 and 4 Geo. V, cap. xlii), sec. 109, empowers the Harbour Trustees to grant to any person the exclusive right to use any of their quays.

The Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. cap. 27), which (with the exception of certain sections) is by section 6 of the above-mentioned Act of 1913 incorporated therein, enacts—Section 23—"The undertakers may lease or grant the use or occupation of any warehouses, buildings, wharfs, yards, cranes, machines, or other conveniences provided by them for the purposes of this or the Special Act, at such rents and upon such terms and conditions as shall be agreed upon between the undertakers and the persons taking the same, provided that no such lease be granted for a longer term than three years."

The Trustees of the Harbour of Greenock having leased a graving dock which formed part of their statutory undertaking to a firm of ship repairers for ten years, an action was brought by certain ratepayers entitled to use the harbour, concluding for declarator that the Trustees had no power to grant the exclusive use of the dock to any person, and for reduction of the lease. No mention was made in the pleadings of either of the parties of section 23 of the Harbours, Docks, and Piers Clauses Act 1847, nor was the section brought to the notice of the Lord Ordinary or of the First Division during the debate, the discussion being confined to the powers of the Trustees under the Act of 1913. *Held* (*rev.* the judgment of the First Division) that section 23 of the Act of 1847 applied to the case, that its effect was decisive, and that accordingly the lease was *ultra vires* and fell to be reduced.

Administration of Justice—Duty of Counsel and Agents—Duty to Bring to the Notice of the Court Authorities which Bear Either Way upon Matters under Debate.

Observations per the Lord Chancellor as to the duty of counsel and those who instruct counsel to bring to the notice of the Court authorities which bear one way or the other upon matters under debate, whether these authorities assist or not the party who is aware of them.

The case is reported *ante ut supra.*

The pursuers appealed to the House of Lords.

After hearing counsel on 6th and 8th December 1920 their Lordships on 23rd February 1921 appointed the cause to be further heard on the effect of section 23 of the Harbours, Docks, and Piers Clauses Act 1847. At the hearing the Lord Chancellor stated that the attention of their Lordships had been directed by Lord Atkinson to section 23 of the Harbours, Docks, and Piers Clauses Act 1847, and that it appeared to their Lordships that the section had a material bearing upon matters which had been debated in the case.

Counsel for the parties were then further heard.

At the conclusion of the argument his Lordship made the following observations:—

LORD CHANCELLOR—Their Lordships will give reasons in writing for the opinion which they have formed. But as a point of very considerable general importance has arisen I think it right to make this observation at once. It is not, of course, in cases of complication possible for their Lordships to be aware of all the authorities, statutory or otherwise, which may be relevant to the issues which in the particular case require decision. Their Lordships are therefore very much in the hands of counsel and those who instruct counsel in these matters, and this House expects—and indeed insists—that authorities which bear one way or the other upon matters under debate shall be brought to the attention of their Lordships by those who are aware of those authorities. This observation is quite irrespective of whether or not the particular authority assists the party which is so aware of it. It is an obligation of confidence between their Lordships and all those who assist in the debates in this House in the capacity of counsel. It has been made clear that Mr Sandeman, Sir John Simon, and Mr Macmillan were unaware of the existence of the section, which appears to their Lordships to be highly relevant to, and in the event decisive upon, the matter under discussion here. Indeed, the circumstances in which leading counsel are very often briefed at the last moment render such an absence of knowledge extremely intelligible. But I myself find it very difficult to believe that some of those instructing learned counsel were not well aware of the existence, and the possible importance and relevance, of the section in question. It was the duty of such persons, if they were so aware, to have directed the attention of leading counsel to the section, and to its possible relevance, in order that they in turn might have brought it to the attention of their Lordships. A similar matter arose in this House some years ago, and it was pointed out by the then presiding Judge that the withholding from their Lordships of any authority which might throw light upon the matters under debate was really to obtain a decision from their Lordships in the absence of the material

and information which a properly informed decision requires. It was in effect to convert this House into a debating assembly upon legal matters, and to obtain a decision founded upon imperfect knowledge. The extreme impropriety of such a course cannot be made too plain. The learned counsel who have addressed their Lordships are acquitted of personal responsibility in this matter, but I very much hope that the observations I have thought it necessary to make will prevent a recurrence of that with which I have dealt. It is possible that the views their Lordships have formed upon this point will be reflected in the form of the order which their Lordships think it proper to make.

On 2nd May 1921 their Lordships delivered judgment as follows:—

LORD CHANCELLOR—[*Read by Viscount Finlay*]—This is an appeal from an interlocutor dated 31st March 1920 of the First Division of the Court of Session adhering to an interlocutor dated 27th July 1919 of the Lord Ordinary, Lord Hunter. The action out of which the appeal arises was instituted by the appellants, two limited liability companies, the first incorporated under the Companies (Consolidation) Act 1908 and having their registered office at No. 6 Grey Place, Greenock, and the second incorporated under the Joint Stock Companies Acts 1862 to 1890 and having their registered office at Western Square, Greenock, against the Trustees of the Port and Harbours of Greenock, incorporated by the Greenock Port and Harbours (Consolidation) Act 1913, and James Lithgow and Henry Lithgow, two shipbuilders of Port Glasgow, to have it found and declared (*a*) that the defenders the Trustees had no power or right to grant to the defenders second called or to any other person the exclusive use of that portion of the undertaking of the first defenders known as the Garvel Graving Dock, and (*b*) that a certain very complicated lease executed by the above-mentioned Trustees to the said James Lithgow and Henry Lithgow (1) of the Garvel Graving Dock with the jetty and dolphins used in connection therewith and the whole appurtenances thereof, and (2) of certain areas of ground adjoining the said dock therein described, for a term of ten years from 15th August 1918 at the yearly rent of £4500, should be reduced as having been made *ultra vires*. The defenders James Lithgow and Henry Lithgow did not enter any defence.

The lease contained a provision (No. 9) that in case the lessees should with the sanction of the lessors widen the entrance to the graving dock in a manner approved of by the latter the lessees should have the option of extending the lease for a further period of ten years, making twenty years in all, paying the same yearly rent of £4500. The appellants are admitted to be the payers of rates on goods, and as such have and exercise the right of voting in the election of certain of the Harbour Trustees who fall to be elected by and from the shipowners and ratepayers registered as electors under the Act of 1913. The business of the appellants is alleged to be served by and dependent upon the service of vessels using the port and harbours of Greenock which may from time to time require the use of the Garvel Graving Dock. This last-named dock was made by the Trustees in the year 1871 under the powers conferred upon them by the Greenock Port and Harbour Act 1866, referred to as the Act of 1866 (see section 8). It was paid for by them out of the Trust funds in their hands. In the record no mention is made of the fact that by section 6 of the Act of 1913 the Harbours, Docks, and Piers Clauses Act 1847, with the exception of certain sections, is incorporated therewith. In the supplementary statement contained in the case to your Lordships' House one finds the following statement — By section 6 of that Act (*i.e.*, the Act of 1913) there was incorporated therein the Harbours, Docks, and Piers Act 1847, with the exception of certain sections which are not relevant or material to this case. If that only means that the excepted sections which are not incorporated are not relevant or material to the case it is of course right. These excepted sections are sections 16 to 19 inclusive, sections 25 and 26, and sections 70 to 80 inclusive, but if the statement means that all of the sections of the Act of 1847 which are incorporated are not relevant or material the statement is utterly inaccurate and misleading, for section 23 of the Act of 1847 which is incorporated provides that "The undertakers may lease or grant the use or occupation of any warehouses, buildings, wharves, yards, cranes, machines, or other conveniences provided by them for the purposes of this or the Special Act at such rents and upon such terms and conditions as shall be agreed upon between the undertakers and the person taking the same, provided that no such lease be granted for a longer term than three years."

By section 6 of the Act of 1913 it is provided that the word "undertakers" used in the Act of 1847 shall mean the trustees under the Act of 1913, and the words "Special Act" shall mean the Act of 1913. It will be observed that this section 23 deals with the leasing of not only things and conveniences which may be provided for the purposes of the Act of 1847, but also with the leasing of those conveniences which may be provided for the purposes of the Special Act, *i.e.*, the Act of 1913. In that sense the section is prospective in its operation. Neither the appellants nor the respondents, however, took their stand on this section. On the contrary they have studiously ignored its existence. In the pleadings in the case it was not definitely referred to, much less relied upon. Neither before the Lord Ordinary nor on the appeal to the First Division, nor yet in the course of the argument before your Lordships, was any allusion direct or indirect made to it. It was only after the arguments in this House had been concluded, and your Lordships had taken the case into consideration, that my noble and learned friend Lord Atkinson called attention to section 23 and its important provisions as expressly bear-

ing upon the issue whether the lease which is challenged would stand. The attention of parties was called to the topic and a second hearing confined thereto was given by this House on 23rd February.

In the first argument both parties having left section 23 out of consideration took their respective stands upon section 109 of the Act of 1913, which runs as follows—"The Trustees may from time to time and at any time appropriate and grant the exclusive use of any of their quays, berths, wharves, warehouses, sheds, quay spaces, timber yards and timber ponds, and any other of their works and conveniences, to any corporation, company, or person as the Trustees may think fit." The respondents contended (1) that the words "other works and conveniences" occurring in this section cover the Garvel Graving Dock, and (2) that the words "appropriate and grant the exclusive right to use" authorise the execution of the complicated lease impeached. On behalf of the appellants it was contended (1) that these latter words did not authorise the making of this lease, and (2) that the words "other works and conveniences" should be construed as only designating works and conveniences *ejusdem generis* of those actually named. In the course of these contentions the more general and important question was discussed to which I shall allude at the conclusion of my speech.

Upon the issues thus raised their Lordships, for the reasons hereafter appearing, do not propose to express any opinion. They feel they must dispose of the appeal on an altogether different ground, namely, the proper construction in the events which have happened of section 23 of the Act of 1847. This section is one of a group of five sections dealing with the construction of warehouses and other conveniences. The first of these, namely, section 20, provides that the undertakers may acquire by contract of purchase any lands adjoining or near to the undertaking in addition to the lands acquired by them compulsorily under the powers of the Special Act for extraordinary purposes which are described thus—"(1) For providing additional yards, wharves, and places for receiving, depositing, and loading or unloading goods, and for the erection of weighing machines, toll-houses, offices, warehouses, sheds, and other buildings and conveniences; and (2) for making convenient roads to the harbour, dock, or pier, or any other purpose which may be requisite or convenient for the formation or use thereof."

That, I think, must mean requisites or conveniences for the formation or use of the harbour, dock, or pier. The word "thereof" cannot be confined, I think, to the roads to be made. Section 21 empowers the undertakers to construct on the lands which they have acquired by either or both of the methods mentioned such warehouses, storehouses, sheds, and other buildings and works as they may deem necessary for the accommodation of goods shipped or unshipped within the harbour, dock, or pier, and to erect or provide such cranes, weighing and other machines, conveniences, weights, and measures as they may think necessary for loading, unloading, measuring and weighing such goods. By section 22 the undertakers or their lessees are required to provide proper servants and labourers for working such cranes at all reasonable times for the public use thereof. Then comes section 23 It would appear to be clear that the Legislature meant to provide by this section for the leasing of any of the several works and conveniences mentioned in the two preceding sections. It would, I think, be quite irrational to hold that a lease of a warehouse for five years was invalid because warehouses were not specifically mentioned in section 23, but that a lease of a toll-house for instance for five years was valid because toll-houses were not specifically mentioned in it. Looking, therefore, at the special provisions of those three sections by themselves it is obvious that the words "other conveniences" occurring in section 23 must receive a wide construction and are not to be confined to works or things *ejusdem generis* with those specifically mentioned in that section. So much for the Act of 1847.

The Act 29 and 30 Vict. cap. 156 (Local and Personal), entitled the Greenock Port and Harbour Act 1866, which authorises the construction of the graving dock, begins with a lengthy recital containing the following passage amongst others:—"Whereas the number and size of vessels resorting to the harbour were of late years greatly increased and were still increasing, and the trade and commerce of the port became more extensive, and it would be a public advantage that a new harbour and graving dock and other works should be constructed and land acquired for the accommodation of the said shipping and commerce." It is reasonably clear that the promoters and framers of this statute considered that this graving dock would be a great convenience for the shipping and trade of the harbour, and in the very nature of things it is a convenience for the ships frequenting a harbour that they should find there a graving dock where needed repairs could be executed. The question for decision is, however, whether it was a convenience provided by the undertakers, the respondents, for the purposes of the Special Act, that is, the Act of 1913, within the meaning of section 23 of the Act of 1847.

The Statute of 1913 begins with a recital that by the aforesaid Act of 1866 divers Acts relating to the port and harbour of Greenock were repealed, and with the exceptions therein mentioned consolidated with amendments. The Trustees of the Port and Harbours of Greenock were incorporated and the undertaking as therein set forth of the then existing Trustees was transferred to the Trustees then incorporated. It is then recited that by a number of Acts named further powers were given to these Trustees; that since the year 1888 the constitution of the existing Trustees has remained unaltered; that it is expedient that the constitution of the existing Trustees should be amended and altered; that the Trustees should be re-incorporated as is

by the Act of 1913 provided, and that the undertaking of the existing Trustees should be transferred to and vested in the Trustees so re-incorporated, thereinafter called "the Trustees." By section 9 of this Act of 1913 the first of these objects was effected, and the Trustees were incorporated under the name by which they are sued in this action. By section 46 it is enacted that on and after the appointed day, namely, 18th November 1913 (section 8), the port and harbours and the whole rights of the existing Trustees should be and the same were thereby vested in and transferred to the Trustees, *i.e.*, the respondents. This was obviously done for the purposes of this Act of 1913. The definition of "port and harbours" is as wide as it well could be. It includes amongst many other things, docks, locks, works, yards, jetties, wharves, piers, quays, warehouses, sheds, shipways, harbour rails, and premises whatsoever for the time being belonging to the existing Trustees. Part 5 of the Act is headed "works." It includes section 52 and the 16 following sections. The first of these empowers the Trustees to make and maintain the works thereinafter described, or some of them or some part or parts thereof, and the works and conveniences connected therewith, that is to say, the widening on both sides and deepening of the entrance of the graving dock and the lowering of the site of the said graving dock. The following section enables the Trustees to make and maintain additional works, including shipways, shipping place, locks, basins, caissons, sluices, &c., and other works, machinery, and conveniences, if any. By section 110 it is enacted that the limits of the port and harbour shall extend to and include the whole works, land, and property vested in and belonging to the existing Trustees, and the Trustees under the Harbour Act and this Act. The graving dock being thus vested in the respondents the statute proceeds to provide how it shall be used. By section 128 the Trustees may levy and take from any vessel entering or using the graving dock the rates and dues mentioned in Schedule G annexed to the Act, just as they may under the succeeding section levy rates and dues for the use of their cranes, or under section 131 for the use of their shed. All these obvious conveniences are treated alike. By section 193 it is provided that as to this graving dock the regulations set forth in Schedule N annexed to the Act are to be enforced in the same manner as if they were byelaws made under the Act of 1847. These regulations contain precise and elaborate provisions touching the entry of vessels into the graving dock, the mode and manner in which they shall use the dock when admitted, and the nature and extent of the control exercised over them by the harbour-master after they have been admitted. Having regard to these several statutory provisions, I think, owing to the events which have happened, this graving dock must now be taken as having been at the date of the impeached lease provided as a convenience for the purposes of the Act of 1913 within the meaning of section 23 of the Act of 1847, although it was originally constructed under the Act of 1866. The impeached lease is therefore, owing to the length of its term, ten years, void, and the interlocutors appealed from will be recalled and decree will fall to be pronounced in terms of the reductive conclusion of the summons.

With regard to the first, that is to say, the declaratory conclusion, it has been a point for consideration whether absolvitor should not be pronounced therefrom in view of the circumstances of the argument already mentioned. In reference to this it should be stated that had the provisions of section 109 of the Act been properly before the House for construction it would of course have been necessary to examine also the further question, namely, how far the provisions of this lease are reconcilable with the statutes and the regulations made under them dealing with the use and government of this graving dock, and whether the apparent monopoly of enjoyment thereof is consistent with the public trust under which the property is held. In the circumstances already stated in which the House confines its pronouncement to the effect of section 23 of the Act and the reductive conclusion of the summons it becomes unnecessary to deal with the declaratory conclusion. The appeal succeeds, not, however, upon the grounds put forward by the appellants, but upon grounds never put forward by the appellants (though they should have been)—never alluded to by either of the parties in any Court. It may be that this omission has brought about the entire litigation, certainly I should think it has brought about this appeal. I therefore think that both parties should bear their own costs here and below.

VISCOUNT FINLAY—The appellants are traders who use the Port of Greenock. The respondents are the Trustees of the Port and Harbour of Greenock under the Port and Harbour Consolidation Act of 1913. Their statutory undertaking includes three graving docks, the most important of which is the Garvel Graving Dock, which will accommodate one large vessel, say of 7000 tons, or two smaller vessels. In September 1918 the Trustees made a lease of the Garvel Graving Dock to Messrs Lithgow, shipbuilders, in Port Glasgow. The lease was for ten years from the 15th August 1918 with a provision for a renewal for a further period of ten years. The lease comprised, first, the graving dock with engines, boilers, and machinery, &c.; secondly, an area of 2000 square yards or thereabout adjoining the graving dock. The second clause of the lease provides that the rent should be £4500 per annum, with a proviso that in the event of the lessors' right to enter into this lease being successfully challenged and the lessees being deprived of the dock the rent should be reduced to £250 per annum, to be paid in respect of the said area of ground. By clause 4 the engineer and firemen required for the working of the engines, boilers, and machinery used in connection with the docks and the

hydraulic system at the lessors' docks were to be appointed by the lessors, who were also to supply the coal, &c. required for working the engines, but the engineer and firemen were to be under the control of the lessees for all work required by them in connection with the lease. By the sixth clause the lessees were to allow the lessors such use of the engines, &c. as should be necessary in connection with the hydraulic system of their docks. By clause 8 the lessees were to have power, with the sanction of the lessors, to widen the entrance to the dock, and by the 9th clause, if this widening should be carried out to the satisfaction of the lessors, the lessees were to have the option of extending the lease for another period of ten years.

On the 1st February 1919 the appellants began an action in the Court of Session against the Trustees of the Port and Messrs. Lithgow, in which the pursuers asked (first) for a declaration "That the Trustees of the Port and Harbour of Greenock had no power or right to appropriate or grant to the defenders second called, or any other manufacturer, trader, shipbuilder, or other person, member of the public, the exclusive right to use or to control and regulate the use of that portion of the undertaking of the Trustees of the Port and Harbour of Greenock known as the Garvel Graving Dock," and (second) for reduction of the lease. The material pleas-in-law for the pursuers were—"(1) In respect that upon a sound construction of the Greenock Port and Harbours Consolidation Act 1913, the defenders, the Trustees of the Port and Harbours of Greenock, are vested with and are bound to exercise the control, regulation, and administration of the Garvel Graving Dock as part of their statutory undertaking, and in particular the use of said graving dock by vessels resorting thereto as regards time and order of admission, and that the grant to any private firm or individual of the exclusive use of said graving dock is inconsistent and incompatible with the statutory rights and duties of the Trustees on the one hand and the public, and in particular the pursuers, on the other hand, the pursuers are entitled to decree in terms of the declaratory conclusion of the summons. (2) The lease between the Trustees of the Port and Harbours of Greenock and the defenders second called libelled in the summons being upon a sound construction of the said Greenock Port and Harbours Consolidation Act 1913 *ultra vires* of the Trustees, the pursuers are entitled to decree of reduction in terms of the recissory conclusion of the summons." The pleas-in-law for the defenders were, in substance, that the lease was *intra vires*. Lord Hunter as Lord Ordinary dismissed the action and his decision was upheld in the Inner House (First Division). From that decision this appeal was brought to your Lordships' House, and it has been twice argued. The first argument, which extended over two days—the 6th and 8th of December last—was devoted to an exhaustive examination of the Greenock Port and Harbour Consolidation Act, especially of section 109. It was urged for the appellants that the provisions of that Act did not authorise any lease by the Trustees of the graving dock, while the respondents argued that the lease was *intra vires*. At the conclusion of the argument your Lordships took time for consideration.

While the case was under consideration Lord Atkinson called the attention of your Lordships to the existence of section 23 of the Harbours, Docks, and Piers Clauses Act 1847, which is incorporated in the Greenock Act. This section is as follows—"23. The undertakers may lease or grant the use or occupation of any warehouses, buildings, wharfs, yards, cranes, machines, or other conveniences provided by them for the purposes of this or the Special Act, at such rents and upon such terms and conditions as shall be agreed upon between the undertakers and the persons taking the same, provided that no such lease be granted for a longer term than three years." This section was not printed in the appendix and attention had not been called to it by either side during the argument. Your Lordships directed that the parties should be invited to address to the House any argument that they thought proper as to the effect of this section, and both sides attended on the 23rd February for the purpose, the argument on this second hearing being confined to the question of the application and effect of this clause 23. It appears to me to be clear beyond all question that this section 23 applies to this case and that its effect is decisive. The graving dock falls within its terms but no lease for a longer time than three years could be granted. The clause puts the right to make a lease of the graving dock beyond question, but it also establishes that this particular lease, which is for ten years, with the provision for possible extention, is invalid. It is invalid altogether; it cannot be remodelled so as to stand good for three years. It therefore appears that the whole of the argument which was addressed to your Lordships on the 6th and 8th December last was otiose, and could not have taken place if your Lordships had been aware of the existence of this section 23. I had prepared after the first argument a judgment stating the conclusion at which I had arrived as to the effect of the Greenock Act. I do not propose to read this judgment as the discovery of section 23 has rendered the question purely academic.

It appears to me that the proper course is to remit to the Court of Session with instructions to find that it is unnecessary to deal with the first conclusion of the summons, and on the second conclusion to direct reduction of the lease as contravening the provisions of section 23 of the Harbours, Docks, and Piers Clauses Act 1847.

There should in my opinion be no costs either in this House or in the Court of Session.

Lord Dunedin—I concur in the opinion of my noble and learned friend the Lord Chancellor. The summons as framed asked for a declarator in general terms. I should myself have preferred to deal with that

conclusion in order either to give effect to it or grant absolvitor from it. But I do not dissent from what I gather is the opinion of your Lordships that in the circumstances, the lease being bad in respect of the section in the Piers and Harbours Act, it is unnecessary to dispose of that conclusion.

Now as the summons is framed the second and reductive conclusion looks as if it were merely ancillary to the first or declaratory conclusion. The pursuers either did or did not know of the section of the Piers and Harbours Act incorporated in the Special Act which prohibits leases of more than three years' duration. If they did know of it they ought to have inserted after the first conclusion the usual words "and whether it be so declared or not" and then proceeded with the reductive conclusion; and they ought to have quoted the section in their condescendence and framed a separate plea-in-law referring to it. If they did not, they are really winning this case on a plea discovered for them in this House. This disentitles them to costs.

I am therefore of opinion that the interlocutors so far as appealed against should be reversed, and that the case should be remitted to the Court of Session with instructions to pronounce a decree of reduction in terms of the second conclusion of the summons, and to find it unnecessary to dispose of the declaratory conclusion, and to find no expenses due to either party. I think there should be no costs awarded in this appeal.

LORD ATKINSON—I have had the pleasure and advantage of seeing beforehand the judgment of the Lord Chancellor which has just been read. I so fully concur with it that I have nothing to add.

VISCOUNT FINLAY—I am authorised to say that my noble and learned friend Lord Shaw concurs in the judgment I have delivered.

Their Lordships ordered that the interlocutor appealed from be reversed, and that the cause be remitted back to the Court of Session with instructions to pronounce a decree of reduction in terms of the second conclusion of the summons, to find it unnecessary to dispose of the first declaratory conclusion, and to find no expenses due to either party, and ordered further that each party do bear and pay their costs of the appeal to this House.

Counsel for Appellants—Sandeman, K.C. — Gentles. Agents — Patten & Prentice, Greenock—Hugh Patten, W.S., Edinburgh —Ward, Bowie, & Company, London.

Counsel for Respondents—Sir John Simon, K.C. — Macmillan, K.C. — Mackay, K.C. Agents—Neill, Clark, & Murray, Greenock —William B. Rainnie, S.S.C., Edinburgh— Beveridge & Company, Westminster.

COURT OF SESSION.

Friday, March 18.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

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

Ship — Collision with Sunken Wreck — Liability — Whether Collision Due to Faulty Navigation or to Fault of Harbour Trustees — Proximate Cause — Misleading Use of Buoys—Absence of Pilots from Station —Duty of Harbour Trustees as Pilotage Authority.

A vessel sailing under Government requisition, and which had been ordered to proceed to Dundee, arrived in March 1919 off the estuary of the Tay. Neither the master nor anyone on board had any personal knowledge of the estuary, and the latest sources of information in the master's possession regarding it were a chart dated 1915, a copy of the North Sea Pilot dated 1914, then the most recently published edition, and a collection of Notices to Mariners, the latest of which was dated 1st December 1918. In these he found a warning to strangers to be cautious in entering the estuary, and a recommendation to take a pilot obtainable from a pilot cutter stationed in the immediate vicinity of the buoy marking the entrance to the channel and known as the Fairway Buoy. This buoy was described as a light-and-bell buoy exhibiting a white light occulting every ten seconds, surmounted by a top mark, and painted in black and red horizontal stripes. In the Notices to Mariners there was also an intimation that lights which had been prohibited during war conditions were to be re-exhibited. With this information the master about 6·30 a.m. on 9th March shaped his course by compass-bearing and dead reckoning for the Fairway Buoy in order to obtain a pilot. The weather was clear above, with low lying mist, and became more hazy as the vessel proceeded. When near what he estimated to be the position of the Fairway Buoy the master reduced the speed of the vessel to slow. Shortly afterwards he sighted a large dumb buoy without light or top mark which he at first thought might be the Fairway Buoy but which, as no pilot cutter was visible and as the buoy did not appear, when examined by the naked eye and through glasses, to correspond with the Fairway Buoy described in his chart, he concluded was not the Fairway Buoy, and passed without a more thorough inspection. Shortly afterwards he saw the white light of a buoy, occulting every ten seconds, and concluding that this was the Fairway Buoy