

ever right in security Saunders & Sons had over these goods, they were bound to deliver over the goods to the trustee on Ramsay's estate, because Ramsay was the owner of that estate, and his trustee was, under the Bankrupt Statute, vested with the right of the whole creditors of that estate, wherever situated. I agree with the Lord Ordinary in thinking, that although, no doubt, the trustee, by virtue of the title he acquired under the Bankrupt Statute, is in the general case entitled to ingather the whole of the bankrupt's property, the right conferred on him is subject to such securities as existed on that estate, and any goods or real security, such as we have here—for in point of fact these goods are a real security pledged to a creditor who has made advances or undertaken an obligation on the security of that pledge,—I cannot read that as entitling the trustee to take away that pledge, over which the creditor has been secured in his advance.

In the next place, it was maintained that Saunders & Sons in this case were not entitled to hold the goods in question for so large a sum as the amount of the acceptances for which they were pledged, in terms of the agreement under which the advance was made, and contend that they were only entitled to retain goods to the extent of three-fourths of the market value under the agreement. It appears to me that the Lord Ordinary is right in the view he takes of articles 8 and 9 of this agreement—that it was clearly stipulated that whatever obligation Messrs Saunders & Sons undertook should be covered by any goods belonging to Ramsay that were to be in their hands.

A third point was also made the subject of argument on behalf of Ramsay's trustee, arising in this way:—It was said that although Saunders & Sons had accepted bills, which I may call accommodation bills, in favour of Ramsay to the extent of £16,000, yet, on the other hand, it appears upon the proof that Ramsay had accepted accommodation bills in favour of Saunders & Sons to the amount of £10,600, and that on that account the trustee on Saunders & Sons' estate should only be held to be entitled to retain goods of the value of the difference between these two sums, and that goods should not be retained to the full value of £16,000, because Saunders & Sons had themselves obtained accommodation bills to the extent of £10,600. I refrain from expressing my opinion on this point, because I do not think it is raised under this action. These Commercial Bank bills for £10,600 were expressly mentioned in the condescendence of the fund *in medio*, article 6th; but if we turn to the claim which is made on behalf of Mr Myles (Ramsay's trustee) I find the claimant adopts articles 1 to 4 inclusive, and also article 9 of the condescendence annexed to the summons expressly—therefore, and I must assume designedly, omitting all reference to the 6th article of the condescendence of the fund *in medio*, which is the only article which throws light on the matter at all; and turning again to the pleas of Mr Myles, I find no indication of any point being intended to be raised in regard to it, and therefore it is inconsistent to propose that the Court should give this point or question—which was neither raised in the record nor alluded to in the proof, and as to which a good deal of light might have been shed

—any consideration at all. And upon that ground, while I agree with your Lordships in thinking that the interlocutor of the Lord Ordinary should be adhered to, I expressly refrain from stating my opinion on this third point.

The Lords adhered.

Counsel for Royal Bank—Asher—A. G. Murray.
Agents—Dundas & Wilson, C.S.

Counsel for Ramsay's Trustee—R. Johnstone—Macfarlane. Agent—J. Smith Clark, S.S.C.

Counsel for Saunders' Trustees—D. F. Kinnear, Q. C.—H. Johnston. [Agents—Morton, Neilson, & Smart, W.S.]

Thursday, November 3.

OUTER HOUSE.

[Junior Lord Ordinary.

THOMSON AND OTHERS, PETITIONERS.

Curator Bonis—Minor Pubes.

In a petition presented by three minors who had attained puberty, with consent of their mother, praying for the appointment of a *curator bonis* to themselves, the Court made the appointment.

This was an application presented by William Malcolm Thomson, his brother and sister, whose father was dead, and who were all in minority but above pupillarity, with the concurrence and consent of their mother and paternal aunts, praying for the appointment of a *curator bonis* to themselves. The petitioners were unable to find any person who would act as curator to them in a process of choosing curators. They had claims upon the trust estate of one of the next-of-kin of their deceased father, but the trustees declined to pay them the money until a guardian was lawfully appointed to them and their estate, and this application therefore became necessary.

The Lord Ordinary (M'LAREN) appointed John Wilson, C.A., Glasgow, as craved.

Counsel for Petitioners—R. V. Campbell.
Agents—Campbell & Smith, S.S.C.

Wednesday, November 16.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

LITTLE AND OTHERS v. BURNS AND ANOTHER.

Reparation—Damages—Ship—Collision—Fault.

A collision took place on the Clyde between two steam vessels, the "Owl" going down, and the "Ariadne" going up the river. The weather was foggy. On sighting one another the "Owl" had ported her helm and reversed engines, in terms of the Admiralty regulations (arts. 13 and 16); the "Ariadne" had kept on the starboard tack, on which she was at the time, and had not slackened speed. In the collision which then took place the

“Ariadne” was greatly injured, and had to be run ashore. In an action of damages at the instance of her owners—*held* (altering judgment of Lord Curriehill, Ordinary) that the damage must be borne equally by the owners of the two vessels, there having been fault on both sides—on the “Owl’s” part, in respect her speed at the time of collision was in the circumstances too great; and on the “Ariadne’s” part, in respect she had contravened the said Admiralty regulations, and had not succeeded in showing “to the satisfaction of the Court that the circumstances of the case made departure from the regulations necessary,” in terms of sec. 17 of the Merchant Shipping Act 1873 (36 and 37 Vict., c. 85).

Process—Expenses.

In an action for damages in respect of a collision between two vessels, in which the pursuers sought to lay all the fault upon the defenders’ vessel, and the Court ultimately found joint fault on the part of both vessels established, and apportioned the damage equally between them, the pursuers’ counsel moved for expenses, on the ground that an offer made by him, after the record was closed and proof had been ordered, to settle the case on receiving a sum considerably larger than the share of the damage ultimately found due by him, together with all his expenses of process to date, had been peremptorily refused by the defenders, who declined to settle on that or any other footing. Motion *refused*, and no expenses given to either party.

This action was raised by Robert Little and others, owners of the screw-steamer “Ariadne,” of Barrow-in-Furness, against John Burns and another, owners of the screw-steamer “Owl,” of Glasgow, and concluded for payment of £5098, 9s. 3d., as the amount of loss and damage sustained by the pursuers in consequence of a collision which took place between the two vessels on 11th December 1879 at a point on the river Clyde a little below Bowling. The “Ariadne,” a vessel of 295 tons gross registered tonnage, was on that day proceeding up the river to Glasgow with a cargo of iron ore and general merchandise, when she was met by the “Owl,” a vessel of 914 tons, going down, which struck her about the starboard quarter, cutting her down to the water’s edge, so that she began to fill and sink, and had to be run ashore on the river bank. She was afterwards raised and repaired, and the parties subsequently agreed that the amount of damage done to her should be assessed at £4850, the question at issue in this action being their respective liabilities therefor.

The pursuers averred—“At the time when said collision took place, both vessels were in water subject to the said bye-laws and regulations of the Clyde Trustees. The collision was caused entirely by the fault, negligence, and unskilful seamanship of the defenders, or of those in charge of the ‘Owl,’ and for whom the defenders are responsible, and by their failure to observe the said bye-laws and regulations, and the rules of good seamanship, as they were bound to do. In particular, it was the duty of the defenders and those in charge of the ‘Owl,’ as they

well knew, to put her helm to port at a proper distance, and to keep as near as possible to the right or starboard side of the river, being the north side; to have two men on the look-out; to keep their vessel at a speed not exceeding the half power of the engines, and to ring the ship’s bell at least every minute. The defenders, however, and those in charge of the ‘Owl,’ and for whom the defenders are responsible, failed in each and all of these respects to observe the said bye-laws and regulations, and the rules of navigation and good seamanship. By the custom and practice of vessels navigating the Clyde at the place in question, and by the rules of navigation which require to be there observed, vessels going down the river are bound to keep the north side of the channel, while vessels coming up the river keep the south of the channel. The ‘Owl,’ however, was improperly going down the river, and for some time prior to the time of the collision, close to the south side of the river, so that those in charge of the ‘Ariadne’ could not pass on that side. The ‘Owl’ was going at an excessive speed, and, at all events, at a speed greater than half power of the engines, with no proper look-out as aforesaid, and without ringing her bell every minute; and her helm was not ported at a proper distance. The bye-laws and regulations of the Clyde Trustees and the Admiralty regulations mentioned in the answer are referred to. *Quoad ultra* the statements in answer, so far as not coinciding with the pursuers’ averments, are denied.”

The defenders’ answer to the above article was as follows:—“Denied. Explained that at and prior to the time of the collision the ‘Owl’ was being navigated properly, and in accordance with the rules of good seamanship, and the bye-laws and regulations which those in charge of her were bound to conform to. In particular, a good look-out was kept, the engines were under command and going less than half-speed, the steam-whistle was kept sounding almost continually, and when the ‘Ariadne’ was sighted, the captain of the ‘Owl’ ordered the helm to be put hard a-port, which was done, and thereafter he telegraphed to have the engines stopped and reversed, which was also done. This latter order had the effect of nearly stopping the way of the ‘Owl’ before she came in contact with the ‘Ariadne.’ The collision was entirely caused by the fault of those on board the ‘Ariadne.’ In accordance with the rules of good navigation and seamanship, and with the rules for preventing collisions, issued under Order in Council in terms of the Act 25 and 26 Vict., cap. 63, sec. 25, it was the duty of those in charge of the ‘Ariadne’ on sighting the ‘Owl’ to have put her helm to port, and to have stopped and reversed her engines, and if these measures had been adopted the collision would not have occurred; but those on board the ‘Ariadne’ failed to adopt either of them, and, on the contrary, starboarded her helm and continued her high rate of speed, and thus made a collision inevitable. By article 13 of the rules for preventing collisions above-mentioned, it is provided as follows—‘If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other;’ and by article 16 it is provided as follows—‘Every steamship when approaching another ship, so as to involve risk of

collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall when in a fog go at a moderate speed.' Both these rules were applicable to the present case. The steamers in question were, immediately before the collision, approaching each other nearly end on, and in such a way as to involve risk of collision, but both the above-quoted rules were violated by those in charge of the 'Ariadne.' The 'Ariadne' was going at more than a moderate speed. It was necessary in the circumstances that she should have stopped and reversed."

The pursuers pleaded—"(1) The collision in question being entirely due to the fault of the defenders, or of those for whom they are responsible, the defenders are liable to the pursuers for the whole loss and damage resulting therefrom."

The defenders pleaded—"(2) The collision complained of not having been caused by the fault of the defenders, or those for whom they are responsible, they are entitled to absolvitor with expenses. (3) The defenders are entitled to be assoilzied in respect that the collision was caused, or materially contributed to, by the fault of the pursuers, or of those for whom they are responsible."

Proof was led, the details of which are sufficiently set forth by the Lord Ordinary in his note, and by Lord Shand in his opinion. The main facts proved were as follows:—The collision took place about one o'clock in the day, about a mile below Bowling. The day was foggy. The "Owl" had been keeping near the south bank of the river as she came down, so as to have the guidance of the dyke and perches on that side. She had come at varying speed, the ebb tide being with her, but on an average her rate was at least five miles an hour. A vessel called the "Amethyst," going up the river, passed the "Owl" shortly before the accident, and told her that the "Ariadne" was a short distance behind in her wake. At the time of the vessels sighting one another the "Ariadne" was on a starboard tack, which she continued to keep without altering her speed; the "Owl" put her helm hard a port, and proceeded to slacken speed and reverse engines. There was a conflict of evidence as to whether or not the vessels were end on, or nearly so, when they sighted one another.

The Merchant Shipping Act 1873 (36 and 37 Vict. c. 85) provides—"If in any case of collision it is proved to the Court before which the case is tried that any regulation for preventing collisions contained in or made under the Merchant Shipping Acts 1854 and 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

The Admiralty regulations for preventing collisions at sea, issued in pursuance of the Merchant Shipping Amendment Act 1862, and of an Order in Council, dated 9th January 1863, provide—" (Art. 11) If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other. (Art. 13) If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port,

so that each may pass on the port side of the other. (Art. 14) If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other. (Art. 16) Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall when in a fog go at a moderate speed. (Art. 19) In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger."

By the bye-laws and regulations of the Clyde Navigation Trustees it is provided—" (2) Every vessel shall during the daytime have one person, and from sunset to sunrise, or in time of fogs, two persons, properly qualified, stationed at the bow as a look-out, to give notice in due time of any obstruction or danger, who shall be furnished with a trumpet or horn or whistle, to be used when there is reason to believe another vessel is near. (27) Every steamer shall be furnished with a bell of sufficient size, properly suspended in an elevated situation in the forepart of the vessel, which shall be rung in time of fogs at least every minute; and shall also be furnished with a mariner's compass kept constantly in good order. During dark nights or fogs the speed shall not exceed half power of the engines. (30) When steamers, proceeding in opposite directions, approach each other, they shall, at a proper distance, put their helms to port; and when within thirty yards shall slow their engines sufficiently, and keep as near as possible to the right or starboard side of the river, so as to afford all possible facility for passing each other."

By an Order in Council explaining articles 11 and 13 of the Admiralty rules above-quoted, dated 30th July 1868, it is explained—"The said two articles (Nos. 11 and 13) respectively only apply to cases where ships are meeting end on, or nearly end on, in such a manner as to involve the risk of collision. They consequently do not apply to two ships which must, if both keep on their respective courses, pass clear of each other. The only cases in which the said two articles apply are when each of the two ships is end on, or nearly end on, to the other—in other words, to cases in which by day each ship sees the mast of the other in a line, or nearly in a line, with her own, and by night to cases in which each ship is in such a position as to see both the side lights of the other. The said two articles do not apply by day to cases in which a ship sees another ahead crossing her own course; or by night to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light or a green light without a red light is seen ahead, or where both green and red lights are seen anywhere but ahead."

The Lord Ordinary (CURRIE HILL) on 11th March 1881 pronounced this interlocutor—"Finds (1) that on 11th December 1879 the defenders' steam-ship the 'Owl' came into collision in the Clyde, opposite Milton Isle, with the steam-ship the 'Ariadne,' belonging to the pursuers: Finds

(2) that the said collision was caused by the fault of those in charge of the 'Owl,' for whom the defenders are responsible: Finds (3) that the 'Ariadne' was by said collision seriously damaged, and that the parties are agreed that for the purposes of this action the damages shall be assessed at £4850: Therefore decerns against the defenders for payment to the pursuers of the said sum of Four thousand eight hundred and fifty pounds, with interest, as concluded for.

He added this note—"On 11th December 1879 the steamer 'Ariadne,' which belongs to the pursuers, was proceeding up the river Clyde with a cargo of iron or general merchandise, in prosecution of a voyage from Barrow-in-Furness to Glasgow. About one o'clock in the afternoon, when nearly opposite the Milton Isle, about a mile below Bowling, the steamer 'Owl,' which belongs to the defenders, and which was going down the river on a voyage to Liverpool, struck the 'Ariadne' about the starboard quarter, and cut her down to the water edge in such a way that she began immediately to fill and sink, in consequence of which the master (Gregson) found it necessary to run her ashore on the north side of the river, where she settled down and lay till raised on 13th January 1880. For the damage thus sustained the pursuers have raised the present action against the defenders, and it has been agreed that for the purposes of the action the damages should be held to amount to £4850.

"From the proof it appears that the day of the collision was very foggy, so much so that although the fog from time to time lifted a little, it was never possible to see ahead a greater distance than from one perch to another (between 400 and 500 yards), and frequently it was impossible to see so far as even 200 yards ahead. It was therefore the duty of both vessels—both under the regulations of the Privy Council for preventing collisions, and under the bye-laws and regulations for the navigation of the Clyde—to proceed slowly and cautiously. The regulations in Council which were then in force, direct, in Article 16, that 'Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall when in a fog go at a moderate speed.' And the Clyde Navigation regulations, art. 2, provide, with reference to sailing vessels, that 'Every vessel shall during the daytime have one person, and from sunset to sunrise, or in time of fogs, two persons, properly qualified, stationed at the bow as an out-look, to give notice in due time of any obstruction or danger;' and the rule is by art. 25 made applicable to steamers.

"Now, the first question raised on the proof is how far the two vessels complied with these regulations. As regards the 'Ariadne,' there seems to be no dispute that she had two men properly qualified on the look-out on the bow, and that she was proceeding on her voyage at a moderate speed—the engines going about half speed against an ebb tide running at about two knots an hour. On the other hand, it is proved that although during the greater part of the voyage from Glasgow the 'Owl' had had two qualified men on the outlook on the bow, yet, in point of fact, for a minute or two before the vessels sighted one another there was only one

man, the second man having been sent by the mate to execute some orders which required his attention below, so that at and previous to the collision there was only one man on the look-out. As to the rate of speed at which the 'Owl' was going, the evidence is conflicting, and it certainly seems to be undoubted that her speed was irregular. She was at one time going ahead, and at another dead slow, and sometimes stopping, at all events until she reached Bowling, about a mile from the scene of the collision. But after she passed Bowling I think the best evidence in the case shows that the 'Owl,' the ebb tide being in her favour, was going too fast. We have the independent evidence, in the first place, of Duncan Macpherson, the master of the 'Amethyst,' which had passed the 'Ariadne' on the voyage up from Greenock, and which met the 'Owl' a short distance above the Milton Isle, and, indeed, so near the scene of the collision that those on board the 'Amethyst' heard the crash quite distinctly. Macpherson says—"As we were passing the 'Owl,' the mate on her fore-castle-head asked me if the river was clear below, and I said it was, but that there was a steamer coming up astern of us—the 'Ariadne.'"—I named the 'Ariadne.'" The "Owl" was going pretty fast for the state of weather when we met her. It struck me that she was going too fast for the state of the weather—not that she was actually going fast. I remarked that to the man who was beside me at the time." Then Robert Fyfe, who was in a small boat on the Clyde at the time, looking out for a shot, says "that he saw the 'Owl' coming down the river and heard the whistle blowing. She was going at a good speed. I think she was going at a good deal more than half speed. I am often out on the river, and know a good deal about the traffic on it, seeing the vessels passing and re-passing. It was a very close day, and it was at the strongest time of the ebb when the "Owl" passed me. It struck me at the time that the "Owl" was going too fast. When I heard her coming at such a speed I kept in towards the shallow water out of her road, and stood and looked at her, and I thought she was going too fast for the day. She was on the south side of the channel close to the perches or beacons. I could see the "Owl" about eighty yards off or thereabout. I do not think I could see 100 yards." I think, therefore, it must be taken as one of the facts in the case that the speed of the 'Owl' was not 'moderate' considering the foggy state of the weather.

"Then it is the rule of the road on the Clyde that down-going vessels shall keep to the right or starboard side of the river, although it seems undoubtedly to be the practice for all vessels, whether going up or down, to hug the south or left bank of the river pretty closely below Bowling, in order to have the guidance of the stone dyke and perches on that side of the river. It is of course the duty of down-going vessels, particularly in fog, to exercise the greatest caution and keep a very close look-out, in order that they may take their own side of the channel in the event of their meeting an up-going vessel; and more especially was this the duty of the 'Owl' on the occasion in question, seeing that those in charge of her had been informed by the 'Amethyst' that the 'Ariadne' was close astern. Now, I think that the evidence shows that the 'Owl' was 'hugging'

the dyke on the south side of the river very closely, so much so that the 'Amethyst,' which was a very small steamer, with difficulty passed between the 'Owl' and the shore. Still it cannot be said that in this respect the 'Owl' was violating any of the rules of navigation, and if she had taken the north side of the channel in sufficient time to allow the 'Ariadne' to pass between her and the wall, I am satisfied that this collision would never have occurred. The close proximity however in which she was to the wall, both before and after she passed the 'Amethyst' must have made it a matter of difficulty for any up-going vessel which was not hugging the left bank very closely, to pass between her and the wall.

"The next matter to be considered is the conduct of the two ships from the time when they sighted each other. The 'Owl,' it should be mentioned, is about 295 feet long by about 30 feet broad, while the 'Ariadne' is 180 feet long and 20 feet broad, being thus much smaller and lighter than the 'Owl.' Very shortly before the 'Ariadne' had sighted the 'Owl,' she had to make a detour from the south margin of the river into mid-channel, in order to avoid a shallow bed of sand which projected from the river wall, and in order to regain her position near the wall she had naturally to port her helm, the result being that her head, instead of pointing up the river, was for a little stem on to the nearest perch. To right her the captain gave the order to starboard the helm, the effect of which was to turn his ship's head towards the north, and to angle the vessel across the river. Before he had time to bring her head once more parallel to the wall the 'Owl' was sighted a point or two on the 'Ariadne's' starboard bow. [*His Lordship then quoted articles 13th, 14th, and 19th of the Order in Council cited above, and article 3rd of the Clyde regulations.*] In construing these rules regard must be had to the 17th section of the Merchant Shipping Act 1873, which is in the following terms:—"If in any case of collision it is proved to the court before which the case is tried that any regulation for preventing collisions, contained in or made under the Merchant Shipping Acts 1854 and 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." The difficulty in the present case arises from the usual conflict of evidence in such cases, and particularly from the great difference among the witnesses as to the distance between the two vessels, and as to their relative positions when they sighted each other. Until these points are satisfactorily ascertained it is impossible to determine which of the rules is applicable to this case.

"According to the captain of the 'Ariadne,' her position when he first sighted the 'Owl' was, as I have said, on the starboard tack, with her bow pointing to the north, and with the 'Owl' a point or two upon the 'Ariadne's' starboard bow. Now, undoubtedly, if the vessels were either meeting end on, or nearly end on, and were at a sufficient distance from one another to enable the 'Ariadne' without danger to navigation to alter her course by porting her helm so as to pass between the 'Owl' and the wall, it

was clearly the duty of the 'Ariadne' so to have altered her course. That, however, was not done, and the 'Ariadne' continued on her starboard course. On the other hand, if the distance between the two vessels was such that it was impossible for the 'Ariadne' with any reasonable chance of safety to port her helm and alter her course so as to pass to the south of the 'Owl,' then I think she was bound instead of porting to continue her starboard course, and to keep out of the way of the 'Owl.'

"In point of fact, the 'Ariadne,' as I have said, proceeded on her starboard course, and the 'Owl' unfortunately ported her helm, and the collision took place. Whether the captain of the 'Ariadne' cried or signalled to those in charge of the 'Owl' to starboard their helm is not at all clear on the evidence, and I do not think it is a material circumstance. Indeed, the captain of the 'Owl' appears to have considered that it was his duty at all hazards to obey implicitly rule 13, and port his helm the moment he came in sight of the 'Ariadne.' As I have said, there is great conflict of evidence. The captain and several of those on board the 'Owl' say that when they sighted the 'Ariadne' the two vessels were end on, or nearly so. This is a direct contradiction of the captain of the 'Ariadne,' who is, however, corroborated in the strongest manner by the first mate of the 'Owl,' Alexander Blair, who was the look-out on the fore-castle head. Now, Blair says that they were closer to the wall than they would have been had the weather been fine by about 60 or 80 feet, and he goes on to say—"The first thing I saw when the 'Ariadne' was coming up on us was the foam at her bow, and about thirty seconds after that, or thereabout, I saw the hull of the vessel, and afterwards the masts. I saw the whole ship then. The 'Ariadne' was a little on our port bow, if anything, but very little. She would be about half a point on our port bow. When I saw the 'Ariadne's' masts she was going away across to the north. I had the best view of the 'Ariadne' of any person on board the 'Owl.'" (Q.) And the first time the masts could be seen they were not in line?—(A.) No. (Q.) Were they very much out of line?—(A.) Yes, very much out of line. By the first time I saw the masts the 'Ariadne' was angled across the river, and her bow pointing to the north. (Q.) When you saw her pointing to the north, what did you conclude she was intending to do?—(A.) I concluded she was going to the north side of the river. The 'Owl' was going away to the north by that time. I could not say how long the 'Owl' had been going that way, but I know her head was beginning to slide away to the north. I observed that just after I noticed the foam of the 'Ariadne's' bow, just as the hull made its appearance. I did not notice any change in the course of the 'Ariadne' from the time I first saw her until I saw her slanted right across the river. (Q.) It would have been very difficult for her to have altered her course and gone to the south without touching you?—(A.) It would when she went northwards. . . . (Q.) You have said that when the 'Ariadne' was going on the starboard tack she could not have turned to the south without touching you?—(A.) Yes, when she went on a starboard helm she would have been sure to run us down or us her. (Q.) Suppose you had kept the south side, could you not

have passed her?—(A.) That is a question for the captain. (Q.) What is your opinion?—(A.) My opinion is that by going to the southward I might clear her. *By the Court*—(Q.) That is by starboard your helm?—(A.) Yes; if I had done it at first.' And to the same effect is the evidence of Kenneth Mackenzie, the second mate, who says—'The "Ariadne" appeared to me to be going to the north side of the river when I first sighted her. She was apparently under a starboard helm, but I don't know. She appeared to be angling across our bow to the north.'

'Now, these two witnesses, taken out of what may be called the enemy's camp, corroborate in the strongest manner the evidence of the captain of the 'Ariadne'—that just before he sighted the 'Owl' he had starboarded his helm, in order to take his vessel properly into the channel of the river, and that on seeing the 'Owl,' instead of porting his helm and bringing her back parallel with the wall, he continued on his starboard course. Now, I must say it appears to me, in that state of matters, the 14th Privy Council rule applies, and that the 'Ariadne' did the right thing. Undoubtedly, from the position when the two vessels first sighted each other, they were not end on, or nearly end on, as the mate of the 'Owl' saw both the masts of the 'Ariadne' quite out of line. The 'Ariadne' was truly 'crossing,' and had the 'Owl' on her starboard side in such a manner as to involve risk of collision. The 'Ariadne' properly kept on her course toward the north side of the river; and the 'Owl,' seeing that the 'Ariadne' was keeping out of her way, ought to have kept her own course straight down the river, or ought to have starboarded, and certainly should not have ported, as such a manœuvre could not fail to lead to a collision.

'There was a great deal of hypothetical evidence given by pilots and others as witnesses on the part of the defenders, for the purpose of showing that if two vessels are approaching each other, one of which is from a point to a point and a-half on the starboard bow of the other, the vessels may be said to be truly end on, or nearly end on, in the sense and meaning of rule 13; but that evidence is not for a moment to be set against the distinct testimony of the two mates of the 'Owl,' to the effect that the 'Ariadne' was distinctly angled across the river.

'Still, it is said on the part of the defenders that the distance between the vessels when they first sighted one another was so great that the 'Ariadne' had plenty of time to have altered her course, and that she should, in terms of section 30 of the Clyde Navigation rules, have put her helm to port. I am by no means satisfied on the evidence that there was sufficient distance between the two vessels to have enabled the 'Ariadne' to execute that manœuvre. In a fog it is at all times very difficult to judge distance, and very great discrepancy as to distance is inevitable on the part of witnesses, however truthful and however experienced they may be. And there is generally, as happened in this case, great variation in the density of the fog, so that a witness who says that he could see 400 yards ahead may be speaking of a time of exceptional lightness, while another who says he could not see 100 feet away may be speaking of a period of exceptional darkness. I think, upon the whole, that it will not be a serious error if the distance between the

vessels at their first sight of each other was from 160 to 180 yards. Now, according to the statement of those in charge of the 'Owl,' the moment the 'Ariadne' was sighted, the 'Owl' ported her helm, reversed her engines, and went full speed astern, and at the moment of collision there was little way on her except what was given by the ebb tide. Yet in that state of matters the collision took place, almost instantaneously. I do not think that a minute could have elapsed between the first sighting of the vessels and the crash. I think therefore it is on the evidence impossible to hold that the 'Ariadne' was at such a distance from the 'Owl' as to have warranted those in charge of her in disregarding the Council rule 14, and endeavouring to comply with the Clyde rule 30; and I cannot do otherwise than hold that as the 'Ariadne' was on the starboard course when the 'Owl' sighted her, she did right in continuing that course, and that the 'Owl' executed the wrong manœuvre in putting her helm hard a-port.

'It is quite true that the 'Owl' not only put her helm hard a-port, but reversed her engines and went astern, and the defenders maintain that it was the duty of the 'Ariadne,' whatever course she was on, to have slackened speed, reversed her engines, stopped, and gone astern. My opinion is that it was not her duty to do so; but even if it had been so, the risk of collision was, in my opinion, created by the wrong manœuvre executed by the 'Owl,' by putting her helm hard a-port, whereby the 'Ariadne,' being then on a starboard course, must have run into or been run into by the 'Owl.'

'The principle to be applied in deciding such cases is, I think, very well formulated by Lord Watson in the recent case in the House of Lords, *Stoomvaart Maatschappij Nederland*, L.R. App. Cases, v. 876—'When two vessels, A and B, are approaching near to each other under steam, each steering a proper course, and A is suddenly by a wrong manœuvre placed in a position of critical danger, and exposed to the obvious risk of collision, she shall not be deemed to be in fault by reason of her captain not having given the order to slacken speed or to stop and reverse as required by the 16th regulation, provided it is explained to the satisfaction of the Court that a captain of ordinary care, skill, and nerve might be fairly excused in the circumstances for not having given such order.'

'I think (1) that the captain of the 'Ariadne' had every reason to expect that the 'Owl' would pursue her ordinary course, or rather go on a starboard course; (2) that he was surprised when he found the 'Owl' coming on with her helm ported; (3) that he did not lose his head, and that he exercised a good deal of judgment in the emergency, because on suddenly finding the collision inevitable by the proceeding of the 'Owl,' he thought that slackening or reversing his engines would in all probability angle his vessel across the river still more, and so expose her to being cut down amidships, and he accordingly put on full speed ahead and ported his helm so as to convert a certain cutting stroke into a sliding blow. Had he not done so, I believe that the 'Ariadne' would have instantly gone to the bottom, with great risk both to life and property.

'On the whole matter I have come to be of

opinion that the collision was entirely due to the fault of those in charge of the 'Owl,' and that the pursuers are entitled to decree."

The defenders reclaimed, and argued—That the "Owl" was not in fault, but that the collision was entirely due to the fault of those on board the "Ariadne." The vessels were meeting nearly end on, so as to involve risk of collision, and it was the duty of each, under Admiralty rule 13, to port. The "Ariadne" did not port her helm, but continued on a starboard course. The vessels were not "crossing" in sense of Admiralty rule 14. "Ariadne" also contravened art. 30 of Clyde bye-laws, requiring steamers approaching each other in opposite directions to port their helms. The "Ariadne" ought to have stopped and reversed, but she failed to do so, and, on the contrary, when risk of collision was apparent, went full speed ahead in contravention of Admiralty rule 16. The "Owl" complied with all these rules, and if the "Ariadne" had done likewise the collision would not have occurred. The "Owl's" speed was moderate. The "Ariadne" having infringed one or more of the regulations made under the merchant Shipping Acts 1854 to 1873, she must be deemed to have been in fault in terms of the 17th section of the Merchant Shipping Act 1873. There were no circumstances rendering a departure from the regulations necessary. That section applied to any infringement, unless it be shown by the guilty party that the infringement could not possibly have contributed to the collision. They cited, in addition to the case referred to by the Lord Ordinary—*The Velocity*, 1869, L.R., 3 P.C. 44; *The Ranger v. Cologne*, 1872, L.R., 4 P.C. 519; *The Concordia*, 1866, L.R., 1 A. and E. 93; *Frankland v. Kestrel*, 1872, L.R., 4 P.C. 529; *Fanny M. Carvill*, 2 Asp. Mar. Law Cas. 478, L.R. 4 A. and E. 422—on appeal, 2 Asp. Mar. Law Cas. 565; *The Love Bird*, 1881, L.R., 6 P.D. 80; *Holt's Rule of the Road*, 151.

The respondents ("Ariadne") argued—That the "Owl" was alone to blame. She was on the wrong side of the river; she ought to have been nearer the north side. She was going at too great a speed, having regard to the fog, and so infringed Admiralty rule 16, which requires steamers when in a fog to go at a moderate speed. This was an infringement falling within scope of the 17th section of Merchant Shipping Act 1873, and therefore "Owl" must be deemed in fault. Her look-out also was defective, there being only one man on look-out immediately before the collision, although two are required by Clyde bye-laws in such circumstances. The steamers were not "nearly end on," and if they were not to be held as "crossing" in the sense of Admiralty rule 16, it was a case to which article 19 applied. There was not time nor room for "Ariadne" to clear "Owl" by porting and reversing. In continuing on the starboard course and going full speed she did what was best calculated according to good seamanship to clear the "Owl," which ought also to have starboarded. They referred to *The Jessmond*, 1871, L.R., 4 P.C. 1.

At advising—

LORD SHAND—This action has arisen out of a collision which occurred between the steamers "Ariadne" and "Owl," at a point in the estuary of the Firth of Clyde below Bowling. The "Owl," a screw steamer of 914 tons register,

proceeding down the river, struck the "Ariadne," a much smaller vessel, being of about 295 tons, on the starboard quarter and cut her down to the water-edge. The "Ariadne" had in consequence to be run ashore and beached, and considerable damage was the result. The parties have agreed to assess the amount of that damage at £4850. The owners of the "Ariadne"—the ship which sustained the damage—have claimed the full amount, on the ground that the collision was occasioned entirely through the fault of those in charge of the "Owl." The defence is, in the first place, a denial of any such fault; further, an assertion that the collision was due entirely to the fault of those who were in charge of the "Ariadne," and that, at all events, if not due entirely to such fault, there was fault inferring responsibility for one-half of the damages. The Lord Ordinary has repelled that defence, and accordingly has given decree for the full sum claimed. The defenders have now brought his Lordship's interlocutor under review; we have heard a very full discussion upon it, and judgment has now to be pronounced.

It is important, I think, that regard be given, in the first place, to the pursuers' statement of the fault which they allege those in charge of the "Owl" were guilty of, and, on the other hand, to the reply that is made to that, and the charge which the "Owl" makes against the "Ariadne." The statements on that subject are contained in the 4th article of the pursuers' condensation and the relative answer for the defenders—[reads]. The pursuers allege in that article that it was the duty of the defenders and those in charge of the "Owl" to put their helm to port at a proper distance, and to keep as near as possible to the right or starboard side of the river, being the north side, to have two men on the look-out, to keep their vessel at a speed not exceeding half power of the engines, and to ring the ship's bell at least every minute. These are the three charges made against the "Owl" by the pursuers. I observe that one plea has been omitted in the pursuers' record, and one that is of some importance in considering the ground of the Lord Ordinary's judgment, viz., there is no charge against those on board the "Owl" of fault at the moment of time when the vessels came in sight of each other, in that the helm was not then put to starboard. Now, one of the grounds of the Lord Ordinary's judgment is, that the failure to starboard the helm when the vessels came within sight of each other was the cause of the collision, and that that was the fault of those in charge of the "Owl." But it is worthy of notice that this fault is not noticed in the record. The failure alleged against them, and the only fault that is alleged against them, is a failure to port their helm at a proper distance.

Then, upon the other side, in answer to this averment, it is explained that as soon as the collision appeared to be likely to occur, the captain of the "Owl" ordered his helm hard a-port; and the defenders go on to say with reference to the rules for preventing collisions issued under the powers of the Legislature—"It was the duty of those in charge of the 'Ariadne' on sighting the 'Owl' to have put her helm to port, and to have stopped and reversed her engines, and if these measures had been adopted the collision would not have occurred; but those on board

the 'Ariadne' failed to adopt either of them, and, on the contrary, starboarded her helm and continued her high rate of speed, and thus made a collision inevitable." These being the contentions on each side, the Lord Ordinary has found that the "Owl" was in fault in two respects—in the first place, because although the day was one in which all parties are agreed there was a heavy fog upon the river, the "Owl" was not proceeding at a moderate speed; and secondly, because, in the view of the Lord Ordinary, those in charge of the "Owl" were wrong in putting her helm hard a-port on sighting the other vessel. The second point is put thus by his Lordship in his note:—"I think, therefore, it is on the evidence impossible to hold that the 'Ariadne' was at such a distance from the 'Owl' as to have warranted those in charge of her in disregarding the Council rule 14, and endeavouring to comply with the Clyde rule 30; and I cannot do otherwise than hold, that as the 'Ariadne' was on the starboard course when the 'Owl' sighted her, she did right in continuing that course, and that the 'Owl' executed the wrong manœuvre in putting her helm hard a-port. It is quite true," his Lordship proceeds, "that the 'Owl' not only put her helm hard a-port, but reversed her engines and went astern, and the defenders maintain that it was the duty of the 'Ariadne,' whatever course she was on, to have slackened speed, reversed her engines, stopped, and gone astern. My opinion is that it was not her duty to do so; but even if it had been so, the risk of collision was, in my opinion, created by the wrong manœuvre executed by the 'Owl,' by putting her helm hard a-port, whereby the 'Ariadne,' being then on a starboard course, must have run into or been run into by the 'Owl.'" Now, that is the passage in which the Lord Ordinary has held fault upon the part of the "Owl" which is not charged upon this record—in which there is no complaint that the "Owl" did wrong by putting her helm hard a-port, when at that point of time she ought to have put her helm to starboard. Taking each of these matters separately, the first question is whether the Lord Ordinary's judgment is right on the first point, viz., was the "Owl" proceeding at a moderate speed, and with reference to that point it is necessary to refer to the rule for preventing collisions which applies to this matter, that is, article 16, which is in these terms:—"Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall when in a fog go at a moderate speed." It is the second or concluding part of this rule on which the owners of the "Ariadne" found. The fog was unquestionable, and they say that the "Owl" when going down the river did not go at a moderate speed. It is maintained on this rule that that is a question of fact to be determined on the evidence, and on that question of fact I agree with the Lord Ordinary. It is impossible to say that the "Owl" was going at a very rapid speed if the day had been clear and the weather fine, but as there was a fog at the time, it was equally clear that she was bound to exercise great caution in the speed at which she was going down the river, and I am of opinion that that caution was not exercised.

The pursuers of this action seem to think, if

one may judge from the record—and there is a good deal of evidence in the case to prove it—that the strong point which they had against the "Owl" was that throughout her course proceeding down the river she kept too close to the south side of the river, which she was not entitled to do, and it is impossible to read the record without seeing that that was the real fault. The Lord Ordinary says that matter has not been proved; and it is clear from the evidence that there was at this particular part of the river, although the sea-going channel is of moderate size, a considerable sheet of water from north to south, and for the safety of vessels going down the river it was necessary to keep close to the south side, because on that side only the beacons which guide the navigation are to be seen by those navigating the vessel, and the proper course is marked out, and the practice and indeed the necessity of the river seems to show that the "Owl" was entitled to keep so close to the south bank—I do not say so close that vessels going up would not be able to pass—but at any rate so close as to be able to see the beacons. But while I think that is the result of the evidence, the very circumstance that she was entitled to keep on that side of the river is a point that tells against the "Owl" on the question of speed; for those in charge of her taking her down the river, must have been aware that they were traversing ground that would necessarily be traversed by vessels coming up the river, whose proper side it was. The "Owl" was towards the south side, and those in charge of her were bound to know that they were in the track of vessels going up the river, and looking to the fact that this would be the place where vessels of the tonnage I have mentioned would be, it is quite clear the greatest caution ought to be exercised in the matter of speed, and I think that cannot be more clearly emphasised than when one sees from the evidence in this case that on this foggy day, in a distance of nine-tenths of a mile, this vessel met no fewer than four steamers going towards Glasgow, between Bowling and the place of the collision. That being the duty of those in charge of the "Owl" in regard to the pace they were going, we must keep in view that they were going with an ebb tide which was running out at the rate of about $1\frac{1}{2}$ miles. And we have this piece of real evidence, that the steamer occupied about 2 hours and 5 or 10 minutes from the time she left the Broomielaw at Glasgow till the time she reached the point of collision—a distance of about ten miles—so that she had traversed that distance in about 2 hours, that is, that she had been going at a steady rate of about five miles an hour on this foggy day. The rate must have indeed been faster, for we know from the evidence that she was at times going ahead, sometimes stopping, and other times going dead slow, as obstructions or other vessels were met, so that her normal pace must have been more than five miles an hour. I take it that after leaving Bowling, where it is quite clear she slowed, her pace was increased and must have got faster as she went on, till just before or at the time of sighting the "Ariadne" her speed must have been somewhere about six or seven miles an hour. I think that was too great a pace on a foggy day for a vessel of the size of the "Owl," with vessels coming up in the track in which she was pursuing. And there is

further proof adduced by the pursuers in this action from the steamer "Amethyst," the last steamer which met the "Owl" before the collision took place. The master and the mate both say the "Owl" was proceeding too fast—so much too fast that the master not only thought so, but remarked so to one or two on board his vessel. And there is also a witness who was in a small boat immediately over the dyke or sea-wall in question at the time, and who speaks to the same thing. And when it is borne in mind that those in charge of the "Owl" were informed that the pursuers' steamer "Ariadne" was immediately behind the "Amethyst," I think there was every reason to call on those in charge of the "Owl" to slacken their pace, which they did not appear to have done, and I am therefore of opinion that there was fault on the part of those in charge of the "Owl;" and further, that that fault contributed to the accident, because there is every reason to believe that if that vessel had been going at a much slower pace, as I think she should have done, the precaution which the captain took when he saw the "Ariadne" coming up the river—of stopping and slowing and porting her helm—would have drawn her out of the line of the "Ariadne," and might have resulted in the avoidance of this collision altogether, or in the collision itself being very much weaker than it was, and much less damage being done. And it is right to say that if this fault of the captain of the "Owl" contributed to the accident, his principal must answer for the legal result here, and that the "Owl" must to some extent be held responsible for the accident, for it is provided by section 17 of the Mercantile Shipping Act 1873, that "if in any case of collision it is proved to the court before which the case is tried that any regulation for preventing collisions contained in or made under the Merchant Shipping Acts of 1854 and 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary"—that is to say, that if the fault is established, the legal result is liability, even although it has not been proved that the fault contributed to the accident.

I have said the Lord Ordinary has found a second ground of fault against the "Owl." I shall in the meantime defer notice of that till I come to deal with the position in which the vessels were at the moment when they sighted each other; but I may say this now, that I do not think that the pursuers have made the point in this case which is material upon the second ground of charge in art. 4 of the condensation—I mean failure to keep a proper look-out. Now, it is true that the Clyde rule requires that two persons should be on the outlook at the bow of each vessel, and it is also quite true that there is a good deal of evidence to show that this is a very proper and very necessary regulation. It is proved that the vessel had two persons on the look-out, and that very shortly before the collision occurred, the mate, who himself was on the outlook, sent the other man away, and he was absent for a minute or two at that time; but it appears to me that that circumstance had nothing to do with the accident that occurred, because the mate at once saw the "Ariadne," just as rapidly as anyone

could have done, and I rather think that that evidence proves one of several things—that he sighted the "Ariadne" sooner than the "Ariadne" the "Owl." This is not one of the rules embraced in section 17 of the Merchant Shipping Act of 1873, and that being so, unless it had been shown that this fault did contribute to the accident, which I think it did not, I think it is of no materiality in a question between the parties.

The next question that arises is, whether there was fault antecedent to the collision on the part of those who were in charge of the "Ariadne?" The owners of the "Owl" also refer to article 16 of the same rule to which I have already adverted, but they found upon the earlier part of that article, which is thus expressed—"Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse." Now, that the captain of the "Owl" complied with this rule there can be no question. He did so at once upon sighting the "Ariadne." What was the conduct of the "Ariadne" on the other hand? No step of this kind was taken—neither stopping nor reversing the engines. The rule was simply disregarded. The "Ariadne," it is true, was not going at the same pace as the "Owl." The captain, I think, says that she was going up the river against this ebb tide at $3\frac{1}{2}$ or 4 miles an hour, and to that speed there was no objection. It was a moderate speed when nothing was in sight. The moment the two vessels came in sight all parties are agreed that there was risk of collision, and this rule in its proper sense ought to have been acted on—"Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse." The captain of the "Ariadne" says that if he had stopped, or stopped and reversed—I am not sure which—he could not have brought his vessel to a stand within 50 or 60 yards, and there is evidence to the same effect. There has been, I think, no good reason shown for disregard or the disobedience of this rule. What the captain of the "Ariadne" did was to order his steersman to keep steady on his course, which he says was a course at that time directly up the river, and after an interval he ordered her engines to be put full speed on. It may have been justifiable after that interval that he should endeavour to get out of the difficulty in which he was placed by putting steam on. But there was an imperative necessity on him, and the first thing he ought to have done was to obey the directions of article 16. The Lord Ordinary on this branch of the case is in favour of the owners of the "Ariadne," taking the view that in the circumstances in which that vessel was placed, a captain of ordinary care, skill, and nerve might be fairly excused in the circumstances for not having given such an order—that is, the order to stop and reverse. The Lord Ordinary in his very careful and elaborate judgment also refers to Lord Watson's opinion in the case of *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Company*, July 23, 1880, L.R. 5 App. Cases, 876, and quotes a passage from his Lordship's opinion as stating the principle on which the Judges of the Court of Appeal had decided the case. But on looking further into that opinion it is clear that Lord Watson cites the opinion quoted, not

for approval, but merely to show what the Court below had held, for after referring to the opinion of Lord Justice Brett—for the purpose of disposing of the grounds thereof and disapproving of them—the result he reaches for himself is, that he will not determine what a captain of ordinary care, skill, and nerve would do, but require of him what is incumbent on everyone, viz., to stop and reverse engines, unless he can show that he falls under the exception provided by article 19, which is to this effect, that “in obeying and construing these rules due regard must be had to all dangers of navigation, and due regard must also be had to all special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid imminent danger.” So that the position of the captain of the “Ariadne” is this, that he was bound to slacken speed, or, if necessary, to stop and reverse, unless he is in a position to show that departure from that rule was necessary to avoid immediate danger. It appears to me that there has been an entire failure to show any such necessity, and I venture to think that if the Lord Ordinary had taken the view which I think is clearly established by the case in the House of Lords to which his Lordship refers, that his decision would have been the other way. On this point too, therefore, I think it is the result of the evidence that there is nothing proved to justify the disobedience of this vessel, and I think that disobedience contributed to the result. Suppose that after the “Owl” had stopped and reversed, on the one hand, the “Ariadne” had done so too, and that way was stopped on each vessel, there might have been no collision, or one of very much less force. But again I say, whether this fault contributed to the result or not is immaterial, and the Court have nothing to do with that, for if fault be found, legal liability is the result. Up to this point, therefore, it appears to me that the evidence shows that there was fault on both sides which caused the collision, and to inquire into who is mostly to blame is not necessary, or who was to blame for the steering when it was seen that the collision was likely to occur. I think there is evidence to show that there was fault on both sides, and that being so, the damage must be borne by the parties on each side.

Upon the remaining point of the case I confess I am unable to agree in holding with the Lord Ordinary that the “Owl” was unskillfully or improperly managed in her helm being put to port when the collision appeared to be inevitable—a view which was not presented by the pursuers when the case was brought into Court. The Lord Ordinary expresses his opinion on this point in the passage in the reclaiming note, which is in these terms. He says—“Undoubtedly from the position when the two vessels first sighted each other, they were not end on or nearly end on, as the mate of the ‘Owl’ saw both the masts of the ‘Ariadne’ quite out of line. The ‘Ariadne’ was truly crossing, and had the ‘Owl’ on her starboard side, in such a manner as to involve risk of collision. The ‘Ariadne’ properly kept on her course towards the north side of the river, and the ‘Owl’ seeing that the ‘Ariadne’ was keeping out of her way, ought to have kept her own course straight down the river, or ought to have

starboarded, and certainly should not have ported, as such a manœuvre could not fail to lead to a collision.” Now, the first observation that one makes on this passage is this, that the captain of the “Owl” in porting his helm was obeying what was *prima facie* the rule applicable to his circumstances. In porting his helm he was seeking to pass to his own side, and he was seeking to obey the rule of the road enforced by one of the regulations which I shall quote immediately. The next observation I have to make is, that this view of the Lord Ordinary was not adopted by the counsel for the pursuers. They expressly repudiated this as a case of crossing, and put the case as one in which the “Ariadne” was not crossing the course of the “Owl” at all, but was clear of the “Owl” upon the north side of the river, and accordingly the judgment, in so far at least as it has been given on other grounds, is very much weakened thereby. I may notice, in the third place, that this view of the vessels crossing each other, if it was the case, must have appeared to those on board the “Owl” to be not so, because even the officer of the “Ariadne” says that that was not so. Captain Gregson says—“When the vessels were near each other the ‘Ariadne’ was very little angled across the bow of the ‘Owl.’ Before I gave the order to port, so as to make the blow a sliding blow, the ‘Ariadne’ appeared to be going at an angle of a point or half a point across the bow of the ‘Owl.’ After getting the starboard helm, and the order steady, and before the helm was ported again, the ‘Ariadne’ would be going at an angle of perhaps half a point, if that, across the river. To anyone on board the ‘Owl,’ I don’t think the ‘Ariadne’ would look as if she were crossing the ‘Owl’s’ bows; she would appear more like a vessel keeping to the starboard side—to the north side of the river; I am sure of that.” Buchanan, the next witness, says—“I don’t think the vessel was angled across the channel after she got the starboard helm. (Q.) May you have been a little?—(A.) No. The amount of starboard helm she got was to straighten her up the river.” Now, these are the two best witnesses for the pursuers, and they present the case in this way, that they were angling across the river to the north when the “Owl” was sighted, and that they then straightened their ship on the starboard course with the intention of passing the “Owl” on the north side altogether. They say they were clear of the “Owl,” and if that be so, it is impossible to sustain the view on which this judgment proceeds, that these were crossing vessels, because the officers on board the “Ariadne” say those on board of the “Owl” could never take them for crossing vessels, with the result that the rule as to crossing vessels did not apply, but that the “Owl” should pass on their starboard or south side—and so it appears to me that the view of the Lord Ordinary, if not displaced, is, at all events, materially weakened. But, then, what is the rule stated by the defenders to be applicable. They maintain that the 13th rule is applicable—“If two ships under steam are meeting end on, or nearly end on, so as to involve the risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.” The rule has been amplified by the later regulation of July 1868, which provides that “The said two

articles (Nos. 11 and 13) respectively only apply to cases where ships are meeting end on, or nearly end on, in such a manner as to involve the risk of collision. They consequently do not apply to two ships which must, if both keep on their respective courses, pass clear of each other. The only cases in which the said two articles apply are when each of the two ships is end on, or nearly end on, to the other—in other words, to cases in which by day each ship sees the mast of the other in a line or nearly in a line with her own, and by night to cases in which each ship is in such a position as to see both the side lights of the other. The said two articles do not apply by day to cases in which a ship sees another ahead crossing her own course, or by night to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light or a green light without a red light is seen ahead, or where both green and red lights are seen anywhere but ahead." Now, that is the rule which the defenders say should have been observed on this occasion. The pursuers would have to put themselves in an exceptional position, for they would require to have recourse to a rule which would permit them to cross on the wrong side of the river—that is, rule 19, which provides for an exception to the other rules. I take it that when anyone founds on that rule, the *onus* lies on those in charge of a ship to show that when they departed from the ordinary rules such departure was necessary.

The next question is as to the position of the vessels, and it is very difficult in the circumstances in which the vessels were to say what was the precise distance they were from each other when they sighted each other. The Lord Ordinary takes 150 or 180 yards as the distance. It rather appears to me, taking the evidence as a whole, that 200 or 230 was the distance. That is the first point we have in the case. The next is, that both parties are agreed that both vessels were to the south side of the mid-channel. The expanse of water was a good deal more than 280 feet, but there was a space of 280 feet of deep water, and the mid-channel would thus be 140 feet from each side. Both parties are agreed that both of the vessels were on the south of the mid-channel—the "Owl" going down the river at a distance of 70 or 80 feet from the sea-wall, and the "Ariadne" coming up at a distance very nearly the same, or a little greater, from the sea-wall. Those on board the "Ariadne" say that they found the "Owl"—the captain himself says—half on the starboard bow, while, on the other hand, the usual conflict of evidence that we find in collision cases occurs here, for the officers on board the "Owl" say that the "Ariadne" was half a point on their port side, nearly the same distance. It is difficult—if indeed it is possible—to reach accuracy in these matters, but looking to the fact that both vessels were in a channel of the breadth and at the distance I have mentioned, it appears to me on the evidence that the case was one in which the rule applied, that if these vessels were not end on, they were at least nearly end on within the meaning of the rule. One cannot express an opinion strongly, but I cannot doubt that if the rules had been obeyed on both sides—the engines stopped and reversed

if necessary, the helms put to port as the law required—the collision would not have occurred. There is a piece of evidence to be found on that point by those on board the "Ariadne" herself. Buchanan, the second mate, says, when pressed on that point, that if he (*i.e.*, the "Owl") had put up his helm they would have cleared. Then this passage occurs—" (Q.) If your vessel had done what I have put to you—stopped and reversed her engines whenever she saw the 'Owl,' and at the same time put her helm hard a-port—would not that have helped to keep the vessels clear also?—(A.) Yes, if the other vessel had done the same. (Q.) If both the 'Owl' and the 'Ariadne' had done what the regulations say whenever they saw each other, don't you think they would have passed clear, or at all events not have come into collision?—(A.) It was not our place to port for him; he was on our starboard bow. (Q.) Whether it was your place or not, don't you think the vessels would never have come into collision?—(A.) Yes; but we should not have ported for him." Now, this is an admission by the second mate of the vessel that if both parties had observed the rule of the road the collision would not have happened. The "Owl" certainly, from the moment she sighted the "Ariadne," observed every rule incumbent on her. The "Ariadne" did not. Upon this question of observation it is worthy of notice, as was observed in the course of the argument, that in two cases which have occurred in England, Dr Lushington, who has great experience in such matters, has expressed a practical opinion. In one of these cases—the case of *Trotter*, in July 1865, and only reported in Holt's "Rule of the Road," p. 160—he says, in addressing the Elder Brethren:—"Looking at the facts of this case, and the conflicting evidence—for undoubtedly it is conflicting on this point as well as many others—are you of opinion that these two vessels were meeting end on or nearly end on? Part of the evidence says they were within two points of meeting end on. I should consider that if they were within two points of meeting end on they would fall in with the latter part of the statement—nearly end on; but on the facts you will give your own opinion." And in the subsequent case of *The Thames v. The Stork* the point is put more shortly, for there he says, p. 153 of the same book—"If, according to the statement of the 'Stork,' she was three points on the starboard bow, I do not pretend to form an opinion what would be her duty then, but I must leave it entirely to your judgment and nautical experience. In order to excuse her from porting, it must be quite clear that there were three points difference and not less, for surely it would never do to contend, where they were so nearly meeting end on, that if the evidence should be that there were one or two points only in the direction they were meeting, that that rule would be sufficient to dispense with the observation of the rule." It is true that the case was appealed to the Judicial Committee of the Privy Council, and then Lord Westbury observed (p. 154 of Holt's "Rule of the Road")—"Whether the vessels were in such a relative position as to bring them within the rule 13 (which we entirely agree with the learned Judge ought to have a larger interpretation put upon it in favour of its being a rule of caution and safety), I find, I say, whether

the vessels were in such a position was a question of fact to be determined on the evidence. We must therefore take the case that this rule as being one of caution and safety is to have a large interpretation put upon it." Taking the case, then, upon this footing, that this rule is one to have a large interpretation put upon it in favour of its being a rule of "caution and safety," what is its application here? The captain of the "Ariadne" (Gregson) says—"The steamer would be from half a point to a point on our starboard bow. I could not exactly say. She was distinctly on our starboard bow." If that is not nearly end on, I do not know what nearly end on is in a case of this kind. Those in charge of steamers meeting in this way must bear in mind what, I think, has been forgotten by Gregson in his evidence, that he is not only bound in himself to fulfil the rule laid down for navigators, but entitled to assume that a vessel meeting him will do the same. These rules, which are framed for safety of navigation, are all framed on the supposition that navigators will depend on each other for the observance of them. The captain of the "Owl" did port his helm in compliance with the rule, and the "Ariadne" was entitled to assume that that would be done, and was bound to take the same course, and therefore upon that part of the case, without saying more upon it, it appears to me that the Lord Ordinary's view is not sustained by the evidence.

His Lordship has referred in support of his view to passages in the evidence of two witnesses taken, as he says, from the enemy's camp. These witnesses are no doubt worthy of every consideration, but I can only say that, after long examination-in-chief and a long cross-examination, they do not appear to me to be referring to or speaking of the time when these two vessels sighted each other—at that point of time when these rules should have been acted on—but that they refer to a time when the vessels came nearer each other than when first sighted, and are not to be taken as meaning anything else than that these vessels should have ported when they first sighted each other.

On the whole matter, therefore, I think there was fault on the part of the "Owl" in respect she did not proceed at a moderate speed, and fault on those in charge of the "Ariadne" that they did not slacken speed, and, if necessary, stop and reverse engines, in compliance with the same rule. As to the proceedings of the vessels in regard to steerage, I think the captain of the "Owl" was not bound to starboard, and that the "Ariadne" was in fault in not having ported helm. It was stated that if she had ported there was a risk of coming into collision with the dyke. I feel that too, but although not called upon to port violently, or to put her helm very far to port, I think she ought to have ported to some extent, and the other vessel doing the same, the "Ariadne" would have passed on the same way as the other four vessels did who complied with the rule, and would have cleared the sea-wall as they did without collision either with the passing vessel or the wall.

The result, if your Lordships agree with me, will be that the damage will have to be borne mutually by the two vessels.

LORD DEAS concurred.

LORD MURE—This case is attended with considerable difficulty, as most cases of collision are, and the difficulty is not lessened from the fact that where this collision occurred the navigation had to be carried on in a fog. On the evidence I have no difficulty in concurring with Lord Shand and Lord Deas in thinking that the collision was not entirely due to the fault of the "Owl." My difficulty has been to find any sufficient ground for holding that that vessel contributed in any respect to the result. On the main facts of the case I agree with Lord Shand—that the immediate cause of the collision was the failure of the "Ariadne" to comply with the rules of the Clyde Trustees and of the Admiralty, which are substantially the same, and distinctly provide that vessels in the position in which the "Ariadne" and the "Owl" then stood towards each other should port their helms; and if in that way a collision was not likely to be prevented, that they should then stop, and even reverse, their engines. Now, the "Owl" complied with all these rules. She ported her helm, and when that would not do she reversed her engines. The "Ariadne," on the other hand, starboarded her helm, and did not alter her speed. The captain and some of the crew of the "Ariadne" maintain that that was the best way out of the difficulty in which they found themselves when they sighted the "Owl." I am, however, unable to adopt that view, and I think the evidence of Buchanan, the second mate of the "Ariadne," who was at the wheel at the time, is pretty conclusive the other way. For he in effect admits that if both vessels, as soon as they saw each other, had ported their helms, slowed, and reversed, the collision would have been avoided. He is asked—"If your vessel had done what I have put to you—stopped and reversed her engines whenever she saw the 'Owl,' and at the same time put her helm hard a-port—would not that have helped to keep the vessels clear also?" The answer is—"Yes, if the other vessel had done the same." Now, that is what the other vessel did. He (witness) is then again asked—"If both the 'Owl' and the 'Ariadne' had done what the regulations say whenever they saw each other, don't you think they would have passed clear, or at all events not have come into collision?"—(A.) It was not our place to port for him; he was on our starboard bow." It appears therefore to have been to some extent a question of etiquette in this witness' view. But he is further asked—"Whether it was your place or not, don't you think the vessels would never have come into collision?"—(A.) Yes; but we should not have ported for him." It thus appears from the evidence of this witness, confirmed as it is by the officers of the "Owl," that if the rules had been followed by both vessels the collision would not have occurred; and it was thus, in my opinion, caused by the failure of the "Ariadne" to comply with the rule.

The question therefore comes to be, whether there was anything in the conduct of the "Owl" which makes her contributory to the collision? I agree with Lord Shand, that although she may in one sense have been on the wrong side of the river, it was usual, and even, I think, necessary in some cases, for vessels to come down the river on that side at that part of the Clyde. That has been proved by Mr Deas, who is the engineer of

the Clyde Trust, and by Captain M'Gaw, who has had 21 years' experience in the navigation of the Clyde. They are agreed that the water is deeper on the south side at that part of the river, that the main navigating channel is on that side, and that it is usual for vessels coming down to keep to that side. I do not therefore think there was any fault on the part of the "Owl" in being on that side of the river, or that she is proved to have been too near the south wall. She was about 100 feet according to some of the witnesses, about 70 feet according to others, from the wall, and had passed the "Amethyst" at about the same distance with perfect safety when both obeyed the rules of the river to which I have referred. No doubt the "Amethyst" was a smaller vessel. But there was, I think, plenty of room for the "Ariadne," which has not above 20 feet of beam, to pass, with 70 feet of deep water up to the very wall between her and the "Owl," as deponed to by Mr Deas; and I cannot see that in these circumstances the "Owl" was to blame for being too near the south side.

The difficulty which weighs with your Lordships is, as I understand it, as to the speed at which the "Owl" was coming down the river, which your Lordships think was too great, especially in a fog, and so exposed the navigation to risk. The evidence on that is certainly very contradictory, but taking it on the whole I cannot say that it is sufficient to show that the speed was beyond what it ought to have been; for M'Gaw, a witness of great experience, who saw the "Owl" passing about a mile from where the collision took place, says—"I thought she was going very slow," and I am not satisfied that the vessel is proved to have been going at a greater speed than the Clyde regulations allow.

But assuming your Lordships to have come to a different conclusion as to the speed from that which I have now indicated, the case will of course fall to be dealt with as one of joint liability, and, according to the authorities, the loss must be divided equally between the parties. To that extent I have no hesitation in concurring with your Lordships in holding that the defenders ought to be freed from the claim made against them by the pursuers.

LORD PRESIDENT—In considering this case I have been much surprised with the views which Lord Mure has expressed. I think fault has been established on the part of the "Ariadne." She committed a breach both of the regulations of the Clyde Trustees and of the Admiralty, and contributed to bring about the collision.

But I cannot altogether absolve the "Owl" from blame, and I agree on that part of the case with Lord Shand. No doubt she was going down the south mid-channel, and I am prepared to accept the view that she had no alternative but to take that course. There was great danger of a vessel of her size going aground. But she was just in the track of vessels coming up, and she was bound to take into consideration the risk of collision with them. That imposed an obvious duty of caution at such a time and such a place. The question is whether she has discharged herself of that duty. All that I shall say is, that considering the ebb tide and the fog I do not think that she has discharged herself of that duty.

I therefore concur in holding that there was fault on both sides, and the damage which occurred must be borne equally.

ROBERTSON for the pursuers then moved for expenses, on the ground that they had—at a date after the action had been raised, the record closed, a proof ordered, and preparations begun by the parties for it—made a written offer to settle the action on the defenders paying 50 per cent. of a sum of £5346, 9s. 3d., the defenders to pay all expenses then incurred. The defenders wrote in reply refusing to settle the action on this or any other footing. This distinguished the case from the rule laid down in *The Clyde Shipping Company v. Glasgow and Londonderry Steam Packet Company*, July 2, 1859, 21 D. 1131.

At advising—

LORD PRESIDENT—In a case of this kind, and indeed in any case, an offer may be made either before or after the action has been raised, but it will be dealt with in a different way accordingly as to the question of expenses. If a very reasonable offer were made and refused before litigation had commenced, even although the ultimate judgment might not correspond exactly with it, or even exceeded it, it is a fair subject for our consideration in awarding the expenses. That was the kind of offer referred to in the case of *The Clyde Shipping Company*. But an offer made after the action had been raised, and things are already in Court, is on a different footing, and must be dealt with in a different way. It should, to be regular, be made in the form of a judicial tender, and then its amount can be compared with the sum ultimately awarded by the judgment of the Court. If the offer is not in the form of a judicial tender, we must look at the whole circumstances of the parties as litigants in Court. Here the action had been raised, the record closed, and proof ordered, and the parties were preparing the case for trial, before any whisper of an offer was heard. The offer which the owners of the "Ariadne" then made came to this, that they should be paid 50 per cent. of £5346, 9s. 3d., and all their expenses incurred in raising the action. Now, that is not quite in accordance with the judgment in the action. We have awarded them 50 per cent. of £4850, and we have yet to decide whether they are to get expenses. I see no reason for taking this case out of the ordinary rule. I think there should be no expenses given on either side.

LORDS DEAS, MURE, and SHAND concurred.

The Lords pronounced this interlocutor :—

"Recall the" Lord Ordinary's "interlocutor: Find that on 11th December 1879 the steamship 'Ariadne' belonging to the pursuers, and the steamship the 'Owl' belonging to the defenders, came into collision on the Clyde at a place opposite Milton Island: Find that the said collision was caused partly by the fault of those in charge of the 'Owl,' and partly by the fault of those in charge of the 'Ariadne': Find that the 'Ariadne' was injured by the said collision, and that the damage has been fixed by agreement of parties to amount to £4850: Find that it is

not alleged or proved that the 'Owl' sustained any injury: Find that in this state of the facts the owners of the 'Ariadne' are entitled to recover from the owners of the 'Owl' one-half of the damage sustained by the 'Ariadne.' Therefore decern against the defenders for payment to the pursuers of the sum of £2425, with interest, in terms of the conclusions of the summons: Find neither party entitled to expenses," &c.

Counsel for Pursuers (Respondents)—Robertson—Dickson. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Reclaimers)—Lord Advocate (Balfour, Q.C.)—Mackintosh—Alison. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, November 17.

FIRST DIVISION.

CARRIGAN, APPLICANT.

Poor-Roll—Certificate—Where Kirk-Session in Abeyance—Act of Sederunt, 21st December 1842, secs. 2, 3, and 4.

Mrs Jemima Morgan or Carrigan was an applicant for the benefit of the poor-roll. She belonged to the Old Kirk Parish of Edinburgh, the kirk-session of which was at the date of her application in abeyance. She was in consequence unable to produce a certificate from "the minister and two of the elders of the parish," in terms of sections 2, 3, and 4 of the Act of Sederunt, 21st December 1842. She, however, produced a certificate by the minister and two of the elders of the High Kirk, which was the kirk in which the banns of marriage of parishioners of the Old Kirk were in use to be proclaimed. This certificate was in the usual form, but added that the statements in it were made on the authority of the Rev. Charles Wedderburn, minister of the Cowgate Free Kirk, at whose kirk the applicant worshipped. In the circumstances the Court dispensed with the Act of Sederunt, and remitted the applicant to the reporters on the *probabilis causa litigandi*.

Counsel for Applicant—Forbes. Agent—J. H. Jameson, W.S.

Thursday, November 17.

OUTER HOUSE.

[Lord Fraser.

FORBES v. FORBES.

Husband and Wife—Divorce—Desertion—Statute 1573, cap. 55—What is.

Held that an action of divorce by a wife against her husband is relevant, and decree of divorce pronounced where the wife had first left her husband without any reasonable excuse, but had subsequently begged leave to be allowed to return to cohabitation, the husband refusing to resume cohabitation, although an offer was made to allow her to

occupy a separate bedroom in his father's house, where her husband lived.

This was an undefended action of divorce on the ground of desertion by a wife against her husband. The parties were married on 2d June 1865, and lived together as man and wife until 3d July 1865, when the pursuer left her husband's house, alleging that her husband did not give her his confidence, nor allow her to perform the ordinary duties of a wife. Thereafter the pursuer made frequent attempts to return and live with her husband, which attempts he always repelled; and in particular she averred—" (Cond. 6) In the spring of 1867 the pursuer again went to the house of the defender's father, where the defender was residing, accompanied by Andrew Strachan, a friend of the pursuer, and again proposed to return to him. Mr Strachan stated in the presence and hearing of the defender and his father that he had come with the pursuer, who wished to offer herself back to live with defender, and that the pursuer and defender should let bygones be bygones. The defender, however, refused to speak to the pursuer. His father stated that there was a room and a bed for pursuer if she liked to sleep by herself. The pursuer, hoping that the defender would be reconciled, remained in the house for five days, occupying the said room. During that time the defender refused to sleep with her, or to occupy the same room with her, or to have any intercourse or connection with her. He never spoke to her, or sought her society, but, on the contrary, avoided her. The defender and his father and his friends treated the pursuer with the utmost coldness and disrespect, and avoided as much as they could having any social intercourse with her. The pursuer in consequence was forced to seek employment for herself, and she has for some years been engaged as a sick-nurse in a nursing institution in Glasgow. (Cond. 7) The defender has thus, since the year 1865, or at least for upwards of four years, wilfully and maliciously failed in his duty of adherence to the pursuer, and he has during the said period remained in malicious and obstinate desertion from her and her society. The pursuer has made various attempts, as above condescended on, to induce the defender to return to her society and company, and to adhere to her as his wife, but this the defender refuses to do. The present action has in consequence been rendered necessary."

She pleaded—"The defender having been guilty of wilful and malicious non-adherence to and desertion of the pursuer for at least the space of four years, the pursuer is entitled to decree as concluded for."

The action was undefended.

The Lord Ordinary held the libel relevant, and upon evidence led pronounced the following interlocutor and note:—"Finds that the pursuer Eliza Jane Neish or Forbes and the defender John Forbes are lawfully married persons: Finds the defender guilty of wilful and malicious non-adherence to and desertion of the pursuer, her society and fellowship, for upwards of four years prior to the date of raising the present action, and still continues in such non-adherence and desertion: Therefore divorces and separates the defender from the pursuer, her society, fellowship, and company in all time coming: Finds