strictures on his habits were disparaging and insulting. Her latent affection only leaks out in occasional outbursts of violent jealousy.

We have before us none of the correspondence between 1916 and October 1918, but there can I think be no doubt that the 1916 letters made their permanent mark upon the appellant, nor is it surprising that they did. They were never withdrawn or qualified by the respondent in any communication produced; the appellant's letters became visibly colder, and until after the visit to Perth and the appellant's letter of 20th November 1920, he never got beyond the "My dear Jean" form of address to which the lady so violently objected.

The position when the appellant returned to England in 1920, I think, on his side clearly was that his affection had cooled as the result of his wife's outbursts in 1916, but he was ready and I think desirous to start entirely anew if his wife would submit to his inflexible condition that their matrimonial residence while he was here should be at his parents' house at Perth and nowhere else.

If it was the appellant's desire that they should begin life anew, I agree that no other condition would have been so likely to defeat it, and I cannot myself doubt that it was only the respondent's real affection for him, which after two years of war service had recovered the 1916 eclipse, that at length constrained and enabled her to go to Perth.

And here in the last stage of the case I am of opinion that the appellant's account of what happened is on the whole to be preferred to the respondent's. It is indeed more amazing than ever that again the appellant's silence was unbroken. But on the other hand his account is in entire accord with everything that happened throughout their married life — and, if accepted, leads to the conclusion that the respondent, try as she might, could not bring herself to the marital act.

The Lord Ordinary would have accepted this conclusion emerging from the Perth visit but for the appellant's letter of November 20. In my judgment that letter is on a par with his undated letter of 1916; he was ready to give his wife when he wrote it another chance; his patience was not yet exhausted. That he sent such a letter has given me no difficulty. What has caused me trouble was the attempt made by the appellant in the witness-box to explain away its terms. That attempt was, in my judgment, a complete failure, and I do not know that the fact that it was made would not have fatally discounted in my eyes the reliability of the appellant's evidence as to the course of events at Perth had it not been for the respondent's letters written after the final breach between the parties. In these letters, while she offers submission in the fullest terms and begs for another favourable opportunity for demonstrating her sincerity, she nowhere suggests that the appellant at Perth dispensed her from all further marital compliance as has, in these proceedings, been suggested on her behalf.

These letters, to my mind, re-establish the substantial correctness of the appellant's evidence which accepted satisfies me that as in India so at Perth, with every desire in the world, the respondent found herself incapable of performing the sexual act with the appellant.

I think therefore that his case for a decree of nullity has been made good.

Their Lordships ordered that the interlocutors appealed against, except in so far as they find the defender entitled to expenses, be reversed; that the cause be remitted to the Court of Session with instructions to pronounce decree in terms of the first conclusion of the summons; and that the respondent have her costs in this House.

Counsel for the Appellant — Macmillan, K.C. — Scott. Agents — Bonar, Hunter, & Johnstone, W.S., Edinburgh — Crusemann & Rouse, London.

Counsel for the Respondent—Moncrieff, K.C. — Keith. Agents — Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

Monday, February 11.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

PACIFIC STEAM NAVIGATION COMPANY (OWNERS OF S.S. "BOGOTA") *v.* ANGLO-NEWFOUNDLAND DEVELOPMENT COMPANY, LIMITED (OWNERS OF S.S. "ALCONDA").

(In the Court of Session, March 1, 1923 S.C. 526, 60 S.L.R. 333.)

Ship—Collision—Contributory Negligence—Subsequent and Severable Negligence—Vessel Emerging from Dock into River—Disregard by Approaching Vessel of Signal that River Blocked—Clyde Navigation Bye-laws, Nos. 3, 18, *and* 19.

The "Bogota," a steamer 415 feet long, was being towed out of a graving dock on the north bank of the Clyde, stern first, by a tug, the width of the river *ex adverso* of the dock being about 500 feet. When she was about two-thirds out of the dock and still athwart the river, her tug being about mid-channel, she sighted the "Alconda" three-quarters of a mile away coming up the river under her own steam with two tugs attached. The "Bogota" had steam up but was not using it, her intention being not to use it until she had been straightened out in the river preparatory to proceeding up stream. On sighting the "Alconda" she gave four blasts of her steam whistle, twice repeated, to show that the river was blocked, and continued her manœuvre. The master of the "Alconda" heard

the "Bogota's" signals and was aware of their meaning, viz., that the river was blocked. The "Alconda," however, held on her course, intending to pass between the "Bogota's" tug and the south bank of the river. In attempting to do so she collided with the "Bogota's" tug, forcing the tug back on the "Bogota," with the result that all three vessels were injured.

Held (*aff.* judgment of the Second Division, *diss.* Lord Ormidale) that the "Alconda" was solely to blame for the collision.

The case is reported *ante ut supra.*

The owners of the "Alconda" appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN — The screw steamer "Bogota," a ship 415 feet long, had to leave the Elderslie Graving Dock where she had been lying in order to proceed up the Clyde to Prince's Pier. The said dock is situate on the north bank of the Clyde, and enters the river at an angle westward of about 30 degrees. The total width of the river *ex adverso* of the dock is about 500 feet. The operation of leaving the dock took place at 4·40 p.m. on the 9th December 1921. At that time there was lying moored immediately to the westward of the entrance to the dock a screw steamer the "War Afridi." The "Bogota" left the dock stern first, her steam was up, but she was not propelled by her own screw. A tug, the "Samson," was attached to her stern with a tow rope of about 12 feet long and pulled her out. She was attached forward by hawsers to blocks on each side of the dock, which hawsers were paid out as she proceeded. The intention of the manœuvre was, so soon as she got clear of the dock, to attach another tug to her bow, and then, when she was straightened, to tow her up the river, proceeding along the south bank to Prince's Pier. At this time there was a flood tide running at about two miles an hour. After making certain signals, which will be more particularly set forth hereafter, she had proceeded so far with the manœuvre that her stern was a little over 100 feet from the south bank, she lying still unstraightened and athwart the stream, when a steamer, the "Alconda," which was proceeding up the river, came into collision with the tug "Samson," inflicting damage and knocking it against the stern of the "Bogota," which was in consequence injured. The effect of the blow was further to slew the stem of the "Bogota" against the "War Afridi," causing injury to both vessels. The "Alconda" herself was also injured. Cross-actions of damages were raised by the "Bogota" and the "Alconda" in the Sheriff Court of Glasgow. The learned Sheriff-Substitute, before whom the case depended, after proof led, pronounced an interlocutor finding both vessels at fault and apportioning the damage equally between them. Appeal was taken to the Second Division of the Court of Session, when a majority of the Court recalled the interlocutor and found the "Alconda" alone to blame. Lord Ormidale dissented, agreeing with the Sheriff-Substitute. Appeal has now been taken to your Lordships' House by the owners of the "Alconda." They admit fault, but pray that the interlocutor of the Sheriff-Substitute should be restored.

As your Lordships are aware, a case of this sort is regulated by the 40th section of the Judicature Act, which requires the Division of the Court of Session before whom the case, originating in the Sheriff Court in which proof has been led, depends, to pronounce specific findings of fact and findings of law, and prescribes that on appeal to this House the findings of fact must be regarded in the same manner as a special verdict by a jury and not open to review, review being confined to the findings in law alone. The effect of these provisions have been explained in your Lordships' House on more than one occasion and notably in *Mackay* v. *Dick*, L.R. 6 App. Cas. 251; *Shepherd* v. *Henderson*, L.R. 7 App. Cas. 49; *Caird* v. *Sime*, L.R. 12 App. Cas. 326; and *Gilroy* v. *Price*, 20 R. (H.L.) 1.

It is unnecessary to repeat what was there said, but I will add this as I do not find it explicitly mentioned. It is not legitimate to extract a new finding of fact from the opinions of the Judges, although it is legitimate to use those opinions to explain, if necessary, any ambiguity in the findings of fact. The result is that we are bound in this case to take the facts as set forth in the interlocutor of the Second Division. At the same time, as pointed out by Lord Atkinson in *Herbert* v. *Samuel Fox & Company, Limited*, [1916] App. Cas. at p. 413, we are not bound to take as a finding of fact a finding which is called a finding of fact but which in reality is a finding of law, or of mixed fact and law. I accordingly turn to the interlocutor to see what are the facts upon which the case falls to be decided. I need not read them all because many of them just set forth in distinct propositions the narrative which I have already given, but the crucial findings which are not covered by my narrative are as follows:—"8. That about 4·40, no vessels being in sight either coming down or going up, the 'Bogota' gave three short blasts with her whistle, and the 'Samson' having replied with similar three short blasts proceeded to tow the 'Bogota' out of the dock stern first, and that these blast signals were repeated by both vessels. 9. That the 'Bogota' did not give a prolonged blast of the whistle before leaving the graving dock as prescribed by rule 18 of the Bye-laws and Regulations of the Clyde Navigation Trustees, but that the failure to give such a blast had no bearing on the collision which subsequently took place. 10. That the movement of the 'Bogota' was hampered (*a*) by the presence of the 'War Afridi,' a large vessel which was moored to the quay just outside the dock entrance with her head pointed to the east, and (*b*) by the flowing tide which operated more and more strongly upon her as she gradually came out of the dock, and had a tendency to throw her stern to the south and her bow towards the bow of the 'War Afridi.' 11.

That when the 'Bogota' was about two-thirds out of the dock and the stern of her tug 'Samson' was about mid-channel, the defenders' vessel 'Alconda,' a steamer 381 feet over all in length, under her own steam and with two tugs attached, one ahead and one astern, was seen rounding the bend of the river below Renfrew Ferry about three-quarters of a mile away. 12. That when the 'Bogota' sighted the 'Alconda' she gave four short blasts of her whistle, which were repeated by the tug 'Samson,' thereby indicating to approaching vessels that the river was blocked, and that, as the 'Alconda' came on, the four-blast signal was repeated by both the 'Bogota' and the tug 'Samson.' 13. That having thus given warning to vessels, including the 'Alconda,' the 'Bogota' was, in the circumstances and particularly in view of the extent to which her manœuvre had been conducted, entitled to continue and complete her movement of quitting the dock and straightening herself in the channel, and that she was not bound to hold on, in the position to which she had attained, till the 'Alconda' had passed. 14. That the 'Samson's' bow was almost directly astern of the 'Bogota,' but slightly towards the port quarter, her bow being only 12 feet from the 'Bogota's stern, and that she was doing her utmost to keep the stern to the north against the influence of the tide. 15. That while these operations were going on the 'Alconda' with her two tugs was coming up the river at a speed of at least six miles per hour, and that she observed a light in mid-channel when she was about Renfrew Ferry, this light being the stern light of the 'Samson.' 16. That she was continuing on her course when her pilot sighted the hulls of the 'Bogota' and 'Samson' about three or four ship-lengths ahead, and about the same time the master heard a four-blast whistle (which the pilot also heard but took to be a three-blast whistle), and that in reply to the master's inquiry the pilot explained that on the Clyde it meant 'I am blocking the river.' 17. That, notwithstanding, the pilot thought that he could pass to the south of these vessels and accordingly ported his helm, blew one blast of his whistle and attempted to pass. 18. That in doing so he collided at about 4.45 p.m. with the 'Samson,' the bow of the 'Alconda' striking her port quarter, forcing her back on the 'Bogota's' rudder, which fortunately was hard-a-port at the time and so acted to some extent as a buffer, but that the 'Bogota' was forced back upon the 'War Afridi' with the result that all four vessels were damaged. 19. That the collision occurred about 100 feet from the south bank, and that the 'Alconda' could have manœuvred in safety to within 50 feet of that bank. 20. That the 'Samson,' from the position in which she was, could not do anything to escape the collision, and was at the time doing her utmost to keep the 'Bogota's' stern to the north against the tide in conformity with her orders from the 'Bogota.' 21. That if the 'Alconda' had stopped or held back as she might have done when she saw the stern light in mid-channel, or even when she first saw the hulls of the vessels outside the graving dock and heard the four or three-blast signal, the accident would not have occurred. 22. That there was fault on the 'Alconda's' part in not so stopping or slackening speed, and that there was no fault on the part of the 'Bogota.' And (23) that the collision was due solely to the fault of the 'Alconda.'"

It should be expained that the expression "hold on" in the 13th finding clearly appears from the judgments of the learned Judges to be used as meaning arrest her further movement into the river by stopping the tug and ceasing to pay out the cables still attaching the 'Bogota' to the dock, helped perhaps by a forward turn of her own screw. It is true that the said 13th finding, which is the foundation of the judgment, may be read as not a true finding of fact but as a determination in law of the result arising from the circumstances of the collision. In that sense it is not binding on your Lordships. But it includes in my view an underlying finding of fact, viz., that the "Bogota" had already so invaded the other channel that it was difficult for her to stop her manœuvre. The appellants, as I have already mentioned, admitted fault, so that the sole question to be decided is whether the collision was due to the sole fault of the appellants or whether any fault of the respondents contributed thereto. There are certain bye-laws and regulations of the Clyde Trustees published to regulate the river traffic which must be here set forth. The bye-laws have not the force of statute, but like the rules of the road they form a rule of conduct, so that an infringement of them would be held to be in law a fault which if it led to damage would infer liability.

The rules quoted at the trial are as follows:—"3. When a steam vessel or a dredger is turning round or for any reason is not under command and cannot get out of the way of an approaching vessel which but for this it would be her duty to get out of the way of, or when it is unsafe or impracticable for a steam vessel or dredger to keep out of the way of a sailing vessel, she shall signify the same by four or more blasts of the steam whistle in rapid succession or by like strokes of her bell, and it shall be the duty of the approaching vessel to keep out of the way of the steam vessel or dredger so situated. 19. Every steam vessel under her own steam crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river."

Now the case of the appellants is this. They say that the "Bogota" transgressed rule 19 and was not excused by rule 3. The respondents argue that rule 19 did not apply, but that if it did, rule 3 provided the excuse. They also say that apart from rule 3 there is in the circumstances no liability. Now it may be doubted whether rule 19 was intended to apply to such a manœuvre as was here going on. But the sense in which it is expressed raises a question of much difficulty. It would indeed be well if the rules were revised so as to remove doubt on the matter. As it is I

do not think it is necessary to decide it. I will assume that rule 19 did apply. But what does it mean? The appellants have read it as if "keep out of the way" meant a duty which was necessarily infringed if in any circumstances whatever there was collision. This can scarcely be so. Supposing a vessel had begun to cross towards the other side and another vessel left its proper water and collided with the first vessel while in its own water. Could it possibly be said that there was fault on the part of the first vessel? I think, therefore, that "keep out of the way" must be interpreted as "do not get into the way of," and whether that duty is contravened will always depend on the circumstances. Now here we have the fact, as shown in the 11th finding, that when the "Alconda" was sighted the "Bogota's" tug had invaded the south channel, and in finding 12 that the signal was given for blocking the river. I therefore think that the respondents succeed on two grounds—first, that rule 19 was not really broken, and second, that if it was broken by invasion of the south channel, the fault which really caused the collision was the subsequent and independent fault of the "Alconda." I have had the opportunity of reading the judgment to be delivered by my noble and learned friend Lord Shaw, and concur entirely in what he says as to this aspect of the case.

I would add that, if the facts were open to me, I should hold that in my view the "Bogota" was excused under rule 3. She did sound the four blasts. It is, I think, clear that rule 3, where there is scope for its application, will override rule 19, for as it itself states it is meant to apply just when but for it there would be a duty to get out of the way of an approaching vessel. There was argument as to the question of whether the "Bogota" was turning round. I do not think she was turning round, but that in my view is immaterial, because I read the words "and cannot get out of the way" as qualifying both the words "turning round" and the words "or for any reason is out of command." I am not entitled to make any finding that the "Bogota" was unable to get out of the way, and I cannot extract this proposition from any of the findings by which I am strictly bound.

On the whole matter I am of opinion that the appeal must be dismissed with costs.

LORD ATKINSON—I approve and will support the motion made by my noble friend on the Woolsack.

Taking, as I am bound to do, the findings of fact in this case by the Sheriff as unassailable, there are in my view several grounds upon which the correctness of the judgment appealed from may be tested. I propose only to deal with one of these grounds and to rest my judgment upon it. Namely, the applicability as to this case, on the facts found by the Sheriff, of the principle upon which the decision of the case of *Davies* v. *Mann* (10 M. & W. 546) was decided. That principle is, I think, this, that in order that a defendant should sustain a plea of contributory negligence he must establish that he himself could not by the exercise of reasonable care and diligence have avoided the consequences of the plaintiff's negligence — *Tuff* v. *Warman*, 5 C.B.N.S. 573. For the purpose of testing the applicability of this principle to the present case, I assume of course that the "Bogota" transgressed one or more of the Clyde rules and was guilty of negligence in getting with her tug the "Samson" into the position in which they were when the collision took place. In Marsden on Collisions, 5th ed., p. 17, it is laid down on the authority of the cases mentioned in the notes, to some of which I shall presently refer, that there is no difference between the rules of law and those of Admiralty as to what amounts to negligence causing a collision, and that before a vessel can be found in fault for a collision, negligence causing or contributing to the collision must be proved, and that in the case of a collision a ship though guilty of negligence will not necessarily be held to blame if the ship with which she collides could by the exercise of reasonable and ordinary skill and care have avoided the collision. In the case of *Cayzer* v. *Carron Company* (L.R. 9 App. Cas. 873), which closely resembles the present case and is directly in point, Lord Blackburn (at p. 883) assumes apparently that the principle of *Davies* v. *Mann* applied. In that case (*Cayzer* v. *Carron Company*) a collision occurred in the Thames between two ships named respectively the "Clan Sinclair" and the "Margaret." The former ship had transgressed one of the statutory rules and regulations framed to regulate navigation on that river. This rule required that in circumstances such as existed at the material times the "Clan Sinclair" should have waited at a certain point in the river until the other ship, the "Margaret," had passed up the stream. She did not ease and wait as she ought to have done, and was guilty of negligence in that respect, but the "Margaret" knowing that the "Clan Sinclair" was steaming up the river attempted to pass between the latter ship and another vessel named the "Zephyr," where there was not room, and so brought about the collision. It was held, however, that notwithstanding the negligence of which the "Clan Sinclair" was guilty she was not to blame, that the "Margaret" was alone to blame because she could, by the exercise of reasonable skill and care, have avoided the collision. At page 883 of the report Lord Blackburn on giving judgment expressed himself thus—"Then it is said that the collision was owing to the 'Clan Sinclair' being where she was, undoubtedly in one sense that is so. If the 'Clan Sinclair' had been some hundred yards higher up the river, the fact which made it a matter of rashness on the part of the 'Margaret' to run where she did run would not have existed. But that is not a sufficient ground for saying that the fact of the 'Clan Sinclair' being there was the cause of the accident. The 'Clan Sinclair' would not have been there at the time when she was there if it had not been that the vessel did not ease and wait so soon perhaps as she ought

to have done, but that was not the cause of the accident; the cause was that the 'Margaret,' knowing where the 'Clan Sinclair' was, attempted to pass between it and the 'Zephyr' where there was not sufficient room." Lord Watson delivered judgment to the same effect. The principle of this decision has been many times applied. I shall only refer to one case. It is the case of H.M.S. "Sans Pareil," [1900] P. 267. It was held there by the Court of Appeal that as a matter of seamanship it was improper for the tug and tow which collided with the "Sans Pareil" to attempt in the circumstances, as they did attempt, to pass across and ahead of the fleet, of which the "Sans Pareil" formed part, but the appeal was dismissed on the ground that the common law doctrine of contributory negligence as applied in the "Margaret" (*Cayzer* v. *Carron Company*, 9 App. Cas. 873) applied here, and that though the tug and tow had been guilty of negligence in keeping on, yet the defender was not hampered by the other vessels of the fleet, and might by the exercise of ordinary care and diligence have avoided the collision. At page 283 of the report Lord Justice A. L. Smith referred to the law of contributory negligence as laid down by Lord Penzance in *Radley* v. *London and North-Western Railway Company* (1 A.C. 754), and said it was qualified thus, "namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him." He said "the case of the 'Margaret' (9 App. Cas. 873) shows that the common law doctrine is applicable to such a case as that now before us."

Even, therefore, if I assume that the "Bogota" and her tug the "Samson" had transgressed one or more of the Clyde navigation rules, and were therefore guilty of negligence in getting into the position in the river in which they lay when the collision occurred, I have to ask myself, as Lord Blackburn had to ask himself, in the case of the "Margaret," was this negligence the cause of the collision? In this case the position of the "Bogota" must have been known to those navigating the "Alconda." The "Bogota" had given the proper whistle to indicate that the river was blocked by her and her tug. The pilot on the "Alconda" heard the signal, knew what it meant, and communicated his opinion to the captain, yet with all this knowledge that the river was blocked the "Alconda" did not check her speed but recklessly steamed ahead as if the river in front of her was perfectly clear, relying apparently on the chance that she might have been able to pass through the gap, 50 feet wide, which separated the tug "Samson" from the southern bank of the river. That was a wrong and reckless proceeding on her part. In the result her commander had not the skill or courage to effect his purpose. There was apparently nothing to prevent her slowing down or stopping to give the "Bogota" time to get turned up stream and get out of her way. (See finding No. 21.) That might have amounted to the exercise on her part of ordinary care, caution, and diligence to avoid the consequences of the "Bogota's" contributory negligence which I have assumed existed, but the "Alconda" made no effort to do anything of the kind. The cause of the collision was therefore, in my view, the reckless and dangerous action of the "Alconda" in steaming up stream at the rate and in the way she did in utter disregard of the warning she had received.

I therefore think that she was alone to blame, and the appeal fails and should be dismissed with costs.

LORD SHAW—In my view the construction placed upon rule 19 by Lord Dunedin is sound, namely, that the rule truly and only forbids vessels—even if one assumes them to be engaged in the operation of crossing the river—from getting into the way of upgoing or downgoing craft. Such a construction appears to me, further, to be consistent with the other provisions of the local code and with the fair requirements and combination of dock and river traffic, and its application will depend upon a fair view of all the facts as these may apply to an emergent vessel.

I cannot see my way to hold that the "Bogota," which had 265 feet of her length emerging into the river and 150 feet of her length still within the dock gates, the river being both up and down clear up to that point, was contravening the rule. I must, however, add that I would not see my way to hold that she was engaged in crossing the river towards the other side. She was in point of fact being manœuvred in order to straighten up. Nor could I see my way to hold that such a vessel being towed out from her stern and not even free from the attaching ropes, handled from the dock side, and no proportion of her under steam being operated, can be reckoned to be a vessel crossing to the other side of the river under her own steam. So that upon both of these fundamental points I also hold that rule 19 would not apply to the situation under consideration. But in truth in the view which I take of this case it is really unnecessary to pronounce upon that rule.

I venture to hold that the action of the "Alconda" was wholly and solely to blame for the collision that occurred, and that for the following reason:—The "Bogota" had only partially emerged from dock as above described up to the moment when the river both up and down was clear. At that point, however, the "Alconda" hove into view, and at once the "Bogota" sounded four blasts signifying that she was an obstruction, the tug "Samson" repeating these blasts. These signals were heard by the "Alconda." They were not mistaken, and it was known to the "Alconda" that *de facto* an obstruction was in the river. No question of collision came into play prior to that moment, and the problem only began to arise when the "Alconda" came up the

river to all intents and purposes regardless of the obstruction altogether.

The Court below most properly held in my opinion that the "Alconda was solely to blame. My opinion is that partial or contributory blame can only be assigned to the "Bogota" if, subsequent to the given and accepted notice of her being an obstruction, the "Bogota" did something to contribute to or fail to minimise the collision which was being precipitated by the reckless advance of the "Alconda." It is not in the view which I take sufficient in law to say that the "Bogota" should not have been, on the view that rule 19 applies, crossing the river, for it is not suggested that she was crossing the river in any sense which was faulty, and, so far as the "Alconda" and the collision are concerned, the "Bogota" from the time that the vessels sighted each other was in the river as an obstruction, known by the "Alconda" to exist, and therefore to be avoided.

The principle does not apply to shipping law alone but to all the law of contributory negligence, from *Davies* v. *Mann* downwards; and I take the principle to be that although there might be—which for the purpose of this point I am reckoning that there was—fault in being in a position which makes an accident possible, yet if the position is recognised by the other prior to operations which result in an accident occurring, then the author of that accident is the party who, recognising the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part could have been avoided. Unless that principle be applied it would be always open to a person negligently and recklessly approaching and failing to avoid a known danger to plead that the reckless approach to encountering of danger was contributed to by the fact that there was a danger to be encountered. There is a period of time during which the causal function of the act or approach operates, and it is not legitimate to extend that cause backwards to an anterior situation. The anterior situation may be brought about either innocently or by some mistake, but if it has nothing to do with the subsequent operations which contributed to produce an accident or collision, it is not legitimate to treat it as a contributory in liability for the result thus produced.

In *Admiralty Commissioner* v. *s.s. "Volute*, [1922] 1 A.C. 136, Lord Birkenhead, then Lord Chancellor, in a valuable judgment applies this principle—"In all cases of damage by collision on land or sea there are three ways in which the question of contributory negligence may arise. A is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B had not been subsequently and severably negligent. A recovers in full." That appears to me completely to fit the situation of the "Bogota," even on the assumption that she had contravened rule 19, as I do not think she had. The whole cause of collision arose from a subsequent and severable negligence on the part of the "Alconda"—that is to say, negligence arising subsequent to the known existence of the obstruction, and severably caused by the "Alconda's" approach to and collision with that obstruction.

I therefore think it right to set down again the language of Lord Chancellor Selborne on this topic, used also in a case of shipping collision—*Spaight* v. *Tedcastle* (L.R., 6 (H.L.) 219)—"Great injustice might be done if, in applying the doctrine of contributory negligence to a case of this sort, the maxim *causa proxima, non remota, spectatur* were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs cannot be established merely by showing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect."

In the present case accordingly I think that the question which is truly relevant on the point of partial liability is whether the conduct of the "Bogota" and her tug in the river, subsequent to the stage when they were there recognised to be obstructions, did something to precipitate or partially to cause the collision. It is for this reason that I think the House is greatly helped by two findings which establish, first, that the "Bogota" even although she had been crossing the river did so leaving quite enough of room, namely, 100 feet, within which the "Alconda" if she was determined to pass her could have done so with complete safety; and secondly, that there was nothing which the "Bogota" or her tug did or could have done to avoid the collision so swiftly brought about by the "Alconda's approach. These findings are as follows:—"That the collision occurred about 100 feet from the south bank, and that the 'Alconda' could have manœuvred in safety to within 50 feet of that bank," and "that the 'Samson' from the position in which she was could not do anything to escape the collision, and was at the time doing her utmost to keep the 'Bogota's' stern to the north against the tide in conformity with her orders from the 'Bogota.'"

It therefore appears to me that the judgment of the Court below was completely justified to the effect that the "Alconda" was wholly in fault.

Upon the point of procedure—this case having originated in the Sheriff Court, and raising the question as to findings in fact or mixed law and fact, and our duty in the House in such circumstances—I also fully agree with my noble and learned friend on

the Woolsack. I should add to the authorities which he cites the decision of Lord Kinnear in *Black* v. *Fife Coal Company* in this House.

I think that the appeal should be dismissed with costs.

LORD PHILLIMORE—I have read the opinion of the noble Lord, Lord Dunedin, and I concur with his conclusion and upon the whole with his reason for it. It may be a refinement of thought, but I should reach the same conclusion by a slightly different way more nearly resembling the reasoning of the noble and learned Lord, Lord Shaw.

All rules relating to navigation by one ship with reference to another ship (rules to prevent collision) assume the existence and the duty to know of the existence of the second ship as being sufficiently near in time and space to require consideration.

If there is no other ship in that part of the Clyde, a vessel may cross or proceed up or down in any part of the channel, may keep her course or change it, go ahead or astern, festoon herself with lights or proceed with none, scream with her whistles or be entirely silent,

Now in this case when the "Bogota" started to leave the dock there was, according to the findings of the court below by which we are bound, no vessel in existence sufficiently close for the "Bogota" to have any duty towards her. Or one might qualify this by saying that if there was any such vessel in existence she had not given such notification of her presence as to make it the duty of the "Bogota" to know of her existence. The "Bogota" therefore lawfully came out of dock, although the coming out of dock may have meant, as I should think, that she would be crossing the river and crossing under steam, and she was entitled to go on with her manœuvre till the time came when it was her duty to be conscious of the existence of another vessel. That time, according to the findings (one may be allowed some private doubt whether they are correct but we are bound by them), did not arrive till the "Bogota" had got into such a position that she was helpless to do anything on her part to avoid a collision; and therefore though she may have been "crossing the river under steam," and therefore within the apparent compass of rule 19 she had never come under rule 19 before the time came when that rule was superseded by rule 3, and the duty of avoiding collision was shifted from her to the other vessel.

LORD BLANESBURGH—As explained by the noble Lord on the Woolsack the effect of the 40th section of the Judicature Act has been to withdraw from your Lordships' cognizance many matters which were in controversy between the parties in the Court of Session, and the appellants now face this House with the admission that unless they establish that rule 19 of the Clyde Regulations was applicable to the "Bogota" when she first sighted the "Alconda," they can no longer contend with success that the "Bogota" was in any way responsible for the collision which ensued.

In the view which I take of the whole facts found by the Court below the appellants would be no nearer success in their appeal if they were to establish the proposition on which they stake its fortunes.

Accordingly I hesitate to follow them in their argument. Their appeal must, I think, fail whether it is well founded or not, and if I do go into the question it is only out of deference to the fullness with which it was canvassed before your Lordships by counsel on both sides.

Now, although one must be struck with the inaptness of the language of rule 19 to describe the operation in which the "Bogota" was engaged at the time, I am prepared to hold as a mere matter of words that the "Bogota" was then crossing, proceeding under her own steam, towards the other side of the river. My own opinion, however, is that if you consider rule 19 in its relation to the other regulations of the Clyde Trustees you find it was not rule 19 with its attendant responsibilities but rule 18 with its implied attendant privileges that then applied to the "Bogota."

It must, I think, be agreed, as I have said, that the operation on which the "Bogota" was engaged is not described with any aptness in rule 19. She was not in real truth crossing towards the other side of the river. She was in fact coming out of dock. For such a vessel as she it is rule 18 that makes provision.

The significance and necessity of such a general regulation as rule 18—to the terms of which I will presently return—is illustrated by the position of the "Bogota" at the moment when the "Alconda" was sighted by her. She had then emerged from the dock stern first to the extent of from one-half to two-thirds of her length. She could have held on by her ropes still attached to the quay or she could proceed with her manœuvre. But one thing she could not do—and this is all important—she could not return to the dock nor withdraw from the northern half of the river any part of her hull which had passed into it. In other words, in the course of a common and ordinary evolution she was powerless to keep out of the way of any vessel coming down the river, and so soon as her stern had crossed the middle line of the stream she was powerless to keep out of the way of any vessel coming either up or down until her manœuvre had been completed.

Now rule 18 applies to all vessels coming out of any dock on the river. The "Bogota" is 415 feet in length. There must be many vessels using graving docks on the Clyde of equal and even greater length. The river at Elderslie is 500 feet wide. There must be other docks on the Clyde where the river is no wider. This dock enters the river at an angle of 30 degrees to the west. There must, I should suppose, be other docks where the angle of approach is more direct. In other words, rule 18 deals with an operation which time and again cannot be completed without an obstruction quite unavoidable being occasioned to the river traffic, both up and down, and as the emerging vessel can on

these occasions only avoid causing obstruction by not emerging at all, the necessary assumption, in the absence of a regulation prohibiting all emergence whatever from a dock unless the river is clear in each direction, must be that the passing traffic is to keep clear of the emerging vessel, and this, as I read it, is the foundation on which rule 18 rests. The rule is as follows:—"Vessels coming out of dock shall signify the same by a prolonged blast of the steam whistle of not less than five seconds duration, and in cases where a vessel is not under steam the tug boat in attendance shall make the same signal." The rule, it will be seen, is in the most general terms. Unlike rule 19 it applies indifferently to all vessels—whether sailing vessels or steamships, whether under steam or not under steam. It places no restriction upon a vessel's emergence from a dock, but it requires every such vessel to announce its approaching advent into the river by a prolonged warning blast. Why, it may be asked, is that obligation imposed? The answer surely is in order to give to all passing vessels an opportunity of keeping out of her way, and that as much if she is a steamship "under steam" as if she is not a steamship at all. But why again should these vessels be required to think of her, if being a steamship "under steam" she, upon the hypothesis that rule 19 applies to her, is bound to keep out of their way? The answer, as it seems to me, again must be that rule 19 has no application to such a case. Even standing alone the necessary implication of rule 18, I think, would be that to *every* vessel coming out of dock vessels navigating up and down the river *and duly warned* shall give place. But that that is its true implication is confirmed by rule 103 of the Clyde Regulations to which I have referred since the argument at your Lordships' Bar. That rule in its last sentence provides as follows:—"No vessel when being taken into or out of a graving dock, or ship basin, or to or off a slip dock shall be allowed unnecessarily to obstruct the navigation or interrupt the passing of other vessels." The right of such a vessel to obstruct or interrupt, so far as *is* necessary, is, it will be seen, there assumed.

Now, if the necessary implication of rule 18 be what I have stated, it becomes apparent that a vessel under steam cannot be governed both by rule 18 and by rule 19 at the same moment. The rules are quite inconsistent. Her express obligation under the latter rule would be destructive of and would render nugatory her privileges under the former. If, then, a choice must here be made between rule 18 and rule 19 as the rule applicable to the "Bogota," there can, I think, be no doubt where the choice lies. Rule 18 in terms covers her case; rule 19 only barely touches it.

This conclusion imports that rule 19, notwithstanding the apparent generality of its terms, is really restricted in its range. A perusal of the Clyde Regulations as a whole shows that this is the fact. A striking illustration may be taken from an observation made by the Sheriff-Substitute in the note to his interlocutor.

"Rule 19," he says, "is of course not limited to ferry boats." The learned Sheriff-Substitute, not perhaps unnaturally, assumed that the rule was primarily applicable to them. A perusal of the regulations, however, shows how far this is from being the case. Steamships on the Clyde have to keep clear of ferry boats at their peril. Regulation 102 provides as follows:—"Every master or other person in charge of a steam vessel when approaching any of the ferries on the river, shall, at least 200 yards from the ferry, slow the engines and proceed dead slow until the ferry is passed." It will, I think, be agreed that general as is the language of rule 19 it has much less relation to the operation in which the "Bogota" was engaged on this afternoon than it has to the crossing of a ferry boat. This last, however, is not apparently intended to be covered by it.

In regard to the position on the river of a vessel coming out of dock there is a passage in the Lord Justice-Clerk's judgment which is not without interest in this connection. It is where he refers to a statement made in evidence by the pilot of the "Bogota" that in his experience he had never seen a vessel trying to pass another which was in course of coming out of dry dock. This statement of course, even if your Lordships could treat it as a fact found—and that is not open to your Lordships—could not affect the true construction of printed regulations. I refer to it only as describing what I may call the normal courtesy of the river extended to vessels more or less hampered in their movements in the course of an experience which every vessel is from time to time called upon to undergo. If so, this is not the first time that rules of courtesy have been based upon and go only a little beyond the rules of obligation, which by the regulations, as I construe them, are imposed upon these passing vessels. I mention, merely to show that I have not overlooked the fact, that the "Bogota" did not give a prolonged blast of the whistle before leaving the graving dock as prescribed by rule 18; she and her tug each gave three short blasts instead. It is found, however (finding 9), that the failure to give the long blast had no bearing on the subsequent collision. In other words, if rule 18 with its necessary implications is the rule applicable, the "Alconda" derives no advantage from the fact that its provisions were not in this respect observed by the "Bogota."

In the application therefore of rule 18 to the case you have a complete answer to the appeal.

But there is to my mind still another. There is, I think, in the stated circumstances enough to dispense the "Bogota" from the obligations of rule 19 if, contrary to my own view, that rule really applied to her.

I have already stated what the position of the "Bogota" was at the moment when the "Alconda" was first sighted by her.

It results from that statement, if correct, that she was then in relation to any vessel coming down the river, in the language of rule 3, "out of command," if by the compelling force of rule 19 she stood bound by remaining stationary to keep clear of the "Alconda" coming up the river.

Was she so bound? I have some difficulty in seeing how to a vessel so placed rule 19 continued to apply. Like all similar rules the rule must be reasonably construed. Its proper sphere, as I hope I have shown, is a narrow one. But of it this can, I think, at least be said, that the rule implies that the crossing steamer, which is by its terms obliged to keep out of the way of all vessels whether navigating up or down the river, shall not be entitled to require any of these vessels to keep out of her way, shall not be entitled, in other words, to hold them up. For, note the consequences if the rule applies to a vessel so entitled. However crowded the traffic in her own half of the stream, however insignificant the traffic in the other half, it would remain her duty indefinitely to block the first flow of traffic, in order that under the rule the second trickle might have free course and passage. The rule does not, in words, cover such a state of things. On the contrary, it imposes upon the crossing vessel obligations which negative its existence, and if, for instance, the approach to the Elderslie Dock on this afternoon of the Spanish steamer the "Artivi Mendi"—coming down the stream had, instead of preceding, synchronised with the approach of the "Alconda" coming up, I cannot myself doubt that it would under rule 3 have been the duty of the "Artivi Mendi" to keep clear of the "Bogota"—which thereupon became dispensed from any obligation under rule 19 of keeping clear either of her or of the "Alconda." In the present case, however, there was no vessel actually coming down the stream at the time. The "Bogota" delayed coming out of dock until the river was clear in both directions, and by the time she was committed to her manœuvre it was a vessel coming up the river and not one coming down that first presented itself. Does this fact alter the whole case? For myself, I think it should not. I take the effect of rule 19 to be that where a manœuvre, such as the "Bogota's," has in propriety been commenced, and where it has so far proceeded as to make withdrawal to the *status quo ante* out of the question, the possibility even of approaching traffic on her own side of the river from which she is neither able nor bound to keep clear except by completing her manœuvre is sufficient, on due warning under rule 3 being given, to exclude her from the obligations of rule 19 in relation to all vessels whether coming up or down. I cannot doubt that it was on this view of her position that the "Bogota" acted when she sounded her four blasts and proceeded with her manœuvre, and I am not surprised that those on board the "Alconda" apparently without hesitation conceded that position to her. I am of opinion therefore that for one reason or another rule 19 is out of the case.

But I fully recognise that in this matter there is room for difference of opinion. I will accordingly now assume, contrary to my own view, that the "Bogota" on this occasion was bound by rule 19, and that in view of the "Alconda's" approach she was in fault under that rule in advancing over the middle line of the river. Even so, as I have already indicated, I am of opinion that the "Alconda" was on the facts stated by the Inner House alone to blame for the subsequent collision between herself and the "Samson." These facts have already been set forth. I need not repeat them.

There is no dubiety as to their effect. They show on the part of the "Alconda" a complete appreciation of the position of the "Samson" and her tow—an acquiescence in their claim after signal given to block the river, and a decision notwithstanding to go on at the same speed instead of stopping as was quite feasible. And all this was done in the belief that the "Alconda" could pass to the south of the two vessels in safety. The collision was the direct result either of the failure on the part of the "Alconda" to stop and hold back, as she could and ought to have done if there was no room to pass, or it was due to her negligent navigation in not taking advantage of the passage sufficiently wide to enable her to pass in safety. Her liability, this passage being sufficiently wide, differs in degree and not in kind from what it would have been had the stern of the "Samson" been to the north of the middle line of the river, and had the "Alconda" negligently starboarded into her.

The "*Volute*," in your Lordships' House ([1922] 1 A.C. 129) is now the *locus classicus* on this subject. It has made no alteration in the law as previously understood in relation to facts like these. My noble and learned friend Lord Shaw has referred to the passage from the Lord Chancellor's speech in which he reaffirms the law. Applying that language, I cannot doubt on the facts stated that even if the "Bogota" were originally at fault "there would here have been no damage had not the 'Alconda' been, as she was, subsequently and severably negligent." She is therefore liable for the whole damage.

I have only to add that had I felt constrained to hold that the "Bogota" was partly to blame for this collision I should in restoring the order of the learned Sheriff-Substitute have desired to modify it, as suggested in the opinion of Lord Ormidale, with whom alone in the Second Division the contentions of the "Alconda" found favour. On any view of the case the fault of the "Bogota," as contrasted with that of the "Alconda," was venial and slight. From first to last the proceedings of the "Alconda," whether they be regarded subjectively or objectively, were without justification or excuse. The blame attaching to her greatly preponderated, and I should have agreed with Lord Ormidale in thinking that she should bear three-fourths of the resulting damage.

On the whole, however, I am of opinion

that she was alone to blame, and that this appeal should be dismissed.

Their Lordships ordered that the interlocutor appealed against be affirmed, and the appeal dismissed with costs.

Counsel for the Appellants—The Dean of Faculty (Sandeman, K.C.)—Bateson, K.C. —W. G. Normand. Agents—J. & J. Ross, W.S., Edinburgh—William A. Crump & Son, Solicitors, London.

Counsel for the Respondents—Macmillan, K.C.—Carmont. Agents—Webster, Will, & Company, W.S., Edinburgh—Godfrey, Warr, & Company, Solicitors, London.

Friday, March 21.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

CONNELL *v.* JAMES NIMMO & COMPANY, LIMITED.

(In the Court of Session, May 25, 1923 S.C. 737, 60 S.L.R. 473.)

Reparation—Negligence—Master and Servant—Mine—Accumulation of Gas Due to Failure to Inspect—Whether Constituting Defect in Condition of Ways and Works—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* (1).

Held (*aff.* the judgment of the First Division, Lords Phillimore and Blanesburgh *diss.*) that an accumulation of inflammable gas in the workings of a "gassy" mine, which the ventilating system had failed to dilute and render harmless, and which had not been detected owing to the negligence of the person entrusted by his employer with the duty of seeing that the works and ways were in a proper condition, constituted a defect in the condition of the ways and works of the mine within the meaning of section 1, sub-section (1) of the Employers' Liability Act 1880.

The case is reported *ante ut supra.*

James Nimmo & Company, Limited, appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—This is an appeal against an interlocutor of the First Division of the Court of Session in Scotland, dated 26th May 1923, pronounced against the appellants upon a case stated. The Case stated was prepared upon a requisition by the appellants to the Sheriff of Lanarkshire on an appeal to the First Division of the Court of Session relative to an interlocutor pronounced by the said Sheriff awarding damages (assessed at £325) under the Employers' Liability Act 1880, and decerning against the appellants for the payment of the above sum with interest from the date of the citation and expenses. The Sheriff sets out the findings at which he arrived. They included—1. That the Auchengeich Colliery belonged to the appellants; that at 4 a.m. on the 1st of June 1920 the respondent, while employed in the appellants' service as a brusher in section No. 3 of Pit 2 of this colliery, was injured by an explosion of gas, and that at the time of the explosion the respondent was working at a place known as the Lye in the intake airway of section 3. 2. That Auchengeich Colliery is ordinarily a gassy mine in which naked lights are not used. 3. That the appellants had prior to the explosion extended an old working by cutting through a whin intrusion, and opening up an area beyond and to the north of the latter. 4. That this opening was effected by making a cutting to the left, a cutting called the left cross cut, and a cutting to the right known as the right cross cut, and by a third cutting in line with the intake airway known as the "heading." 5. That the air which ventilated this section No. 3 passed along the intake airway through the whin intrusion, then along the right cross cut and round the face, returning by a third cutting through the whin intrusion. The lye, where the respondent was working at the time of the explosion, was to the south of this last-mentioned intrusion. 6. That within the fortnight preceding the explosion gas had been discovered in this heading on several occasions—on two of which occasions the gas had been found to be in such quantity that it led to the withdrawal of the men working at the heading. 8. That the mine was worked on double shifts.

The Sheriff then proceeds in this case to deal with the happening of the explosion and its causes.

The 9th of his findings is to the effect that the ignition of the gas was caused by a spark from an electric coal-cutting machine which was being used in this section 10. That this machine was fitted with a switch-box cover intended to prevent sparking and the emission of flame to the outer air from the ignition of the gas in the switch-box, and was effective for that purpose if properly bolted down. 11. That at the time of the explosion the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working-place in the vicinity of the top of the heading fit for working. I quote the following important findings *in extenso*:— "(11) That at the time of the explosion the ventilation provided failed to dilute and render harmless inflammable gas to such an extent as to make the working-place in the vicinity of the top of the heading fit for working. (12) That the men operating the coal-cutting machine had negligently failed to screw down the cover properly, having used only one of the eight studs provided for that purpose. (13) That during the shift the machinemen had worked the coal-cutting machine following the direction of the air from the right cross cut round the face to the top of the heading, at which point the explosion occurred. (14) That the fireman employed by the appellants to inspect the section on the respondent's shift negligently and without sufficient excuse failed to inspect the section, as required by the Coal Mines Act, within