Counsel for the Second Parties—M'Lure. Agent—Bruce Cowan, W.S.

Counsel for the Fifth Parties—Asher—C. S. Dickson. Agents—Miller & Murray, S.S.C.

Counsel for the Sixth, Eighth, and Ninth Parties—H. Johnston—J. P. Grant. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Seventh Party—Rhind—C. N. Johnston. Agent—John C. Junner, W.S.

Saturday, November 30.

SECOND DIVISION.

GRAY *v.* THOMSONS.

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-secs.* 1 *and* 3—*Clyde Navigation Harbour Regulations—Byelaw Regulating Watching and Lighting of Opening in Vessel's Deck.*

A workman was injured by falling in the dark into an opening in the deck of a vessel which was lying at a quay for the purpose of being supplied with new boilers. There was a lantern at the distance of a few feet, but the opening was unfenced. There was one watchman on board the vessel, but he was absent from the opening at the time. Byelaw 59 of the harbour regulations required that "every vessel in the harbour having any large opening in deck for the reception of machinery . . . shall after dark have such opening either securely covered or properly lighted, and under the charge of a special watchman."

Held that the employers had sufficiently complied with the byelaw by providing a competent watchman for the ship, and were not responsible for the accident, which was due to the watchman deserting his post.

Diss. Lord Lee, who thought the accident was due to the neglect of the foreman, for whom the employers were responsible, not having the opening under the charge of a special watchman, or at least of a watchman with special instructions.

Thomas Gray, a workman in the employment of Messrs John & James Thomson, engineers and shipbuilders, Glasgow, upon the morning of the 2nd November 1888, while on his way to deposit his check or ticket in the check-box on board the steamhip "Pretoria," fell into a hole in the deck and was severely injured.

He brought an action in the Sheriff Court at Glasgow against his employers for reparation—damages £500, or if found due under the Employers Liability Act, £150.

He averred—"The accident was caused through the fault and negligence of the defenders or of their manager or foreman carrying on the works on board the steamship 'Pretoria,' for each of whom they are responsible in terms of The Employers Liability Act 1880, in neglecting to take the necessary precautions for the safety of their workmen. The opening in the deck ought to have been covered, or a barricade erected from the side of the vessel right across the front of the opening to prevent anyone passing up that side, or otherwise, there ought to have been lights to indicate and show the opening, and a watchman. The only light, which was a common ship lantern, was at the end of the gangway on board the vessel, and that was some 30 or 40 feet from said opening. In ordinary circumstances they were bound to take necessary precautions to properly secure all openings on the deck during night, and specially they were also bound to do so under byelaw 59 of the byelaws and regulations enacted by the Trustees of the Clyde Navigation at Glasgow, on 3rd January 1860, in virtue of the power conferred on them by the Clyde Navigation Consolidation Act 1858, and the Acts incorporated therewith."

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault or negligence of the defenders, or of those for whom they are responsible, is entitled to reparation therefor. (2) The defenders being bound under the byelaw referred to in the condescendence to properly secure the opening in question, and having failed in their duty, are liable to pursuer in reparation. (3) Or otherwise, the pursuer having been injured when in the employment of the defenders, through the fault or negligence of the defenders, or of those for whom they are responsible, he is entitled under the Employers Liability Act 1880, sections 1, sub-sections 1, 2, and 3, to decree in terms of the second conclusion of the petition."

Byelaw 59 referred to was in the following terms—"Every vessel in the harbour having any large opening in the deck for the reception of machinery or other purpose shall after dark have such opening either securely covered or properly lighted, and under the charge of a special watchman."

A proof was allowed which established the following facts—Until the day before the accident the "Pretoria" had been lying with her port side to the quay. The check-box was on the starboard side, and could be approached either by going along the port side and crossing over (the easier way), or by crossing first and going along the starboard side over some piled iron plates. At the time of the accident the "Pretoria" was lying with her starboard to the quay. New boilers were being put in which necessitated the lifting of a portion of the deck, but the hole was usually covered with planks during the night. Before the accident the men had for the first time been working all night, and the planks were up. The night-watchman went away at 5·30 leaving the donkey-boiler-house door open against the hole, and a lamp resting upon a plate of iron at the after-part of the boiler space, but 3 feet from it. The day-watchman came on duty at 5·30, but shortly afterwards went forward to get a cup of coffee. In his absence the pursuer, who

was somewhat short-sighted, came along the starboard side, pushed aside the door of the donkey-boiler-house, which when open covered the open space in the deck, and fell into the hole. There was no rope in front of the space.

The defenders' foreman James Mullan deponed—"When the door of the donkey-boiler-house was open it covered more than the opening, but if we shut it we could walk into it. So long as this donkey-boiler door was opened out it was impossible to fall down the hole unless one put-to the door. . . . The hole would be there for three or four months before the accident, and the men were working on board and passing to and fro, and they knew that the opening was there. Pursuer had worked on board the 'Pretoria' for two or three months; he had been working back and forward with me for about two years. He had been sent to the 'Adirondack' four or five days or a week before the accident. . . . I cannot tell whether there was a lamp at the opening at the time of the accident, but there was one there the night before at 11 o'clock when I left the ship. I thought the place was sufficiently lighted at 11 o'clock. It was as well lighted as such holes usually are. . . . I know well enough about the Clyde Trustees' Regulations in regard to the openings on decks of vessels. It is the duty of the night-watchman to put up the lights at the opening, and the day-watchman sees them all put out in the morning. (Q) Is it customary to have in addition to the lights a special watchman to watch each special hole or opening?—(A) I never knew it. The only think we have a special watchman for is the bellows fire. With regard to an opening in a deck we would never think of having anybody besides the ship's watchman, and to have the place properly lit. I consider that the 'Pretoria' was properly lit when I left her. . . . The night-watchman who was on board the vessel was there for the purpose of seeing that nothing was taken away from the vessel, to see that the ship was right, and that nobody came on board. He was there the same as if we had had a policeman there. He was not there to stand with a light at the hole, but he was there to see that there was a light at the hole. I know a little about the byelaws of the harbour, but I never read them. I was the man in charge at the time, and I was entitled to say to pursuer 'do this' and he did it. I did not give any instructions to have this large opening in the deck protected in any particular way before the accident. I knew that the donkey-boiler-house door was open; we used to tie a line across it, and that was a thing that was done every night before that in order to prevent anybody going along that side."

The Sheriff-Substitute (GUTHRIE) found that the accident was not caused by the negligence of the defenders, or anyone for whom they were responsible, and therefore assoilzied them.

"*Note.*—It . . . is necessary to inquire what fault the defenders have committed. It is said that they failed to have the opening in the ship's deck properly fenced or properly lighted and guarded by a watchman.

"1. As to fencing. It is proved that the defenders' workmen were engaged about the boilers and upon the deck all that night, aud that any fencing of the opening would have been impossible, because it would have interfered with their operations. The men on the night-shift appear to have left about 5·30, and the day-shift was just about to begin when the accident occurred. In the circumstances it does not appear to me, and indeed was hardly contended, that the opening should have been fenced for the brief interval between the night-shift and the day-shift.

"2. As to lighting and watching. The great preponderance of evidence is to the effect that the one lamp, which was placed on a pile of plates a few feet from the end of the hole nearest the gangway, was sufficient to show it and prevent a man of ordinary prudence from walking into it. But the hole it is said should have been not only lighted, but protected by a special watchman. This, it is said, is the requirement of the 59th of the regulations of the Clyde Trustees for ships in the harbour. There was a watchman for the ship, and I am of opinion that if he had been doing his duty this unhappy accident would not have happened. He was at the time getting his coffee, and I am inclined to think that the time for so doing was ill-chosen, and that he should have been at his post when the workmen were coming on board the ship for their day's work. This absence of his, however, was not, and indeed could not—being the negligence of an ordinary fellow-workman — be pleaded as involving the defenders in liability. It was urged that they were bound as long as the opening existed to have a 'special' watchman for it. Now, I will not say that the 59th rule is not capable of being construed as the pursuer contends that it should. But I think that that is not its fair meaning, and that so to interpret it would be a malignant construction. It is not very well, at least not quite clearly expressed, but I think it is plainly intended to apply to an opening made for the 'reception of machinery or other purposes,' which 'after dark,' is intermitted or abandoned, so that covering or watching and lighting is not only a possible and convenient but an indispensable and permanently necessary arrangement for the safety of the public, or those having access to the ship during the night. I have already said that this is not the state of the facts in the present case, where work was going on continuously. I think that in the circumstances safety was sufficiently provided for by the regular watchman kept for the ship undergoing repairs in the engineer's hands. I do not therefore need to consider the more general questions, as to which, I think, there is a good deal to be said, whether, even if the work had not been going on, this regular watchman is not a special watchman; or again, whether the rule is intended to have any application to a vessel not at all in a seagoing condition, but which has been in the hands of trades-

men for extensive and long-continued repairs.

"I think therefore that none of the faults alleged against the defenders have been made out. I do not wish to say much about the door which the watchman appears to have set open as a sort of barricade when he went away. It may be that it operated as a snare to the unfortunate pursuer rather than a defence, and that he would have had a better chance of seeing the hole if it had been closed. But it is difficult to avoid the conclusion that the proximate cause of the calamity was the pursuer's own incautiousness. He knew well the locality, he knew that the deck-plates were lifted, and the cavity yawning, yet he went forward without thought and without watching his steps. He first failed to notice that the vessel had been turned in the river, which should have warned him that the hole was now on the side next the quay, and that he ought to have gone round the engine space to the safe and covered side of the vessel, and then he went forward in face of the light on the pile of plates, which should at least have suggested that he was walking into danger.

"I do not find it necessary to refer to certain authorities which were cited. If the facts be regarded as I think they must, then for the principles applicable to them it is sufficient to refer to such leading cases as *Indermaur* v. *Dames*, and *Thomas* v. *Quatermaine* (Lord Justice Bowen's judgment)."

The pursuer appealed to the Second Division of the Court of Session, and argued—There was fault on the part of the defenders or their foreman, for whom they were responsible, inasmuch as (1) there was no special watchman as required by the byelaw referred to; (2) there was no barricade; (3) the lighting was insufficient. There should have been exceptional care taken, because the vessel had been recently turned, the morning was peculiariy dark, and the hour for the day-shift coming on board was a specially likely time for accidents to happen.

Argued for the respondents—There was no fault on their part. They had done their duty by providing a competent watchman and sufficient lighting. They had sufficiently complied with the requirements of the byelaw. It was absurd to say that there must be a special watchman for every hole in addition to the ship's watchman. There was a light; a light meant a hole; therefore even if they were in any way to blame, there was contributory negligence on the part of the pursuer. The accident was due to the fault of the watchman—a fellow-servant of the pursuer, for whose actings they (the respondents) were not responsible—going away from his post when he did—*Robertson* v. *Adamson*, July 2, 1862, 24 D. 1231; *Seymour* v. *Maddox*, 1851, 16 Q.B. 326; *Brooks* v. *Courtney*, 20 L.T. 440; *Pritchard* v. *Lang*, July 2, 1889, 5 Times' Law Reports, 639; *Bolch* v. *Smith*, 7 Hurl. & Nor. 736; *Griffiths* v. *East and West Indian Dock Company*, 5 Times' Law Reports, pp. 43 and 371; *Wilkinson* v. *Farie*, 32 L.J. Ex. 73; Clyde Navigation Act (21 and 22 Vict.)

At advising—

Lord Justice-Clerk—The pursuer in this action was injured by falling into a hole in the deck of the steamer "Pretoria" when proceeding to his work in the defenders' employment. Previous to that time the hole had been covered by loose planks, but these had been taken away with a view to having a new boiler let down into the ship. The hole was situated between the deck-houses, and the practice had been to have a rope across it from one deck-house to the other, but the rope was not there on the occasion of the accident. There was a light near the hole. The defenders had also provided a watching by night and day. The accident occurred on a dark morning just after the night-watchman had been relieved by the day-watchman, who, however, had left his place to get some coffee. The pursuer came forward to "turn his ticket," and fell into the hole.

On the evidence, I think that the hole was sufficiently lighted. Several of the workmen who were engaged at the work are clear about that. In particular, I refer to the witness John Heffron. But lighting only was probably insufficient. The defenders were bound, it is said by the pursuer, to have a special watchman in terms of byelaw 59 of the Harbour Regulations of the Clyde Trustees. Now, as I have said, they had a watchman whose duty was to look after the ship generally, though there was no special watchman for this particular danger. I am of opinion that the rule was satisfied by the provision of this watchman on deck, who had the duty of attending to this source of danger. He did not fulfil it, for he neglected to put up the rope across the hole, and he left his post to get coffee, which he had no business or need to do. His neglect was the true cause of the accident, and I am of opinion that the Sheriff-Substitute was right in holding that the accident was not due to the negligence of the defenders or anyone for whom they were responsible.

Lord Young—I am of the same opinion. I should only like to add that while I think the lighting was sufficient, I also think that, even if it had not been so, the master would not be liable. He had supplied sufficient lamps, and had put competent people there to attend to them. I agree that the immediate cause of the accident was the watchman going away for his coffee at this especially dangerous moment, and omitting the obvious precaution of putting up the rope where it had been hooked previously. That would probably have prevented the accident without his presence. Now, how is the master to blame because the watchman went away and did not put up the rope? He is not at common law blameworthy, and not responsible. If the Employers Liability Act makes any difference here, it is because someone else was negligent for whose negligence, contrary to the common law, the master is responsible. Was the foreman blameworthy? If he was, the master will be liable for his negligence.

But what duty of inspection did the foreman fail in? It was surely not his duty to be present to tell the watchman not to go for his coffee. The watchman knew he was neglecting his duty, if he was fit to be a watchman at all, and he did not need to be told. Should the foreman have been there to tell him to put up the rope? You do not need to tell a servant to cover a trap-door. He knew that he should have so done, and his neglect to do it was the proximate cause of the accident. Through his fault this unfortunate short-sighted man suffered.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD LEE—The facts of this case are, I think, plain enough, and I do not understand that there is any doubt about them.

The defenders are shipbuilders and engineers, and were engaged in carrying out alterations upon various ships in the Glasgow docks, including the "Pretoria." The pursuer was in the employment of the defenders as a labourer, and required to go on board the "Pretoria" before six o'clock on the morning of the accident in order to give his time by depositing his ticket in a box which stood upon the deck before proceeding to his work upon another ship. Being winter it was of course known that the deck which the pursuer had to traverse would be in darkness unless lighted by artificial light. Now, it so happened that the defenders had made a large opening in the deck of the ship for the purposes of their operations in putting in new boilers. The opening was entirely uncovered and unguarded. There was no light excepting a single lamp placed on the deck—the shipkeeper Dixon is quite distinct that it was placed on the deck — and the pursuer in passing along the deck to the box fell into the opening and was severely injured.

The question is, whether there was fault for which the defenders are responsible? This is a question of mixed law and fact, and my view of the law applicable to the case leads me to a different conclusion from that reached by the Sheriff-Substitute.

I understand that your Lordships are not of opinion that the accident happened from any fault or want of ordinary caution on the part of the pursuer himself, and I humbly think that if there was fault on the part of the defenders, or for which they are responsible under the Employers Liability Act, it will not relieve them that there was fault also on the part of the ship's watchman, a fellow-servant.

I think that the defenders were clearly bound to make reasonable provision against the damage which they had created or caused to be created. It is said that they did so by having a competent foreman in charge, to whom they lawfully entrusted the duty of seeing that the proper measures were used for that purpose. And I think that this cannot be successfully disputed on the evidence. Liability at common law is therefore out of the case. But there remains a question whether there was not negligence on the part of the foreman for which the defenders are responsible under sections 1 and 2 of the first clause of the Employers Liability Act.

The contention of the appellant is that the accident happened through the fault of the foreman in neglecting to see that the proper and necessary precautions were taken, or to give any instructions as to the use of such precautions, although it was known to him that on the night in question there were special circumstances of danger owing to the absence of any covering or of any rope such as were ordinarily used for the protection of persons who might be going about the deck.

The fact that there was unusual danger that night is proved by the foreman himself. He must have known that the hole was uncovered that night, for he says that men had been working all night at the hole, and Arthur Dixon proves that the boards were left off on the night before the accident, because the men were working all night. "This was the first night," he says, "that the men had been working all night, and that the boards had been taken off." The foreman also admits that there was another precaution ordinarily observed which was not used that night. He says—"We used to tie a line across the hole, and that was a thing that was done every night before that in order to prevent anybody going along that side." Further, the foreman must have known that between half-past five and six a.m. men like the pursuer would be going along the deck to deposit their tickets.

In these circumstances it was obviously very necessary that the regulation No. 59 should be observed, or some other sufficient precaution adopted. I think it not less obvious that the duty of seeing that the rule was observed, or of using some other sufficient precaution, was imposed on the foreman James Mullan. For he says himself—"I was the man in charge at the time." The rule required that if not securely covered the opening should be "properly lighted, and under the charge of a special watchman."

The learned Sheriff-Substitute appears to have held that the rule was sufficiently observed by placing one lamp on the deck and having a general watchman for the ship.

I am not prepared to say that this might not have been sufficient if the ship's watchman had received special instructions applicable to the special danger. But it was not literal fulfilment of the byelaw, and the responsibility for not fully complying with it, or giving special instructions to the watchman, clearly rests on the foreman. He admits that he gave no instructions to have the opening protected in any particular way, and thus he certainly neglected to have a special watchman, or a watchman with special instructions, in charge of the opening.

I am further of opinion that the great preponderance of evidence is against the sufficiency of the light. It is proved that the usual thing is to have two lights, and a rope also. But it is sufficient for the pur-

suer's case, in my opinion, to show that the foreman neglected to have the opening under charge of a special watchman, or at least of a watchman with special instructions.

I think that the accident occurred by reason of a defect in the condition of the deck which the pursuer had to traverse, which defect arose from or had not been remedied owing to the negligence of the foreman entrusted with the duty of seeing that the byelaw was observed, or other sufficient precautions taken.

The Court pronounced the following interlocutor:—

"The Lords . . . Find in fact (1) that on the occasion libelled, the pursuer, then a workman in the employment of the defenders, was injured by falling into a hole in the deck of the steamship 'Pretoria,' which the defenders were filling with new engines and boilers; (2) that the defenders appointed sufficient watching and lighting for the protection of those having to traverse the deck of said vessel; (3) that at the time of the accident the watchman on duty had gone away from his post unnecessarily, and that it was in consequence of his failure in the duty entrusted to him that the accident to the pursuer happened: Find in law that the defenders are not liable for the consequences of the failure of the watchman to fulfil the duty entrusted to him: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute appealed against, and decern."

Counsel for the Pursuer—Rhind—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for the Defenders—Dickson—Aitken. Agents—Drummond & Reid, W.S.

Saturday, November 30.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WALLACE *v.* ANDERSON.

Landlord and Tenant—Trust-Deed—Occupier of Farm—Ground Game Act 1880 (43 *and* 44 *Vict. c.* 47)—*Interdict.*

A tenant farmer at Whitsunday 1889 conveyed to a trustee his whole estate, including his rights under his lease, and granted at the same time to the landlord a deed of renunciation of his lease as at the following Martinmas. He continued by agreement to reside on and manage the farm. On 10th October 1889 the landlord sought to interdict the farmer from killing the ground game, alleging that he had no authority therefor either from himself or the trustee, who was occupier of the farm. The farmer opposed the application, alleging that he was occupier of the farm, and desired to protect his crops for behoof of his creditors.

Held (*diss.* Lord Young) that as the pleadings disclosed a question for trial between the parties, and as caution had been found, the note was properly passed.

Hugh Robert Wallace, proprietor of the farm of Barneil, Ayrshire, raised this note of suspension to interdict William Anderson from killing ground game thereon.

The respondent became tenant of the farm of Barneil for nineteen years after Martinmas 1882. The lease included the following provisions—"Reserving all game of every description on the said lands, so far as not inconsistent with the Ground Game (Scotland) Act 1880, . . . with the exclusive privilege of . . . shooting . . . on the same by the proprietor or others having his authority, free of all damages and expenses: . . . It being hereby declared that the tenant shall have no claim on the landlord for any injury or damage done to the crops by game in any manner of way: . . . If the tenant shall at any time during the currency of this lease become bankrupt, . . . or if he shall voluntarily divest himself of his property by trust-disposition or otherwise for behoof of his creditors, . . . then, and in any of these events, it shall be in the power of the proprietor to put an end to this lease, and to resume possession of the subjects hereby let without any declarator or process of law for that effect."

On 2nd April 1889 the respondent executed a trust-deed for behoof of his creditors in favour of James Findlay, the landlord's factor, by which he assigned and conveyed his entire estate and effects, including his rights under the foresaid lease. At the same time he executed a deed of renunciation of the lease to take effect at Martinmas 1889. Findlay accepted the office of trustee under the foresaid trust-deed, and entered upon possession of the farm.

The complainer averred—"The respondent continues to reside on and manage the farm under the said James Findlay. Taking advantage of his residence there, he is regularly in the habit of killing the ground game on the said farm, although he holds no authority to that effect from the said James Findlay. He has been frequently warned by the complainer that he has no longer any right to kill the ground game, but he still continues the practice. The complainer is consequently forced to apply to your Lordships for interdict as craved."

The respondent averred that for some time past his crops had suffered from over-preserving of game. "As the complainer declined to keep the ground game within reasonable limits, and as he refused to pay compensation for the partial destruction of the respondent's crops, the respondent had no other alternative but to exercise his right under the Ground Game Act in order to protect his crops from total destruction. The respondent during this year has suffered loss by partial destruction of his crops by the excessive stock of ground game by over-preserving to the extent of £60, as estimated by the complainer's factor, who is the respondent's trustee. Said trustee and creditors have made frequent complaints to the