tion of a school of more dignity and importance, but not the less did the High School continue to be and is the Burgh School of Edinburgh. So in Greenock this new Academy replaced the Burgh School. The important point for us here is that the magistrates continued to make a payment to that school—a payment in my opinion from the common good to the Burgh School. It continued the Burgh School although with extended wings. That payment was a contribution to a burgh school falling under clause 46 of the Education Act. From 1860 until 1881, when the School Board took over the School, the amount of that contribution was £145. Accordingly I do not think the Lord Ordinary was wrong in holding that the customary contribution from the common good to the Burgh School has been £145 a-year, and I do not consider the determination to hand over the Academy to the School Board and the manner of its acquisition by that body relieves the town council of their liability to contribute to its support out of the common good as formerly.

The result therefore I arrive at is that the School Board, who are now managing the education of the Burgh, are entitled under clause 46 to have the sum of £145 annually handed over to them.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD LEE—I agree. The history of this school shows that whether it was a proper burgh school or not it was in 1851 a burgh school within the meaning of the Education Act. The difficulty lies in this, that in 1872 it was under a constitution which, in form at least, took it out of the definition in that Act of a burgh school and was not taken over by the School Board as such. But when the difficulty is explained away, as I think it has been, I am of opinion that in 1872 there was a customary payment provided by the magistrates which it is incumbent upon them to continue to provide for the educational purposes of the burgh. The Act intended that customary contributions should not be put an end to by such a form of transaction and transference of administration as we have here.

The Court adhered.

Counsel for the Pursuers (Respondents)—Low — Guthrie. Agents — Maconochie & Hare, W.S.

Counsel for the Defenders (Reclaimers)—Sir C. Pearson—Shaw. Agents—Cumming & Duff, S.S.C.

Friday, June 20.

SECOND DIVISION.

[Lord Trayner, Ordinary.

BAINE & JOHNSTON AND OTHERS *v.* M'COWAN.

Maritime Insurance — Construction of Policy—Collision Clause—Tug and Two.

A ship was insured "from the Clyde (in tow) to Cardiff" upon a policy which bore that "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel . . . any sum of money, . . . we (the underwriters) will pay the assured three-fourths of the sum so paid." A tug while towing said ship collided with another vessel and sank it. Both the tug and the tow were by the Admiralty Court in England found liable in damages to the owners of the vessel sunk.

Held that the owners of the tow were entitled to recover under the policy of insurance, although the tow had not itself been directly in collision.

Messrs Baine & Johnston, shipowners, Greenock, managing owners of the iron ship "Niobe," upon 1st April 1887 insured the said ship with David M'Cowan, insurance broker, Glasgow, and others, for the sum of £8000, the amount underwritten by David M'Cowan being £100. The policy of insurance bore that the "Niobe" was insured "at and from the Clyde (in tow) to Cardiff," . . . and provided that "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, we (the underwriters) will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, or if the value hereby declared amounts to a larger sum, then to such declared value, and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid."

On the night of the 23rd March 1887 the "Niobe" was on a voyage from Greenock to Cardiff, in ballast, in tow of the steam-tug "Flying Serpent." Shortly before 11·40 p.m., while in St George's Channel, off South Tuskar Light, the "Flying Serpent" came into collision with the ship "Valetta." The "Flying Serpent" with her stem and starboard bow struck the port bow of the "Valetta." Very shortly thereafter the port quarter of the "Niobe" struck the starboard quarter of the "Valetta," doing no substantial damage. Such damage was

sustained by the "Valetta" through the collision with the "Flying Serpent" that she shortly afterwards sank. The owners of the "Valetta," her cargo and freight, in consequence of said collision, raised an action in the Admiralty Division of the High Court of Justice against the owners of the "Flying Serpent" and her freight, and also against the owners of the "Niobe" and her freight, for the damage sustained through the total loss of the "Valetta." The owners of the "Flying Serpent" and her freight admitted liability for said collision. The tug had kept no proper look-out, and had negligently failed to keep out of the way of the "Valetta." The owners of the "Niobe" defended the action brought against them, but after sundry procedure, and on proof being led, judgment was given against them, and they were held liable to the "Valetta." The "Niobe" had failed to keep a proper look-out, and was partly to blame for the collision between the "Flying Serpent" and the "Valetta."

In respect of the said judgment Messrs Baine & Johnston and the registered owners of the "Niobe" were obliged to make payment on 10th August 1888 of £12,909, 19s. 8d., and in June 1889 they brought an action against the said David M'Cowan for £60, 10s. 4d., being the proportion of the sum payable by him under said policy, with interest from said 10th August 1888.

The pursuers pleaded—"(1) In respect of the terms of said policy, and of the said collision, and of the payment made by the pursuers under the said judgment, decree should be granted as concluded for. (2) The pursuers having been protected by said policy against liability for the said collision, and the damage thence arising, they are entitled to decree."

The defender admitted that if liable the amount sued for was his proportion of the sum due under the policy, but he pleaded—"(2) The damage done to the 'Valetta' not having been caused by collision with the 'Niobe,' the defender is not liable for the same underthe policy sued on. (3) In respect that the policy sued on does not cover the claim made in the action, the defender is entitled to absolvitor, with expenses."

Upon 5th February 1890 the Lord Ordinary (TRAYNER) decerned against the defender in terms of the conclusions of the summons.

"*Opinion.*—The parties to this case are at one as to the circumstances out of which the pursuers' claim arises. The admitted facts are shortly these—The 'Niobe' was being towed from the Clyde to Cardiff by the steam-tug 'Flying Serpent,' and on the voyage the latter came into collision with the 'Valetta.' In consequence of the injuries sustained by the 'Valetta' she sank shortly after the collision. After the tug and the 'Valetta' came into collision the 'Niobe' also came into contact with the 'Valetta,' but no substantial damage was thereby occasioned. The direct cause of the loss of the 'Valetta' was the collision with the tug. The pursuers, as owners of the 'Niobe,' have been found liable for the amount of the damage sustained by the owners of the 'Valetta,' on the ground that the 'Niobe' was in fault, and this amount the pursuers have paid. At the time of the collision the 'Niobe' was insured under the policy, No. 6 of process, for a voyage from 'the Clyde (in tow) to Cardiff and/or Penarth, while there, and thence to Singapore,' &c., which policy contains a collision clause providing that 'if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money,' &c., the underwriters will pay the assured three-fourths of the sum so paid.

"The pursuers now claim from the defender, who underwrote said policy. his proportion of the sum paid by them to the owners of the 'Valetta.' The defender denies liability, on the ground that the loss in question did not arise from any collision between the 'Niobe' and the 'Valetta,' for which he would have been liable had it occurred, but from a collision between the 'Flying Serpent' and the 'Valetta,' which is not covered by the policy, and for which he is not liable. The pursuers, on the other hand, maintain that their claim is covered by the policy, (1) because the 'Niobe' did in point of fact come into collision with the 'Valetta,' and (2) because in the circumstances the 'Niobe' and the 'Flying Serpent' must be regarded as one ship doing the damage to the 'Valetta.' The question therefore comes to be one of construction of the collision clause.

"I do not attach any weight to the consideration that the 'Niobe' and 'Valetta' actually came in contact with each other before the latter sank. That collision, if it may be called so, did not cause the damage for which the pursuers have been held liable, and of which they now seek to be relieved. The 'Valetta' had received the injuries which made her sink before she came in contact with the 'Niobe'; that contact admittedly did no substantial damage.

"But there remains the question whether, having regard to the circumstances attending the collision, and the terms of the collision clause, the defender has incurred any liability. If the collision clause is read in the strictest manner of which it admits, so as to impose liability on the underwriters only in the case where the collision giving rise to the claim has taken place directly and immediately between the 'Niobe' and some other ship, 'in consequence whereof' the owners of the 'Niobe' have incurred responsibility for damage, then I would be of opinion that the defender was not liable for the present claim. The 'Niobe,' as I have said, did not come into collision with the 'Valetta' so as to cause that damage to the latter vessel for which the pursuers have had to pay. But in my opinion the collision clause should not be so read. I think it admits of being read, and should be

read, in a broader and more comprehensive sense than that contended for by the defender, and in a sense which covers (as I cannot help thinking it was intended to cover) the case that has occurred.

"The primary purpose of the collision clause was to protect the insured (to the extent of three-fourths) against claims arising for damages occasioned by collision, and for which they, as owners of the vessel mentioned in the policy, or, as it is there expressed, 'the ship insured,' might be made responsible. So far as the interests of the insured were concerned, it was immaterial whether their liability arose from their ship coming into direct collision with another ship or not. The risk which they wished and had an interest to cover was liability for damages arising from collision, for which, as owners of that particular ship, they might be held answerable. That being the risk which the pursuers wished to cover, and which the defender knew they wished to cover, it may fairly be presumed that the collision clause to which the parties agreed as expressing their contract *quoad hoc* was intended to cover that particular risk.

"But, apart from this presumption, I think the clause in question is effectual to impose upon the defender the obligation now sought to be enforced. As observed by the Lord Justice-Clerk (Inglis) in the case of *Coey* v. *Smith*, 22 D. 960, it must be held that the parties had the state of the law in their view when they entered into this contract. Now, at the date of the contract it was (as it is) the law that 'where one ship is in tow of another, the two ships are for some purposes, by intendment of law, regarded as one, the command or governing power being with the tow, and the motive power with the tug'—(Marsden on Collisions, p. 189).

"One of the cases in which the two ships are regarded as one is the case where collision with a third ship has occurred through the fault of either the tow or the tug. This was settled in the case of the 'Cleadon', 14 Moore's P.C.C. 97, where the rule of law I have above quoted was treated as an 'admitted' rule. The same rule of law was recognised in the case of the 'American,' L.R., 6 P.C. App. 132, although there held inapplicable in respect of the peculiar circumstances of that case. I take it, therefore, to be the case that when the defender insured the 'Niobe' from 'the Clyde (in tow) to Cardiff,' he must have had in view that if a collision occurred in the course of that voyage arising from the fault of the 'Niobe' or the tug-steamer towing her, involving liability for damage on the part of the insured, the two vessels would be regarded as one, and that one the 'Niobe' (the ship insured), which had the governing power. In this view of the case the collision clause in question covers the case which has occurred, and imposes liability on the defender for the sum sued for. In reaching this conclusion, I have had also in view the general rule that where a policy of insurance is of doubtful construction or meaning, that construction is to be adopted which is most favourable to the insured."

The defender reclaimed, and argued—This was not a question of intention of parties but of the construction of a policy of insurance which must be construed strictly. The Lord Ordinary had misconstrued the policy. The ship was not insured against liability for collisions, unless it was itself the colliding object. The risk of the tug being in collision was not insured against. The value of the ship was referred to in the policy, not of the ship and the tug. This showed the tug was not taken account of. A tug and a tow were not necessarily regarded as one—Opinion of Sir James Hannen in "The Stormcock," 1885, 5 Aspinall's Maritime Law Cases, 470.

Argued for the respondents—The intention of parties was to be looked at, and the policy construed in a fair and reasonable manner—Parsons on Marine Insurance, vol. i. 68. On the face of the policy it was a vessel in tow that was insured. If such a vessel was insured against liability for collisions as here, the probability of the tug being the colliding object must have been considered. The 'Niobe' was itself in collision here. But apart from that fact the tug was to be regarded as in fact part of the ship. In law it was generally so regarded, although Sir James Hannen was not inclined to carry that view so far as had been done by other authorities—*The "Cleadon,"* 1860, 14 Moore's P.C. Rep. 92; *The "American,"* 1874, L.R., 6 P.C. App. 127 (see foot of p. 132); Marsden's Law of Collision at Sea, 189, *et seq.*

At advising—

LORD JUSTICE-CLERK—This case is a peculiar one. This vessel the "Niobe" being required to be taken a certain voyage in tow was insured as a ship in tow for that trip. The provisions in the policy as to collisions runs thus—"if the ship hereby insured" (that is, the ship in tow) "shall come into collision with any other ship or vessel and the insured shall in consequence thereof become liable to pay, and shall pay" and so on. Now the peculiarity of this case is that it was the towing part of the organisation—the tug—that did the damage, for I lay out of account the fact that the "Niobe" itself after the collision came into contact with the vessel run down. The damage, then, caused to the "Valetta" was damage caused physically by the towing steamer. The question is, whether these words "the ship insured" cover the case which actually occurred. Upon the face of it, one would expect that any person insuring a vessel in tow against claims which might be made against it for damages done to another vessel by collision, would necessarily insure the whole organisation, for if a vessel in tow through fault ran down another vessel it was likely to be the tug which would cause the injury. It is difficult to see how a vessel struck could be passed by the tug and struck by the tow. If the contract clearly did not include the tug we should have to hold accordingly, but if it is ambiguous we may give effect to the more

reasonable interpretation. The policy here seems to be in the form usually adopted. There is no doubt that in certain circumstances a vessel in tow is looked upon as one with the towing vessel, and the real question here is whether that view is applicable to such a case as the present. It would have been better if the policy had been more clearly expressed, but I think, after giving the matter my best consideration, although not without hesitation at first, that the policy means that if a collision is caused by the vessel itself or the towing vessel, that collision is insured against. That in my opinion is the true interpretation of the policy applicable to rather peculiar facts.

LORD YOUNG—I am of the same opinion, and I entirely concur in the judgment of the Lord Ordinary.

I understand the proposition that according to this bargain no liability was to attach to the insurers unless a collision with the "Niobe" took place immediately and directly, and that the policy did not apply to any other collision although one for which the "Niobe" might be held liable. I quite understand that proposition, but there is nothing in it to recommend it to my mind. It is one of these arguments which illustrate the legal maxim *qui hæret in litera, hæret in cortice*, and which if given effect to would not carry out the intentions of parties but would defeat the whole of them. Payment by the ship intended to be insured was, in my opinion, payment of a premium against precisely such a risk as occurred here. The circumstances here were not of an exceptional character, but just such as were looked forward to as possible to happen to a ship in tow. I cannot resist the conclusion of the Lord Ordinary that this was the very kind of collision the possibility of which was contemplated and insured against. I have no doubt in my mind at all nor any hesitation in concurring with the Lord Ordinary.

LORD RUTHERFURD CLARK—With your Lordship in the chair I have had doubts as to whether this case comes within the class of cases in which a tow and a tug are to be regarded as one. My doubts have not been removed, but as your Lordships are agreed I need not say more.

LORD LEE—I concur in thinking that this contract must be construed as a contract against risks having reference to a ship in tow. The policy in one place applies in express terms to a ship in tow, although in another place it refers only to "the ship." I agree with the Lord Ordinary.

The Court adhered.

Counsel for Pursuers and Respondents—Dickson—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender and Reclaimer—Sir C. Pearson—Ure. Agents—J. & J. Ross, W.S.

Tuesday, June 17.

SECOND DIVISION.

[Sheriff-Substitute of Caithness, Orkney, and Zetland.

BRUCE *v.* SMITH AND OTHERS.

Local Custom—Essentials for Local Custom having the Force of Law—Reasonableness—Right to "Caaing" (Stranded) Whales in Shetland.

Held (*diss.* Lord Lee) that the custom by which the heritors of Shetland, without giving any consideration therefor, claimed one-third share of all caaing whales stranded and killed on the sea shores of their respective lands, as a pertinent of said lands and as in conformity with the immemorial usage of the islands, was unjust and unreasonable and had not the force of law.

Upon 14th September 1888 a shoal of "caaing" whales (so called because they are "caaed" or driven ashore) was driven into Hoswick Bay, Shetland, from a distance of some miles at sea. The whales were stranded upon the sea shore of or adjacent to the lands of Hoswick, and were killed in the sea by the captors wading in water waist deep. They were thereafter dragged upon the beach, flenched, and sold by auction, the sum realised being £450.

John Bruce, Esquire, of Sumburgh, proprietor of 33¼ merks of the 72 merks of which the lands of Hoswick consisted, who had in no way either directly or indirectly taken part in the capture, brought an action in the Sheriff Court at Lerwick against Robert Smith, fisherman, Sandwick, and others—a committee acting for the captors and in possession of the sum realised—for payment of £69, 7s. 3d, as his share of the said sum.

He averred—"The heritors of Shetland have, as a pertinent of their lands, and conformably to the laws, usages, and rights of the islands, right to one-third share of all caaing whales stranded and killed on the shores of their lands. . . . According to the custom and the laws, usages, and rights of the islands, the largest heritor or proprietor sells the caaing whales so stranded, retaining his proportion and dividing the remainder among the salvors, and others interested. . . . In this case, however, the salvors repudiated the heritors' rights, and without consulting the pursuer, who is the largest heritor, at their own hands realised the whales."

The pursuer pleaded—"(2) The heritors of Shetland having as a pertinent of their lands, and by the laws, usages, and rights of the said islands, right to one-third share of all caaing whales stranded and killed on the sea-shores of their respective lands. (3) The pursuer being a proprietor of 33 merks 2 ures land in the town or room of Hoswick, is entitled to decree for £69, 7s. 3d., being the proportion effeiring thereto of the heritors' share of the whales before referred to."