of the Sheriff-Substitute, which dismissed the original petition, and to allow the reclaiming note against the interlocutor of the Lord Ordinary officiating on the Bills. It is clear, for the reasons your Lordship has given, that the Sheriff was quite wrong in dismissing the original petition, and the logical consequence would have been now to remit to him to grant the sequestration.

But within a few days after the Sheriff had dismissed the petition the daughter of the deceased man whose estates had been sought to be sequestrated, although she had appeared and opposed the original petition, concurred in a new petition for sequestration brought by another creditor, and on that petition sequestration was awarded.

The logical course would have the effect of sweeping away as ill-founded all the proceedings which have followed upon the award of sequestration in the later petition.

But following upon the second petition a trustee was appointed who had already been for some time in the saddle as judicial factor, and he has been in administration and has ingathered the estate. To set aside all that procedure and to start a new sequestration would expose the insolvent estate to unnecessary expense and inconvenience.

There would have been strong grounds for following that course if we had seen reason to suppose that proceedings under the second petition for sequestration instead of under the first would leave the estate open to the preferences of particular creditors which would be cut down under the first but left standing by the second.

There are two different principles running through the cases cited. In the first place, the Court says it cannot assume that the date of sequestration is of no importance, for even in the ordinary case it is of importance that preferences should be cut down from the earliest possible date, while in such cases as the present, where the sequestration is that of a deceased debtor the importance is greater, for it is only within seven months of the deceased's death that preferences can be cut down at all.

The other principle upon which the Court has acted is that where there is no reasonable apprehension of creditors getting preferences to which they are not entitled, the Court ought not to interfere with a going sequestration.

In the present case I think that the balance between the two principles is turned by the statement of the trustee that there are no such preferences, and as he has informed the Lord Ordinary officiating on the Bills that there is no risk of preferences, I think it is right that we should take the most convenient and least expensive course—that is, should recal the Sheriff's interlocutor to the extent indicated by your Lordship and adhere to that of the Lord Ordinary.

LORD JOHNSTON—I agree entirely in the course your Lordship proposes to take.

LORD SALVESEN was sitting in the Second Division.

The Court recalled the interlocutor of the Sheriff-Substitute dated 27th July 1910 in so far as it found the pursuer liable in payment to the defender Jeanie M'Gregor in thirty shillings of expenses, and in lieu thereof found the said defender Jeanie M'Gregor liable to the pursuer in thirty shillings of expenses; *quoad ultra* affirmed said interlocutor, and decerned; found the pursuer entitled to the expenses of the appeal against the said defender.

The Court adhered to the interlocutor of Lord Ardwall dated 1st September 1910, and refused the reclaiming note.

Counsel for Robert Lochrie (Appellant and Reclaimer)—Blackburn, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Jeanie M'Gregor (Respondent)—Lyon Mackenzie. Agent—Norman Macpherson, S.S.C.

Saturday, November 12.

FIRST DIVISION.

[Sheriff Court at Glasgow.

THE ELLERMAN LINES, LIMITED *v.* CLYDE NAVIGATION TRUSTEES AND OTHERS.

GLASGOW AND NEWPORT NEWS STEAMSHIP COMPANY, LIMITED *v.* CLYDE NAVIGATION TRUSTEES AND OTHERS.

(See *ante*, March 4, 1909, 46 S.L.R. 472, and 1909 S.C. 690).

Ship—Collision—Collision Due to Negligence of Two Independent Third Parties—Question whether Negligence of One Directly Contributed to Collision.

Two vessels in the Clyde, the one proceeding up and the other down the river, found themselves, without any fault on their part, in such a position owing to the original misdemeanour in navigation of a tug and flotilla of barges that escape from collision was rendered impossible by the position of a cruiser then in course of construction on the river, and whose stern had been wrongfully projected into the navigable channel.

In an action of damages brought by the owners of the colliding vessels against the owners of the tug and the builders of the cruiser, *held* that as but for the wrongful protrusion of the cruiser into the fairway of the river there would not, or at least might not (notwithstanding the original fault of the tug), have been any collision, she (the cruiser) had directly contributed to the accident, and that the builders were liable jointly and severally with the owners of the tug.

The Ellerman Lines, Limited, owners of the s.s. "City of Benares," brought an action against (1) the Trustees of the Clyde Navigation, and (2) John Brown & Company, Limited, shipbuilders, Clydebank, craving decree against the defenders jointly and severally, or severally, for the sum of £1500 as the damage sustained by the "City of Benares" in a collision on the Clyde with the s.s. "Almora" on 26th November 1907. The collision, they averred, was due to (1) the faulty navigation of a tug and a flotilla of barges belonging to the first defenders, and (2) the fault of the other defenders, John Brown & Company, in having moored the cruiser "Inflexible" (then in course of construction on the river) so as to project her stern into the fairway, contrary to the bye-laws and regulations for the navigation of the Clyde.

[A similar action was raised by the Glasgow and Newport News Steamship Company, Limited, the owners of the s.s. "Almora," concluding against the said defenders jointly and severally, or severally, for £6000 damages in respect of the same collision. The two cases were heard and disposed of together.]

The *facts* are fully stated in the note (*infra*) of the Sheriff-Substitute (FYFE), who on 1st December 1909 pronounced the following interlocutor:—"Finds (1) that the steamship 'City of Benares' belonging to the pursuers was on 26th November 1907 proceeding down the river Clyde; (2) that the steamship 'Almora' was coming up; (3) that at a point in the river, about opposite the private dock of John Brown & Company, Limited, these two vessels came into collision, whereby both sustained damage; (4) that the collision was not caused by fault or negligence on the part of those navigating either of these vessels, but was the result of fault on the part of (*a*) the defenders John Brown & Company, Limited, in respect that they, in contravention of Article 6 of the Clyde Trust Bye-Laws of August 1889, had moored the war vessel 'Inflexible' in their dock for the purpose of being fitted up in such a manner that her stern projected beyond the line of the North River Wall and for a considerable distance into the navigable channel of the river, and (*b*) a servant of the defenders the Clyde Trustees, for whom they are responsible, viz., the master of the steam tug 'Clyde,' in respect that he recklessly came out from Brown's basin with mud barges in tow, and proceeded to cross the river in the way of vessels navigating up and down the river in contravention of Article 19 of said Clyde Trust Bye-Laws, and particularly in the way of the 'Almora': Finds therefore in law that the damage to the pursuers' vessel 'City of Benares' having been the result of fault on the part of both defenders, or of those for whom they are responsible, the defenders are jointly and severally liable in reparation to pursuers," &c.

Note.—". . . The craft in the river at the time of the collision were (1) the steamship 'City of Benares' belonging to the Ellerman Lines, Limited, a vessel of 4320 tons net register with triple expansion engines of 760 horse power nominal, 460 feet long, and 55 feet broad. She was outward bound for Calcutta *via* Liverpool, and was on the way to Liverpool to complete her cargo, which had been partly loaded at Glasgow. Her draught of water was about 21 feet forward and 21 feet and 2 inches aft. She was proceeding under her own steam, and as is customary with vessels of her size she was attended by two tugs—one ahead and one astern. (2) The steamship 'Almora' belonging to Glasgow and Newport News Steamship Company, Limited, a vessel of 2835 tons net register, with triple expansion engines of 368 horse power nominal, 390 feet long, and 50 feet broad. Her draught was 19 feet forward and 20½ feet aft. She was inward bound with a general cargo from Newport News. She was attended by one tug astern. (3) The steam tug 'Clyde' belonging to the defenders the Clyde Trustees, a vessel specially built for the purpose of towing mud barges. She has engines of 82 horse power. She has two engines which can be worked separately, and she had in tow eleven loaded barges lashed together and attached by a chain, as close as they could get up to the stern of the tug. The mud barges had been filled inside the private basin of the defenders John Brown & Co., and the tug 'Clyde' was taking them across to the south side of the river. (4) The 'Inflexible,' a large war vessel, which had been constructed by the defenders John Brown & Co., and was in course of being fitted up at their private basin. To enable a crane on their wharf to reach a particular part of the ship forward of the bridge the vessel was moored with her bow inside Brown & Co.'s private basin and her stern projecting into the river. She had moorings to the wall of the private basin, and also to a small island at the mouth of the basin (which is referred to by the witnesses as 'the Dolphin'). She also had a tug in attendance astern, with a hawser attached to the 'Inflexible's' stern, to help to steady this large vessel and prevent her stern swinging with the flood tide. The vessels concerned, therefore, which were in motion in the river at the time are the outward bound 'City of Benares' and her two tugs, the inward bound 'Almora' and her one tug, and the tug 'Clyde' with her barges in tow.

"What I have to consider in the first place is whether there was fault on the part of any of those moving vessels which contributed to the collision between the 'City of Benares' and the 'Almora'; and, in the second place, whether it was a contributing cause of the casualty that the warship was moored in the position described.

[*After dealing with the evidence and finding that neither the 'Almora' nor the 'City of Benares' was to blame, the Sheriff Substitute proceeded*]—

"In my opinion the proof conclusively shows that of the three moving vessels the tug 'Clyde' was alone to blame. It was close upon high-water, a time when the up and down traffic in the river was

likely to be thickest. There was the huge hull of the 'Inflexible' obstructing the view both up and down the river. A down-coming vessel had deep water close to the north bank, and so might arrive at the mouth of the basin before craft coming out of the basin could see her. In these circumstances it appears to me that it was most reckless for the 'Clyde' to come out of the basin at all without having first got warning that the way across the river was clear. There were people on the 'Inflexible' and there were people on the wharf. It was quite practicable to have given the 'Clyde' a signal, but no effort was made to direct her when to come out. There was a digger at work up in Brown's Basin filling the barges, and the extraordinary arrangement, or rather want of arrangement, which appears to have prevailed was that when a sufficient number of barges had been filled they were lashed together and taken in tow by the tug, which then proceeded out of the basin without knowing the actual state of the traffic at the moment, but in the general knowledge that there were likely to be vessels coming up and down the river, and in the hope that there would be time to cut across. If it is the case, which the evidence does not make very clear, that the tug 'Clyde' if she found anything in her way in the river, could have backed her barges into the basin, her master should have done so when he saw the 'City of Benares,' for I think it is proved that, apart altogether from the 'Almora' coming up, there was considerable risk in the tug coming out in front of the 'City of Benares' going down. Had the latter not been coming very slowly, and able promptly to check her speed, I think it quite likely that the 'City of Benares' might have run into the 'Clyde' or the barges. The fact is, that the 'Clyde' came out trusting apparently to a protective providence in the shape of the vigilant pilots of the up and down traffic.

"When the master of the 'Clyde' found himself out, he could not go back because the 'City of Benares' would have been on him; nor could his much-vaunted separate port and starboard engines enable him to keep out of the way by going between the 'City of Benares' and the north shore, for the hull of the 'Inflexible' was in his way. Once he had come out he was shut up to going on, and in going on he had of necessity to take the risk of crossing the bow of the 'Almora,' trusting that her pilot would, if necessary, as in fact he did, reverse the 'Almora's' engines and avoid a collision.

"The immediate cause of the collision, of course, was the 'Almora' sheering across the river, but I think it is amply proved that the only explanation of the sheer was that the tug 'Clyde' suddenly emerged out of the basin in front of the 'Almora.' I have not, therefore, any difficulty at all in holding the Clyde Trustees responsible for the fault of their servant the master of the tug 'Clyde,' and for the resulting damage which was occasioned both to the 'City of Benares' and the 'Almora.'

"It is a more difficult and much nicer legal question whether the defenders John Brown & Co. are also liable. As I understand the decision of the Supreme Court in the appeal upon the relevancy, I am not now concerned with the question of degree of fault as between the two defenders. I have only to consider (1) whether the defenders John Brown & Co. were in any degree wrongdoers in placing the 'Inflexible' at that time where they did place her, and (2) whether the fact that she was so placed, in any degree, great or small, contributed to the result.

"Now there is an express bye-law that in this particular part of the river no vessel shall 'be moored or berthed inside the lines of the river walls for the purpose of taking on or landing goods or passengers, or of being fitted up or repaired, or for any other purpose, but without prejudice to any vessel calling at a quay or wharf in the ordinary course of trade, provided the navigation be not thereby interrupted.' The part of the bye-law with which we are here more immediately concerned is the prohibition against mooring a vessel inside the lines of the river walls for the purpose of being fitted up. What was being done on the 'Inflexible' was putting armour on board. The armour was being lifted by a 150-ton crane erected upon the wharf, and it was to be placed on board at the after end of the forward barbette. The jib of the crane has a reach of 132 feet, and in order to bring the forward barbette, where the armour was to be placed, as near to the outreach of the jib as possible, it was necessary to have the vessel placed as she was placed. But this was for the convenience of the defenders John Brown & Co., who were fitting up the vessel in their own private dock.

"The only exception in the bye-law is that of a vessel calling at the quay in the ordinary course of trade, and that only if calling at the quay does not interrupt navigation. There is no exception of a vessel being fitted up in a shipbuilders' private dock, and quite possibly when these bye-laws were framed twenty years ago the exigency of manipulating a huge war vessel in a private dock or basin was not at all before the minds of the Clyde Trustees. If it had been, one would almost have expected that, for the encouragement of the shipbuilding industry on the Clyde, an exception would have been made to meet the case of a large war vessel such as this, the work upon which could not, at that particular place at any rate, be done at all without a part of the vessel projecting beyond the line of the river wall. Had the projection been only technically beyond the river wall, I should not have been inclined to consider this bye-law as strictly applicable to the defenders John Brown & Co., because I think that the underlying reason for the enactment of this bye-law obviously was to prevent the navigable channel of the waterway

being obstructed. If, therefore, the stern of the 'Inflexible' had merely projected into a portion of the waterway too shallow to be occupied by a downcoming vessel, I should not have been inclined to hold that the bye-law had been contravened, despite the fact that the stern of the 'Inflexible' might have been beyond the river wall. But having regard to the soundings as shown on the plan, and to the evidence led, I am constrained to find that the stern of the 'Inflexible' did project some distance into the navigable channel of the river used by downgoing vessels of large size. As to how much it projected there is a conflict of evidence. Some witnesses say 100 feet, others a great deal less. I think probably the import of the evidence may fairly be taken to be that the 'Inflexible' was about 50 feet out into the navigable channel.

"It was said that, even assuming this to be so, that does not affect the present question, because in the circumstances as they occurred the collision would have happened all the same although the 'Inflexible' had not occupied that part of the waterway at all. I think this is quite likely, for no witness is prepared to say positively that if this 50 feet of waterway had been available to the 'City of Benares' and the 'Almora' they would have avoided the collision. This 50 feet of projection of the 'Inflexible' out into the channel was at any rate an additional 50 feet of screen, delaying the master of the 'Clyde' getting a view down the river and obstructing the view of the upcoming 'Almora.' It is possible that if that 50 feet of waterway had been available the collision might have been altogether avoided, or at any rate the damage occasioned might have been less.

"The main importance, however, of the fact that the 'Inflexible' being placed as she was was a contravention of Bye-law 6, is that it shifts the burden of proof (Marsden on Collisions, 5th ed., p. 29, and cases cited). Once the pursuers get the length of establishing the contravention, they are not required further to prove positively that the presence of the 'Inflexible' where she was placed was a contributory cause of the collision. The defenders John Brown & Co. are then required to prove that the presence of the 'Inflexible' where she was had no effect in bringing about the collision. I think that upon the proof the pursuers have sufficiently established the fact that the 'Inflexible' was a contributory cause of the collision, because it may be said with much force that if the 'Inflexible' had not been there the tug 'Clyde' and her barges would not suddenly have shot out across the bow of the 'Almora'; that if the tug had not so shot out of the basin the 'Almora' would not have had suddenly to reverse her engines; that if she had not been compelled so suddenly to reverse she would not have sheered across the river; that if she had not sheered across the river there would have been no collision. Probably, also, it may be said, with a good deal of force, that in the circumstances the downgoing 'City of Benares' would have kept as far to the north as she could in meeting the upgoing 'Almora,' and that she might have been at least 50 feet further inshore. But I am not required to consider all this. What I have to consider only is, in the first place, whether the defenders John Brown & Co., in placing the 'Inflexible' where they did, contravened Bye-law 6, and, in the second place, if they did so, whether these defenders have discharged the *onus* of proof thereby shifted to them of proving that the presence of the 'Inflexible' had nothing to do with the collision. I am of opinion that it is proved that the defenders John Brown & Co. were in contravention of Bye-law No. 6, and that they have failed to discharge the *onus* of proof referred to. I am therefore shut up to the conclusion that they are jointly and severally liable with the other defenders, notwithstanding that I am also of opinion that the actings of the defenders John Brown & Co. may have arisen from a quite natural misapprehension of their right to make temporary use of a portion of the waterway; and although I think also that their fault was technical and trivial compared with the gross recklessness displayed by the navigator of the tug 'Clyde,' for whom the other defenders the Clyde Trustees are responsible."

The defenders, the Trustees of the Clyde Navigation, and the defenders John Brown & Co., appealed.

Argued for the Clyde Trustees—It was not proved that the tug was the cause of the collision. The real cause was the "Almora's" sheer, in consequence of which she was unable to clear the "Benares." The sheer was due to a faulty manœuvre on the "Almora's" part, and not to the presence of the tug, for when the sheer took place the tug was already across the river and alongside her moorings at the south side. The sheer took place three minutes before the collision, and when there was a clear space between the tug and the stern of the "Inflexible," so that had the "Almora" kept her course she would have passed the "Benares" in safety.

Argued for John Brown & Co.—There had been no contravention of the bye-laws, for the bye-law in question (viz., Article 6) was a river regulation, and inapplicable to a private dock. The bye-law was also inapplicable in respect that the "Inflexible" was not "moored" in the "river"; she was moored in a private dock —a place outside the limits of the river—Clyde Navigation Consolidation Act 1858 (21 and 22 Vict., cap. cxlix), secs. 2 and 75. Assuming, however, that the bye-law had been contravened, the appellants were not to blame, for where in a river an obstruction not *per se* dangerous had been put down wrongfully it was the duty of navigators to avoid it where as here it was noticed. The proximate cause of the accident was not the breach of the bye-law, but the negligence of those in charge of the "Almora." The appellants therefore were not liable—*Cayzer, Irvine & Co.* v.

Carron Co., L.R., 9 A.C. 873, *per* Lord Watson at p. 887; "*The Monte Rosa*" [1893] p. 23. The *onus* of showing that the position of the "Inflexible" contributed to the collision lay on the respondents, and they had failed to discharge it. It was not enough to say that the "Inflexible" narrowed the manœuvring ground; it must be proved that she actively contributed towards the collision, and that she was a *causa causans*. *Esto* that her position in the river contained the potentialities of danger she did nothing to quicken them into activity, and unless she did so she could not be an actively inducing cause of the collision—she was really in the position of a third party *quoad* the colliding vessels. That being so she was not liable—Glegg on Reparation (2nd ed.), pp. 44-45; *Renney* v. *Magistrates of Kirkcudbright*, Dec. 19, 1890, 18 R. 294, 28 S.L.R. 242, *rev.* March 31, 1892, 19 R. (H.L.) 11, 30 S.L.R. 8; "*The Bernina*" (1886), L.R., 12 P.D. 58; Marsden's Collisions at Sea (6th ed.), p. 13. The contravention of the bye-law was not sufficient to shift the *onus* where as here the bye-law was a mere domestic rule and not a statutory bye-law like the Regulations for Preventing Collisions at Sea—*Cayzer, Irvine & Co.* (*cit.*), *per* Lord Watson at p. 885. *Esto*, however, that the *onus* lay on the appellants to show that the position of the "Inflexible" did not contribute to the collision, then they had discharged it.

Argued for the owners of the "Almora" (respondents)—the Court having intimated that they held the tug was to blame—*Esto* that the tug was an inducing cause of the accident, so also was the "Inflexible," for (*a*) she narrowed the manœuvring ground, and (*b*) acted as a screen, and so prevented the "Almora" seeing the tug in time. The breach of the bye-law imposed on the appellants John Brown & Co. the *onus* of showing that the position of the "Inflexible" could not by any possibility have been an inducing cause of the accident—Bevan on Negligence (3rd ed.) 1087; "*The Arklow*," L.R., 9 A.C. 136; "*The Fenham*," L.R., 3 P.C. App. 212, at p. 216. This *onus* she had failed to discharge.

Argued for the owners of the "City of Benares" (respondents) — Assuming that the tug was to blame, it was enough for these respondents to show that but for the position of the "Inflexible" the collision would have caused them less loss than it did—Marsden's Collisions at Sea (6th ed.) at pp. 15 and 124. That her position had done so was clear from the argument stated for the "Almora," which these respondents adopted.

At advising—

Lord President—This case has already been before your Lordships upon a question of relevancy and procedure, and the observations that I then made make it unnecessary for me to say what I otherwise should have felt bound to say upon the question of joint delinquency. There has now been a proof, in which the Sheriff-Substitute has held that the Clyde Trustees as owners of the tug "Clyde," and John Brown & Co. Ltd., shipbuilders, who upon the occasion in question had in their dock the warship "Inflexible," but projected into the waterway of the river, were joint delinquents—that is to say, that they were both guilty of such negligence as caused, each in their own contributing way, the collision between the "Almora" and the "Benares."

The Sheriff-Substitute has given what I venture to characterise as a most admirable note on this case; and he has really gone so fully and so fairly, according to my view, into the whole evidence that I think it only necessary to say a single sentence.

So far as the behaviour of the "Clyde" is concerned I cannot say I have had any difficulty. I think it is quite clear that the result at which the Sheriff-Substitute arrived was right—that the "Clyde" made a bolt for it across the river without taking the slightest trouble to find out before she emerged into the river with her long tail of barges, two hundred feet in length, whether she was likely to meet shipping going up and down the river or not; and that the result of her bolt across the river was to cripple the manœuvre of the "Almora," with the effect of making the "Almora" lose complete control of herself and sheer towards the north of the river. In other words, I think that at the critical moment the position of the "Clyde" and her barges was such that the "Almora" could not do the only one thing that could have saved her, which was to go full steam ahead.

As regards the liability of John Brown & Co., I think it is clear, first of all, that in protruding the "Inflexible" into the waterway of the river as they did, they clearly contravened a bye-law of the Clyde Trustees which they were bound to obey, and thereby put themselves into the position of persons committing a fault; and secondly, that the effect of their so protruding the stern of the "Inflexible" was severely to restrict the navigable portion of the river upon that occasion. I agree with the Sheriff-Substitute in saying that the case here is narrower than it is in the case of the "Clyde," because it is possible that if nothing had been done by the "Inflexible" the collision might not have happened. But, on the other hand, I think that the *onus* upon the pursuers has been fairly made out.

I think the position of the "Inflexible" had three prejudicial effects. In the first place, it acted as a screen and prevented the "Almora" from seeing the "Clyde," and its attendant barges as soon as she otherwise would have done. In the second place, it made an obstacle of danger which the "Almora" had considerable difficulty in avoiding when the sheer to the north began; or, in other words, it really caused her in the first place to devote her efforts towards avoiding a danger which ought not to have been there, and therefore did not allow her, as otherwise would have been the case, to devote her whole efforts to avoiding a collision with the "Benares" alone. Thirdly—and this I think practi-

cally was the greatest evil of the three—it narrowed the manœuvring space available to the "Benares" and prevented the "Benares" from going further to the north and nearer the river bank—a manœuvre which, even if it only meant a few feet, might have been enough to avoid the collision, or at least to have avoided a collision of so serious a character as this.

As the beginning of all that was admittedly a fault—namely, the protrusion of the stern of the "Inflexible"—I think it is a case where the pursuers have made out that the position of the "Inflexible" was one of the causes directly contributing to the accident. Therefore on the whole matter I come to the same conclusion as the learned Sheriff-Substitute.

Lord Kinnear—I agree with your Lordship.

Lord Johnston—In these two actions we have to determine the question of liability on the claims of the s.s. "Almora" and the s.s. "City of Benares," which came into collision on the Clyde near Clydebank on 26th November 1907, not *inter se*, for neither ship was in fault, but each on its own account against the "Clyde," a tug belonging to the Clyde Navigation Trustees, and against the "Inflexible," a ship of war in the course of construction for the Admiralty by John Brown & Company, Limited, at their yard at Clydebank. I have read the judgment of the learned Sheriff-Substitute and have carefully considered it with reference to the evidence, and, in common with your Lordships, I am in entire concurrence with the general result to which he has come, and I would add nothing to the very lucid analysis of the evidence contained in the note appended to his interlocutor, but that I prefer a somewhat different view of the effect of the "Inflexible's" position on the navigational dilemma in which the "Almora" and the "City of Benares" found themselves, by reason of the conduct of the "Clyde," to that adopted by the Sheriff-Substitute. We are all agreed that the tug "Clyde" with her train of barges was absolutely and unqualifiedly to blame, and as to her liability there is no doubt. But the liability of her owners is limited with reference to her value, which is comparatively small; and if either the "Almora" or the "City of Benares" are to recover in full the damage which they have suffered, they must substantiate their claim also against the "Inflexible," of which John Brown & Company, Limited, must, for the purposes of the case, be treated as the owners.

The peculiarity of the situation is that if the "Inflexible" was in fault, hers was a totally different fault from that of the "Clyde." Without the "Clyde's" original sin there would have been no question as to any concurrent fault on the part of the "Inflexible"; for the original cause of the collision being awanting, there would have been no collision and therefore no question of the "Inflexible's" fault. But owing to the original misdemeanour in navigation of the "Clyde," the two colliding ships found themselves in such a position that, as alleged, escape from collision was rendered impossible by the fault of the "Inflexible." If so, she was contributory to the accident in this sense, that but for her there would not, or at least might not, notwithstanding the fault of the "Clyde," have been any collision. I do not mean that there is any contribution *inter se* between the "Clyde" and the "Inflexible," giving either a claim to have the damages apportioned between them, but that both are jointly and severally responsible for the accident to third parties to which they both contributed. I think that the two injured ships have succeeded in showing that they were so responsible.

The "Inflexible" was in a position in which she had no business to be. For the purpose of putting on board a portion of her armour plating she had been brought to the mouth of the Clydebank Wet Dock and moored in such a position that her stern was protruding at right angles into the river to an extent to impede free navigation, in breach of the bye-laws of the conservators of the Clyde Navigation. This was fault or negligence, for the consequences of which her owners were responsible, and I think that they would have been equally responsible if there had been no question of bye-laws. But there is a considerable conflict of evidence as to the degree to which she thus protruded into the navigable channel. I venture to think that this question, which is left in doubt on the oral evidence, is conclusively determined by a small piece of real evidence. I refer to the plan of the Clyde at the mouth of John Brown & Company Limited's Clydebank wet dock, on which the wharf to which the "Inflexible" was moored is delineated. On that wharf the site of the company's 150-ton crane is marked. Now we know that the object of mooring the "Inflexible" there was to put aboard plating for the after portion of her forward barbette, that for this purpose she was moored so that the plating should be dropped by the crane as nearly as possible on that part of the deck where it was to be fixed. If, then, the vessel is placed with the after portion of her forward barbette in line with the seat of the crane—which is a travelling, not a beam or swinging crane—we have the exact position of the vessel fixed, and taking her dimensions from the deck plan, No. 26 of process, along with the above-mentioned plan of the Clyde, it is a simple matter to calculate how much her stern must have projected into the river. That calculation shows without any doubt that her stern post must have been 100 feet beyond the line of the Dolphin situated in the middle of the entrance to the dock—that is, 100 feet into the navigable channel. I think, indeed, a little more than 100 feet, but 100 feet is the maximum suggested by any of the witnesses in their oral evidence, and it is quite sufficient for my purpose.

Such being the position of the "Inflexible," the "Almora," coming up the river,

and being faced with the difficulty occasioned to her in keeping her proper course on the south side of the river furthest away from John Brown & Co.'s dock by the improper navigation of the "Clyde" and her string of barges, first stopped, and then reversed her engines. As she was coming up the river with the tide she at once lost steerage way, got out of control, and sheered right over in the direction of the "Inflexible." The "City of Benares," on the other hand, was perfectly correctly navigated after the "Clyde" and her barges emerged from John Brown & Co. Ltd.'s dock. She was on her proper course and she checked her speed until the barges were sufficiently clear to give her what her pilot termed "a clear eye" to pass on down the river. But though clear of the "Clyde" and her barges, she was suddenly called upon to deal with the situation caused by the sudden change of course of the "Almora," of the cause of which she was necessarily ignorant at the time. But it was evident that a collision between her and the "Almora" was imminent just off the stern of the "Inflexible." The "City of Benares" at once stopped and reversed her engines, which was the only thing that she could do; but though clear, she was on a course that would have taken her past the stern of the "Inflexible," with not much room to spare, and with a right-handed screw it was well known to those navigating her that on reversing her engines she would at once sheer to starboard, with the certainty of colliding with the stern of the "Inflexible," a collision with which would have been very fatal. The auxiliary tug attached to her bows, with commendable promptitude at once starboarded his helm and towed to port sufficiently to save the "City of Benares" from this catastrophe, but in so doing maintained her in such a position that the "Almora" coming inside the angle between the "City of Benares" and her tug, the collision which had been imminent occurred, and when it did occur the starboard bow of the "City of Benares" was within a few feet of the stern of the "Inflexible." Now had the "Inflexible" not been there the "City of Benares" might have been allowed to pay off to starboard for at least 100 feet without coming into contact with anything. This she would have done naturally, as I have said, by the act of reversing her engines, and she might have been assisted by her tug towing to starboard instead of to port. Even if she had come in contact with the Dolphin, the probability is that no ill results would have happened. If, then, there had been this additional 100 feet of sea room in which to manœuvre, the probability is that the collision between the "Almora" and the "City of Benares" would have been averted, and although the entire avoidance of collision cannot be predicated as a matter of absolute certainty, it can be certainly said that the collision, if it did take place, would have been far less disastrous in result. The fault of the "Inflexible," therefore, prevented, if not the entire avoidance of the collision, at any rate the opportunity of minimising it. I think, therefore, with the Sheriff-Substitute that her owners are responsible along with those of the "Clyde" for the result of the collision which took place. Their fault or acts of negligence were independent, but they combined to produce a common result. The "Inflexible" was a dangerous obstruction to navigation, and though the primary cause of the collision was the fault of the "Clyde," that does not discharge the "Inflexible," but only renders her liable along with the "Clyde," the injured vessels being innocent.

I prefer this ground of judgment as against John Brown & Co. Ltd. to that of the Sheriff-Substitute, for I am not by any means satisfied that the "Almora's" course was affected, as he thinks it was, by the fact that the "Inflexible's" stern obstructed the "Almora's" view of the mouth of John Brown & Co. Ltd.'s wet dock, and so somewhat covered the exit of the "Clyde" and her barges. But the result in law is the same as that to which the Sheriff-Substitute has come.

LORD SALVESEN was sitting in the Second Division.

The Court pronounced this interlocutor—

"Affirm the interlocutor of the Sheriff-Substitute of 1st December 1909: Repeat the findings in fact and in law therein: Refuse the appeals: Remit the cause back to the Sheriff-Substitute to proceed as accords; and decern."

Counsel for the Ellerman Lines, Limited (Pursuers and Respondents) — Constable, K.C. — Mair. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Glasgow and Newport News Steamship Company, Limited (Pursuers and Respondents)—Munro, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for the Clyde Navigation Trustees (Defenders and Appellants) — Sandeman, K.C.—Black. Agents—Webster, Will, & Co., W.S.

Counsel for John Brown & Company Limited (Defenders and Appellants)—Morison, K.C.—C. H. Brown. Agents—Macpherson & Mackay, S.S.C.

Wednesday, November 9.

FIRST DIVISION.

[Lord Dewar, Ordinary.

O'KEEFE v. THE LORD PROVOST AND MAGISTRATES OF EDINBURGH.

Reparation—Negligence—Personal Injury—Ice on Street—Averment of Failure to Regulate Flow of Fountain—Relevancy.

A woman slipped on a piece of ice which had formed on the pavement near a fountain, and fell, sustaining fatal injuries. Her husband and certain