

—I agree with the judgment which your Lordship proposes.

LORD CULLEN—I concur.

LORD SANDS did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary and assoiized the defenders.

Counsel for Pursuer and Respondent—Wark, K.C.—King. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders and Reclaimers—MacRobert, K.C.—Black. Agents—Macpherson & Mackay, W.S.

Thursday, March 1.

SECOND DIVISION.

[Sheriff Court at Glasgow.

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

Ship—Collision—Contributory Negligence—Clyde Navigation Bye-laws, Nos. 3, 18, 19—Vessel Emerging from Dock—Failure to Give Sound Signal—“Under her Own Steam”—“Crossing.”

The Clyde Navigation Bye-laws provide, *inter alia*—“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, . . . 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. . . . 18. 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. 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. . . .”

A steamer was being drawn out of a graving dock, situated on the Clyde, stern first by a tug, and when two-thirds out of the dock with the tug about mid-channel she sighted another steamer three-quarters of a mile away coming up the river under her own steam with two tugs attached. The former steamer had steam in her boilers but was not using it and did not intend to use it until she had been straightened out in the river. On sighting the approaching steamer she gave four blasts of the steam whistle in rapid succession, twice

repeated, instead of a prolonged blast as required by rule 18 of the Clyde Navigation Bye-laws in the case of vessels coming out of dock, and continued her turning movement. The second vessel neither stopped nor slackened speed, and a collision occurred between the two vessels at the entrance to the graving dock. In counter claims for damages between them, in which a proof was taken, *held* (1) (*diss.* Lord Ormidale) that rule 19 did not apply to the steamer which was being drawn out of the dock, in respect that she was not “under her own steam” and was not “crossing from one side of the river towards the other side”; (2) that the vessel which was coming up the river was at fault in not stopping or slackening speed; and (3) that the steamer which was being drawn out of the dock did not by her failure to give a prolonged blast in any way contribute to the collision.

Opinions (*per* the Lord Justice-Clerk and Lord Hunter) that the steamer emerging from the dock was “turning round” within the meaning of rule 3; (*per* Lord Anderson and Lord Ormidale) that she could not be said to be “turning round” or “not under command” within the meaning of that rule; and (*per* the Lord Justice-Clerk, Lord Hunter, and Lord Anderson) that having given a blocking signal she was entitled to complete her manœuvre, and that the other vessel was bound to give way.

Ship—Process—Evidence—Inadmissibility of Evidence Involving Questions of Nautical Skill and Experience where Nautical Assessors Assisting Court.

Opinion (*per* Lord Hunter) that in Admiralty cases where the Court has the assistance of nautical assessors, evidence involving questions of nautical skill and experience is not admissible.

The Pacific Steam Navigation Company, Liverpool, *pursuers*, brought an action in the Sheriff Court at Glasgow against the Anglo-Newfoundland Development Company, Limited, Newfoundland, *defenders*, for payment of £5000 with interest as damages for loss arising out of a collision in the Clyde between the “Bogota,” a steamer belonging to the pursuers, and the “Alconda,” a steamer belonging to the defenders.

In order to avoid the arrestment of their vessel the defenders agreed to prorogate the jurisdiction of the Sheriff Court.

The facts of the case appear from the findings in fact of the Second Division as set forth in their interlocutor of 1st March 1923 (*infra*)—“1. That the ‘Bogota,’ a steamer of 415 feet over all in length and 52·4 feet in breadth belonging to the pursuers, on the afternoon of Friday, 9th December 1921, had occasion to leave Elderslie Graving Dock and proceed up the river eastwards to Prince’s Dock on the south bank. 2. That the said graving dock is on the north bank of the river Clyde, and is inclined to it westwards at an angle of about 30 degrees. 3.

That the 'Bogota' had her own steam up, but had to be drawn out of the dock stern first by the paddle tug 'Samson,' and that it was intended that as soon as she had been drawn entirely clear of the dock she should be attached to and receive the assistance of another tug, the screw tug 'Victor,' at her bow. 4. That the afternoon was fine and clear with a fresh wind from S.S.W., that sunset was at 3:40 p.m., and that there was good visibility up till the time of the collision after mentioned. 5. That there was a flowing tide which was running about two knots. 6. That at 4:32 p.m. the engine-room of the 'Bogota' received from the bridge the order to 'stand by.' 7. That at this time a Spanish steamer of the Mendi Line was observed coming down the river, and that the 'Bogota' waited till it had passed. 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 after the 'Bogota' had been drawn half-way out of the dock. 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 Byelaws 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 an 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 hull 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 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.'"

The Sheriff-Substitute (A. S. D. THOMSON) allowed a proof, which was led before him with the assistance of a nautical assessor, in the course of which the defenders objected to the admission of certain evidence involving nautical skill and experience led by the pursuers as incompetent when the Court was sitting with a nautical assessor.

The Sheriff-Substitute having repelled the objection the defenders appealed to the Sheriff (A. O. M. MACKENZIE), who on 16th June 1922 refused the appeal, and remitted the cause to the Sheriff-Substitute to proceed.

Thereafter the Sheriff-Substitute having heard parties' procurators upon the evidence pronounced an interlocutor on 22nd July 1922 in which he found in fact, *inter alia*, that the collision was due equally and concurrently to the fault of both the "Bogota"

and the "Alconda," and found in law that the loss and damage resulting from the collision fell to be borne by these two vessels equally, and with these findings continued the cause and granted leave to appeal.

The defenders appealed, and argued—The evidence showed that the collision was due entirely to the fault of the "Alconda" and in no way due to fault on the part of the "Bogota." The fault of the "Alconda" which caused the collision consisted of failure to keep a good look-out, excessive speed, and failure to hold back until the "Bogota" had got straightened in the river. The "Alconda" took no real action at all until the collision was inevitable. On hearing the short blasts of the whistle she should have stopped and reversed. Moreover, she did not let go her anchor until it was too late. With regard to the grounds of fault alleged against the "Bogota," viz:—(1) Her alleged failure to obtemper the injunction contained in rule 18 of the Clyde Bye-laws to give a prolonged blast of the whistle on coming out of the dock—the failure to give the signal was not the cause of the collision and in no way whatever contributed to it—*The "Tempus,"* [1913] P. 166, and *The "Harberton,"* [1913] P. 149, were referred to. (2) The allegation that the "Bogota's" head tug the "Victor" was too long in fastening on to her—the evidence showed that the delay was not due to fault on the part of anyone for whom the pursuers were responsible. It was due to the position of the starboard wire. Moreover, the alleged fault was not averred on record—*"Eidsvaag" v. "Gala,"* 1920 S.C. 247, 57 S.L.R. 260. (3) The allegation that the "Bogota's" look-out was defective—this allegation was disproved by the evidence. (4) The allegation that the "Bogota's" stern tug the "Samson" was in the wrong position—this allegation was disproved by the evidence—*The "Niobe,"* (1888) 13 P.D. 55, per Sir James Hannan at 59, and *The "Jane Bacon,"* (1878) 27 W.R. 35, were referred to. (5) The allegation that the "Bogota" ought to have held on instead of proceeding out of the dock—rule 19 of the Clyde Bye-laws did not apply. The "Bogota" had steam up but was not "under her own steam." Moreover, she was not "crossing from one side of the river towards the other side." Even if the "Bogota" had broken the rule the breach was merely a technical breach of a local rule which was justified by the special circumstances of the case. It was impossible for the "Bogota" to do otherwise than she did—Marsden on Collisions at Sea (7th ed.), pp. 484-5; *The "Hazelmere,"* [1911] P. 69; *The "Whitlieburn,"* (1900) 9 Asp. Mar. Cas. 154. The Regulations for Preventing Collisions at Sea (1910) applied to the Clyde—Marsden on Collisions at Sea (7th ed.), p. 301; *Little, &c. v. Burns, &c.,* (1881) 9 R. 118, 19 S.L.R. 105; and article 27 of the Regulations applied to the circumstances of the case. On the other hand article 19 of the Regulations did not apply—*The "Gulf of Suez,"* [1921] P. 318. The actings of the "Bogota" were in conformity with the dictates of common sense and with common law—*Admiralty Commis-*

sioners v. "Volute" (Owners of), [1922] 1 A.C. 129, per Lord Chancellor (Viscount Birkenhead) at 136; *Cork Steamship Company, Limited v. Commander Kerrison Kiddle (H.M.S. "Active"),* (1920) Lloyd's List Law Reports, vol. ii, p. 505; *"Warsaw" v. "Linn of Dee,"* (1906) 8 F. 1013, 43 S.L.R. 732; but if any of the Clyde Bye-laws applied to the circumstances of the case, it was rule 3. The "Bogota" had to do a swerving turn, which took up a good deal of the channel. Accordingly she was "turning round" within the meaning of the rule. Moreover, she was a vessel which was "not under command," and could not "get out of the way of an approaching vessel"—*"Mendip Range" (Owners of) v. Radcliffe,* [1921] 1 A.C. 556, per Viscount Finlay at 570. Under article 4 of the Regulations for Preventing Collisions at Sea (1910) it was left to the vessel to treat herself as being a vessel not under command, and it was for the Court to determine whether a vessel was entitled to do so. In the circumstances the "Bogota" was entitled to treat herself as not under command. The Court had a discretion to review the apportionment of blame and liability—*The "Karamea,"* [1921] P. 76; *The "Peter Benoit,"* (1915) 13 Asp. 203.

Argued for the respondents—Admittedly the "Alconda" was in fault, but the evidence showed that the "Bogota" was also in fault and her fault was a contributory cause of the collision. The grounds of the "Bogota's" fault were—(1) The "Bogota" had broken rule 18 of the Clyde Bye-laws by failing to give a prolonged blast of the whistle on coming out of the dock. Obedience to local rules was just as obligatory as obedience to general regulations—Marsden's Collisions at Sea (7th ed.), p. 6, and there was an onus on the "Bogota," which she had not discharged, of proving that the breach of the rule did not contribute to the collision—Marsden on Collisions at Sea (7th ed.), pp. 70-1; *Cayzer, Irvine, & Company v. Carron Company,* (1884) 9 App. Cas. 873, per Lord Watson at 886; *Russian s.s. "Yourri" v. British s.s. "Spearman,"* (1885) 10 App. Cas. 276. (2) The "Bogota's" head tug, the "Samson," was too long in fastening on to her. (3) The "Bogota's" look-out was defective. She should have heard the "Alconda's" whistle and seen her sooner than she did. (4) The "Bogota's" stern tug was in a wrong position. And (5) the "Bogota" ought to have held on instead of proceeding out of the dock. In so doing she was in breach of rule 19 of the Clyde Bye-laws. A bye-law had the effect of a statute—Beal on Cardinal Rules of Legal Interpretation (2nd ed.), p. 401, and the "Bogota" could not plead custom as an excuse for an infringement of a bye-law—Marsden on Collisions at Sea (7th ed.), p. 10. The "Bogota" was "under her own steam," and was "crossing from one side of the river towards the other side"—*"Gulf of Suez" (cit.),* per Atkin, L.J., at 332. Rule 3 of the Clyde Bye-laws did not apply to the circumstances of the case. The "Bogota" was not "turning round," nor was she "not under command"—*The "Mendip Range" (cit.); The "James Joicey"*

v. *The "Kostrena,"* 1908 S.C. 295, 45 S.L.R. 216; *The "P. Caland,"* [1893] A.C. 207. Even if rule 3 did apply to the circumstances of the case, it only required the "Alconda" "to keep out of the way" of the "Bogota." The "Bogota" had failed to prove that the "Alconda" should have stopped, and the evidence showed that the collision was in part due to the "Bogota's" own manoeuvres—Marsden on Collisions at Sea (7th ed.), pp. 37 and 479; Beven on Negligence (3rd ed.), 1089; *The "George Roper,"* (1883) 8 P.D. 119; *The "Llunelly,"* [1914] P. 40; *Admiralty Commissioners v. s.s. "Volute" (cit.); "Hero" (Owners of v. Commissioners for Executing the Office of Lord High Admiral of the United Kingdom, [1912] A.C. 300, per Lord Chancellor (Earl Loreburn) at 304; The "Ovingdean Grange," [1902] P. 208, per Collins, M.R., at 213, and Mathew, L.J., at 215; Cork Steamship Company v. Commander Kerrison Kiddle (H.M.S. "Active" (cit.).* Where the Court was assisted by nautical assessors expert evidence was not admissible—Marsden on Collisions at Sea (7th ed.), p. 273; *The "Ann and Mary,"* (1843) 2 W. Rob. 189, at 196; *The "Sir Robert Peel,"* (1880) 4 Asp. Mar. Cas. 321; *The "Earl Spencer,"* (1875) L.R., 4 A. & E. 431, at 433; *The "Assyrian,"* (1890) 6 Asp. Mar. Cas. 525; *The "Kirby Hall,"* (1883) 8 P. 71, at 75. The case of *The "Cuirnbahn,"* [1914] P. 25, was also referred to.

At advising—

LORD JUSTICE-CLERK—This is an action by the Pacific Steam Navigation Company, who sue as owners of the s.s. "Bogota," against the Anglo-Newfoundland Development Company, who are convened as owners of the s.s. "Alconda." The pursuers claim damages from the defenders amounting to £5000 sterling in respect of a collision which occurred in the Clyde between the "Bogota" and the "Alconda," and for which collision and its consequences the pursuers maintain that the fault of the "Alconda" was solely responsible. The defence is that the collision was due to the fault of the "Bogota" and that the "Alconda" was free from blame. In these circumstances the defenders counter claim from the pursuers £1000 in name of damages. The Sheriff-Substitute before whom the proof was taken has held that both vessels were to blame for the collision, and that the damage done falls to be apportioned equally between them. Against that judgment the pursuers have appealed. In the course of the debate before us the defenders frankly admitted that they could not maintain that the "Alconda" was not in fault, and accordingly—though no doubt the two questions are in a sense interrelated—the only question which now falls to be decided is whether the "Bogota" was also in fault. The appellants say "No"; the respondents say "Yes."

[After narrating the circumstances in which the collision occurred his Lordship examined the evidence of those on the "Alconda" and then proceeded]—Fault more plain and more inexcusable than that of the "Alconda" it would be difficult to

conceive. That fault was, in my judgment, the direct and proximate cause of the collision. If the "Alconda" had, as indeed the Sheriff-Substitute observes, stopped or even slackened speed—and it is abundantly clear from the evidence that had she been so minded she might have done either—the collision would not have occurred.

I now turn to the faults attributed by the respondents to the "Bogota." They are five in number. First, it is said she disobeyed bye-law 18 in failing to give a long blast with her whistle before she came out of dock; second, it is maintained that her head tug was too long in fastening on; third, her look-out is alleged to have been defective; fourth, it was argued that her stern tug was in a wrong position; and fifth, it was strenuously maintained that she ought to have held on instead of proceeding out of the dock, and so to have avoided the collision.

I shall examine these various grounds of fault in the order stated.

(1) Failure to obtemper the injunctions contained in bye-law 18. That bye-law provides that "vessels coming out of dock shall signify the same by a prolonged blast of the whistle of not less than five seconds duration." It is admitted that this blast was not given by the "Bogota." The view of the captain was that inasmuch as that signal means "we are going ahead" it was inappropriate, and that the proper signal was the one which he gave, viz., three short blasts, which means "we are going astern." However that may be it was maintained on behalf of the "Bogota" that the failure to give that particular signal had no relation to the collision which occurred. I think, in agreement with the Sheriff-Substitute, that this contention is sound. In point of fact I am satisfied that at the time when the signal prescribed by bye-law 18 should have been given the "Alconda" was so far off that she would not have heard or at any rate distinguished it had it been given, and that accordingly the omission to give it had no real bearing on the collision which subsequently occurred. Indeed it requires some courage on the part of the "Alconda" to maintain that though she failed to pay any heed to later and more emphatic blasts given by the "Bogota" an earlier and less imperative signal would have materially affected the situation. In any case the argument, in my opinion, fails.

(2) The second ground of fault alleged is that the head tug was too long in fastening on to the "Bogota." This fault, it is not unimportant to observe, is neither averred on record, nor was it, so we are informed, maintained before the learned Sheriff-Substitute. Now this failure of the "Victor" to fasten on sooner appears to have been due to the position of the starboard wire which was holding the "Bogota" in line with the dock, and which prevented the tug from making fast. In point of fact till that wire was slackened down the "Victor" could not get alongside the "Bogota" and make fast. There is, however, no allegation that fault attached to anyone in respect of the position of the starboard wire. The

second ground of fault, accordingly, also fails.

(3) It is further said that the look-out on the "Bogota" was imperfect. Now, in the first place, it is to be observed that the placing of the pilot, the officers, and the crew at their respective stations was unexceptionable. Moreover, it is clear that the "Alconda" was observed by the "Bogota" long before the "Bogota" was observed by the "Alconda." The officers of the "Bogota" were in point of fact scarcely cross-examined with a view to showing that they should have seen the "Alconda" before they did. So much for their eyes. Fault is, however, also attributed to them in respect of their ears. It is said that they should have heard the "Alconda's" signals before they did. What then were the signals which they should have heard? The master of the "Alconda" depones to one signal only having been given by his ship, and that just before the collision occurred. It is true that neither the master of the "Bogota" nor the third officer appear to have heard that blast, but the pilot who was in charge of the navigation and also the master of the "Samson" did. The witness Aageson, who was beside the pilot, also heard it. I think the attack on the look-out fails.

(4) It is further said that the tug of the "Bogota" was in a wrong position, and that she should have been attached stern to stern to the "Bogota," not bow to stern. On this I think it is proved that the "Samson" adopted the usual and proper course. The evidence is all one way and it is to that effect. I think that the attempt made to build up a case of fault in this connection from admissions made by the pursuers' witnesses completely fails.

(5) Finally it is maintained—and this, I think, is the only difficult part of the case—that the "Bogota" should have held on when she sighted the "Alconda," and should not have proceeded to manoeuvre out of dock. A question of fact and a question with regard to the bye-laws have in this connection to be considered.

As regards the question of fact, it is clear, as I have already indicated, that the operation in which the "Bogota" was engaged was a delicate and difficult one. The entrance to the dock was narrow. The proximity of the "War Afridi" was embarrassing. The tide was troublesome. Nevertheless it is argued that when the "Alconda" was sighted the "Bogota" should have stopped. Now the "Bogota" was under way at that time and the suggested manoeuvre could only have been executed by using her own steam by putting her engines ahead. No doubt that could have been done, and at, as I think, some risk, having regard to the tide and the position of the "War Afridi," the "Bogota" could have held on. Even so, I am unable to see that that was her duty. The "Bogota" had signalled in effect—"Don't come on, the river is blocked," and that signal had admittedly been heard and understood on the "Alconda." The "Bogota" therefore was bound to hold on only if, a signal having been given which she was entitled to assume

was heard and understood, and which is proved to have been heard and understood, she ought to have assumed that that signal would be disregarded. The contention is I think extravagant and unmaintainable. I am of opinion that the "Bogota" was entitled to assume as she did that the "Alconda" who could not have failed to hear the signal, and who in point of fact did so, would on hearing it hold back. This, however, as we know she did not do. That she had ample time to do so and to avoid the collision is, I think, upon the evidence quite clear.

I turn now to the bye-laws. Bye-law 19 provides that "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."

The Sheriff-Substitute has held that that bye-law applied to the "Bogota." I do not agree. In the first place the "Bogota" was not under her own steam. Steam was no doubt in her boilers and she could have used it, but she was at the time being propelled by a tug and was not using her own steam. In order that the bye-law should apply I think that the vessel referred to must either be propelled by her own steam or at any rate it must be in contemplation that when she moves she is to use her own steam. In the second place, the "Bogota" was not in my opinion crossing from one side of the river towards the other side. I agree with the contention of the Solicitor-General that the bye-law contemplates two classes of case—(1) Vessels crossing from side to side of the river, and (2) vessels navigating up and down the river. The bye-law enjoins that the latter class shall have a preference. The "Bogota" was not, in my judgment, a crossing vessel. She was being towed stern first by her tug. The object of taking her to the centre of the river was not to take her to the other side but to straighten her up. She was about to proceed not towards the other side of the river but up the river. In short, the "Bogota" belonged, in my view, not to the first class but to the second class mentioned by the Solicitor-General.

I now turn to bye-law 3. I am disposed to think that the manoeuvre of the "Bogota" falls within its ambit. The purpose of the rule is to warn off normal traffic from traffic which is for some reason at a disadvantage. That the movement which the "Bogota" was carrying out prevented her from manoeuvring with the ease and expedition which under ordinary circumstances she could command is not I think in doubt. She was unquestionably executing a turning movement. She was turning from the Dumbar-ton direction to the Glasgow direction, and it appears to me too niggardly a construction of such a rule as this to hold that while the "Bogota" was turning she was not turning round, and to calculate with nicety the number of points in a right angle. The disability attaching to the position of the "Bogota" was independent of such metaphysical or mathematical calculations. It is at any rate plain that whether the bye-

law applied to the "Bogota" or not her captain thought that it did and acted accordingly.

But I prefer to base my judgment on wider considerations than these. *Esto* that the situation which developed was *ruleless*. It would then fall to be regulated by common law and by common sense. I am of opinion that the "Bogota" had come so far out of the dock when she sighted the "Alconda," that having given a blocking signal as she did—whether the signal was enjoined by bye-law 3 or was not—she was entitled to complete the operation which she had begun, and that she had no reasonable ground for believing that, the signal having been giving and understood by the "Alconda," the latter would endeavour to force her way past. The pilot of the "Bogota," Morison, says that in his experience he never saw a vessel trying to pass another vessel which was in course of coming out of a dry dock. The effective and proximate cause of the collision was, as I have said, that the "Alconda" resolved to come on and did come on after she had heard a signal from the "Bogota" which she understood, and rightly understood, to mean "the river is blocked."

Accordingly I am of opinion that the collision was due solely to the fault of the "Alconda," and that to that extent the Sheriff-Substitute's interlocutor falls to be recalled.

LORD ORMDALE—[*After narrating the facts*]—The Sheriff-Substitute has found that the collision was due equally and concurrently to the fault both of the "Bogota" and the "Alconda," and that the loss and damage resulting from the collision falls to be borne by these two vessels equally. This judgment has been challenged by the "Bogota," but acquiesced in by the "Alconda."

The fault of the "Alconda" was her complete disregard of certain signals given by the "Bogota" to the effect that she was obstructing the river.—[*His Lordship summarised the evidence bearing on this matter and proceeded*]—It appears to me on the evidence that the look-out on the "Alconda" was defective, but her cardinal fault was in not holding back, which she still had ample time to do after hearing even the later of the two four-blast signals and sighting the hulls of the blocking vessels, until the latter had straightened up and left a passage clear.

The question whether the "Bogota" was also guilty of fault is a more difficult question. It is said that she was, in five ways—(1) in failing to comply with bye-law 18; (2) in failing to have her head tug, the "Victor," sooner made fast; (3) in failing to have the "Samson" in a proper position; (4) in failing to keep a good look-out; and (5) in failing, especially having regard to bye-law 19, to hold on to the dock after sighting the "Alconda."

(1) I think the "Bogota" was clearly in fault in not giving the prolonged blast prescribed by bye-law 18 as she came out of the dock. On the other hand it seems reasonably clear that her failure to do so

made no difference in the other circumstances of this case, and did not cause, or to any extent contribute to bring about, the collision. The four-blast signal was a substitute warning to the "Alconda," the only other vessel concerned, to keep out of the way.

(2) The "Victor" was lying at the entrance of the dock ready to be made fast when the "Bogota's" bow was clear of the dock wall. She was not at any time made fast, although the "Bogota" was before the collision well outside of the dock. The chief officer offered the tow rope to Kennedy, the master of the tug, but the latter declined to take it. He was afraid, he says, that the starboard bow wire of the "Bogota," which had been let go but not hauled in, might foul the tug's propeller. The master of the "Bogota," on the other hand, says that the wire was still out and had not been slacked down. Whether taut or slack, the wire somehow got in the way of the "Victor" and prevented her making fast. There was, it seems to me, some delay unexpected by the pilot of the "Bogota," and not very satisfactorily accounted for, but I cannot hold that it has been proved that this delay was of material importance or was due to any negligence on the part of the "Bogota."

(3) The "Samson" had a double duty to perform. She had to tow the "Bogota" out of dock. She had also to keep her from canting round overmuch towards the south bank. She was made fast bow on to the "Bogota's" stern, and not stern to stern, and took up a position astern of the "Bogota" and very slightly on her port quarter. It was maintained that this position made it difficult for her to hold the "Bogota" up against the flood tide and impossible for her when the collision was imminent either to go ahead or astern, and so get out of the "Alconda's" way, while to have slipped her tow rope would have allowed the "Bogota" to swing right across the "Alconda's" course with disastrous results. The weight of the evidence, however, is to the effect that the "Samson's" position was the correct and customary position for a tug charged with the double duty which the "Samson" had to perform, and negligence in the performance of that duty is not established.

(4) A good look-out was kept on the "Bogota" in the sense that the "Alconda" was sighted as soon as it was possible to see her.

(5) The fault alleged here is that the "Bogota" did not hold on to the dock by her ropes when she sighted the "Alconda" and her attendant tugs when she was about 2600 feet, or between six and seven ship-lengths, away and coming on at a fairly rapid speed. In leaving the dock the "Bogota" was bound, it seems to me, to exercise the utmost precaution. The operation, at no time a simple one where the river was rather less than 500 feet wide, was greatly complicated by the presence of the "War Afridi" close alongside. This necessitated the "Bogota" following a course which was not in direct alignment with the dock, but at an angle which at

once took her more towards the centre of the river, and as she got farther out into the river made it increasingly difficult to hold her up against the action of the flood tide. It also made re-entry into the dock, should occasion arise for it, an extremely difficult manœuvre.

I have come to the conclusion, agreeing with the Sheriff-Substitute and his nautical assessor, that on sighting the "Alconda" those in charge of the "Bogota" should have held her in the position she then was in, *i.e.*, one-half to two-thirds out of the dock, if it were possible for them to do so. This they should have done, it seems to me, at least until they were satisfied that the "Alconda" understood and was acting on their four-blast signal, and if they saw that she was not, then until she had passed. Three or four minutes would have sufficed.

That it was possible for them to do so is established by the concurring testimony of all the witnesses on board the "Bogota" who speak to the point, except perhaps the master, and even he declined to say definitely that he could not have held on, summing up thus—"It is a matter of impossibility to say what we could have done, . . . but we never anticipated that we wanted to do that, because we considered that we were so perfectly in the right in going astern." The chief officer, who was in a good position for judging as he was on the forecastle-head, is asked—"(Q) Could you then have hung on to your ropes quite well?—(A) Yes. (Q) And not come further out?—(A) Yes. (Q) Quite easily—(A) Yes." Gunson, the pilot who, differing from the other "Bogota" witnesses, insists that the "Bogota" was altogether out of the dock when the "Alconda" was first sighted, is asked—"(Q) Supposing that you were one-third still in the dock, you could have held on in the dock if you had thought fit to do so?—(A) Yes, if there was any necessity for it. . . . (Q) And if when you had got a-half to two-thirds out you had found the 'Alconda' was close to you, I presume you would have hung on there?—(A) Yes. (Q) And you could have done that without difficulty?—(A) Yes." The master of the "Victor" says the same thing. The only evidence to the contrary is that of Shearer. Taking his evidence as it was presented to us by the Solicitor-General as that "not of an expert in navigation but only of a practical man of some experience," I am unable to hold that it is sufficient to displace that of the seamen to whom I have referred, the more especially as the latter was accepted by the nautical assessor.

The "holding-on" might have been a delicate and difficult manœuvre—I cannot think that it would have been—but it certainly was not an impossible one. The fact seems to be that those in charge of the "Bogota" never thought of trying it. The pilot had made up his mind that he had done all that it was incumbent on him to do by giving his four-blast signal, that he was thereafter in possession of the river, and that any ship coming up the river was bound to keep out of his way. He further

assumed that the "Alconda," which when he last saw it was paying no attention to his signal, would be certain to observe it and keep out of his way. Accordingly he continued to go astern. He was, in my opinion, in fault for so doing.

The "Bogota" calls in aid bye-law 3—[*His Lordship quoted the bye-law*]. I cannot think that the "Bogota" was a steam-vessel "turning round" in the sense of this bye-law. She was not turning round, but simply backing down the river with the intention of later straightening and going up the river. This involved a change of course, but she did not require to turn round to enable her to effect it. No doubt her stern swung to starboard a bit, but unless the swinging movement took her through at least eight points of the compass, it seems to be an incorrect description of it to say that it was a turning round. Further, she was at no time "not under command." She was not disabled in any way, but so far as she was concerned fit and competent to perform all the movements required of her. She was to no extent in distress.

On the question of the applicability of bye-law 19 to the "Bogota" I agree with the Sheriff-Substitute. No authority was cited to us which seems to me to warrant us in holding that the bye-law does not apply to ships coming out of dock either bow first or stern first—provided, of course, that they are steam vessels under their own steam. The "Bogota" was certainly crossing from one side of the river (the north) towards the other side (the south). Her intention was, no doubt, to straighten up. This she hoped to do about mid-channel, but to effect the manœuvre she had first to cross towards the other side. As a matter of fact her stern had got to about 100 feet from the south bank. It is not so clear that she was "under her own steam" in the sense of the bye-law. But I have come to the conclusion that she was. She had her own steam available, and was not of necessity dependent for her propulsion on that of the tugs. According to the evidence she had, while still in the dock, gone half-speed ahead for the purpose of clearing the engines of water, and thereafter half-speed astern, and later slow ahead, in both instances for manœuvring purposes. Accordingly being, in my opinion, both before and at the time of the collision, a vessel crossing from one side of the river towards the other, it was her duty to keep out of the way of vessels navigating up and down the river. It does not help in the construction of the bye-law, but it is worth noting, that the pilot of the "Bogota" thinks that it would have been applicable, and he would have acted on it if the "Alconda" had been, when sighted, closer up to him—within a reasonable distance of him. There may be difficulty in saying what is a reasonable distance, but it seems to me that if the result of the crossing vessel's action is to hang up, by getting in the way of, a vessel navigating up or down the river, the crossing vessel has been in breach of the bye-law.

Acting, as I think she did, on a misunder-

standing of bye-laws 3 and 19, the "Bogota" proceeded to block the river without warrant when it was possible for her, by holding on to the dock, to keep out of the way of the "Alconda" which she knew to be navigating up the river. This fault on her part was, in my judgment, a contributory cause of the collision.

I have only to add, that while I agree with the Sheriff-Substitute in holding that both vessels were to blame for the collision, I am unable to concur with him in the apportionment he has made. On a survey of the conduct of the two vessels from start to finish, it seems to me that the proportion of blame attaching to the "Alconda" is so distinctly greater than that attaching to the "Bogota" that the apportionment of damages should be—on the "Alconda" three-fourths, and on the "Bogota" one fourth.

I must dissent therefore, very respectfully, from the judgment which your Lordship advises the Court to pronounce.

LORD HUNTER—[After stating the facts, and holding, on an examination of the evidence given by the master and pilot of the "Alconda," that disregard by that vessel of the "Bogota's" four-blast signals was the primary cause of the collision]—Was there also fault on the part of the "Bogota" which contributed to the accident? The Sheriff-Substitute has answered this question in the affirmative, because he holds that that vessel was acting in breach of certain of the bye-laws and regulations relative to the navigation of the river Clyde. Bye-law 18 provides that vessels coming out of dock shall signify the same by a prolonged blast of the steam whistle, of not less than five seconds' duration. This regulation was not complied with by the "Bogota," the pilot considering it was not applicable where the vessel was coming out stern first, and three short blasts of the whistle were given. Assuming, however, that he was wrong in this view—and on a strict construction of the bye-law I think he was—I am quite clear on the evidence that the Sheriff-Substitute is right in holding that failure to observe this regulation in no way contributed to the accident. The more important question is whether bye-law 19, which provides that every steam vessel under her own steam crossing from one side of the river toward the other side shall keep out of the way of vessels navigating up and down the river, applies to the case of the "Bogota." The Sheriff-Substitute holds that it does, but in this view I am unable to agree with him. The bye-law appears to contemplate the regulation of traffic between vessels crossing from one side to another and vessels proceeding up and down the river. Assuming, however, that that is too limited a construction to give the language used, I do not think that it can fairly be said to be applicable to a vessel which is being towed stern first by a tug out from a graving dock, although her course must necessarily take her in the first instance somewhat in the direction of the opposite bank of the river. It certainly is inapplicable if the third of the

Clyde Regulations applies to the case of the "Bogota." That bye-law is in these terms—[His Lordship quoted bye-law 3].

The Sheriff-Substitute seems to hold that this bye-law was not applicable—the "Bogota" not being strictly a turning vessel as she would have been if her bow had been to the west instead of the east. This appears to me to be an unnecessarily narrow construction to give the rule. The "Bogota" was a turning vessel in the sense that she had first to proceed west and then to turn her course to the east. Her length, however, was 415 feet, and the breadth of the river at the Elderslie Dock was only 470 to 500 feet. It was therefore an impracticable manœuvre for her to leave the dock bow first with her own steam and then turn round as she might have done if her length had been greatly less than it was. The manœuvre, however, which she executed involved the same obstruction to traffic, and as she was not using her own steam and was not in a position to manœuvre so as to avoid other traffic on the river, it appears to me that on a reasonable construction of the terms of the third regulation she was entitled if she did so at a suitable time to give the four-blast signal with the effect of transferring to the approaching vessel the duty to keep out of the way.

The fault which the Sheriff-Substitute has found proved against the "Bogota" is that when she saw the "Alconda," which she appears to have done when she was about a half or two-thirds out of dock, she ought to have refrained from proceeding further and held on until the "Alconda" passed her. In view of the state of the tide and the proximity of the "War Afridi" to the dock entrance the stoppage of the "Bogota" before she had cleared the dock may have been a difficult operation, and if not skillfully executed attended with risk. At the same time I am not satisfied on the evidence that it was an impossible or even an impracticable operation. If, therefore, the Sheriff-Substitute be right in holding that the "Bogota" was in breach of bye-law 19, I should have difficulty in holding that that breach had nothing to do with the collision, and should concur in his view that both vessels were to blame. As, however, I am of opinion that the "Bogota" was entitled to give the four-blast signal, and to assume that a vessel in the "Alconda's" position would on hearing the signal keep out of the way, I am unable to hold that the "Bogota" was under any obligation to hold on when she sighted the "Alconda."

Apart from the "Bogota's" alleged failure to comply with the Clyde Regulations, fault was attributed to that vessel in three respects. It was said that she was not keeping a proper look-out. This appears to me disproved by the fact that the "Alconda" was seen as soon as she appeared at the bend at Renfrew Ferry and the appropriate signal was given. In the second place, it is said that there was delay on the part of the "Bogota's" head tug. This ground of fault is not suggested on record, and seemed to be developed solely upon certain admissions

given by some of the pursuers' witnesses that they expected that tug to make fast sooner than she did. An explanation for such delay as occurred is given, and I am satisfied that nothing is proved in this connection which would entitle the defenders to plead this as a contributory cause of the collision. In the third place, it is alleged that the stern tug was in a wrong position to prevent the "Bogota" from falling towards the south bank of the river, and that she did not alter her course or stop and reverse when it became apparent that a collision was inevitable or at all events probable. It appears, however, that neither the pilot on board the "Bogota" nor the master of the tug "Samson" expected the "Alconda" to come on without alteration of speed after the four-blast signal. On the evidence I do not think that any fault is established against the "Samson" after the master of that vessel realised that the "Alconda" was disregarding the signals which she had given. At that stage he seems to have done his best to prevent the "Bogota" from getting in front of the "Alconda" and thereby causing a more serious collision.

A question arose in the course of the proof as to which I desire to make a few remarks. At one point in the examination of Mr Shearer, a witness for the pursuers, objection was taken by the defenders to the question that was being put to the witness on the ground that it involved a question of the management of a vessel which fell to be decided by the Court with the assistance of the Nautical Assessor, who was sitting along with the Sheriff-Substitute. The objection was repelled. A separate appeal upon this point was taken to the Sheriff, who refused the appeal. It appears to be a well-established rule of practice in England that in Admiralty cases, where the Court has the assistance of nautical assessors, evidence involving questions of nautical skill and experience is not admissible. Reference may be made in this connection to the "*Kirby Hall*," 8 P.D. 71, and the "*Earl Spencer*," L.R., 4 A. & E. 431. In the former of these cases Sir Robert Phillimore in rejecting certain evidence said—"I think it is evidence on a point on which it is the province of the Trinity Masters to advise the Court, and I do not think I ought to do anything which will go any way towards allowing the examination of expert witnesses on questions of nautical skill and seamanship in cases where the Court is assisted by the Trinity Masters." In refusing to apply this rule the learned Sheriff indicated that although the Admiralty law in both countries is the same, it does not follow that the practice of the Courts in the two countries is also similar. He added—"If the English rule of practice applied in Scotland one would expect that the Scottish Courts when sitting with nautical assessors would *proprio motu* take exception to the admission of expert evidence on matters of nautical skill and experience, but it cannot, I think, be disputed that such evidence has frequently been admitted without objection in the Scottish Courts in such

circumstances." This may be so. At the same time I may say that when I sat in the Outer House along with a nautical assessor I followed the English rule and disallowed such evidence. In my opinion there is no reason for any discrepancy between the Scottish and English practice in this respect.

On the whole matter I think that the appeal ought to be allowed and the "Alconda" found alone to blame for the collision.

LORD ANDERSON—The Sheriff-Substitute has found that the collision was in part due to the negligence of the "Alconda," and in this finding the respondents acquiesce. It is expedient, however, to ascertain what was the fault of the "Alconda," as this may have a bearing on the question of the alleged negligence of the "Bogota." The negligence of the "Alconda" may be found to have been of such a character as to give the "Bogota" and her tug the "Samson" no opportunity for effective action with the object of avoiding a collision.

The Solicitor-General maintained that the "Alconda" had been proved guilty of three faults—(1) Failure to keep a proper look-out, in consequence whereof (a) the "Bogota" and the "Samson" were not sighted as early as they might have been, and (b) the warning blasts of the "Bogota" and the "Samson" were not properly heard, located, and obeyed; (2) approaching in the circumstances at an excessive rate of speed; and (3) failure to make the appropriate manoeuvre to avert a collision.

The evidence in my opinion establishes that the "Alconda" was in fault in coming on in the face of an obvious risk, and after warning had been given, at undiminished speed with the object of passing through a gap which was too narrow for safe passage or which if sufficient was negligently navigated. This seems to me to be the result reached by the Sheriff-Substitute. On the evidence I hold it proved that the first four-blast signal signifying that the channel was blocked was heard by the tug "Flying Serpent" when that vessel was at Renfrew Wharf. In a question of this nature tug and tow are in law held to be one entity—*The "Niobe"*, 13 P.D. 55. The duty of the tug was therefore to communicate this warning signal to the tow—*The "Jane Bacon"*, 27 W.R. 35. Renfrew Wharf is 2600 feet or thereby from the Elderslie Dock. Moving at the rate of 6 knots the approaching vessels had thus 4½ minutes or thereby to take precautionary measures, but none such was taken. The second warning of four blasts was heard by the tug and also by the "Alconda" herself at Renfrew Ferry, which is 1700 feet or thereby from Elderslie Dock and the time for action thereafter was 3 or 4 minutes, which I hold to be ample for the purpose of slackening speed and if necessary reversing. By this time I am satisfied that the position of the vessels in the channel was observed and the pilot of the "Alconda" made up his mind to push on and endeavour to get through the gap.

At this point of time the width of the gap may with some exactitude be estimated.

We were told that the breadth of the river at Elderslie Dock was 500 feet or thereby. The Sheriff-Substitute holds it proved that when the "Alconda" was sighted by the "Bogota" about three-quarters of a mile away the stern of the "Bogota" was well over to mid-channel. Astern of the "Bogota" was the "Samson," 115 feet long, attached by a 12 foot rope to the "Bogota." It is plain therefore, even keeping in mind that these vessels were aligned towards the west owing to the angle of 30 degrees made by the Elderslie Dock with the river, that the gap available for the passage of the "Alconda" was very narrow. I have difficulty in accepting the evidence given on behalf of the respondents that the collision took place 100 feet or thereby from the south bank.

The evidence, however, places the "Alconda" in this dilemma. Either the gap was manifestly insufficient and so should not have been essayed, or if it was sufficiently wide for safe passage, there was negligence in its navigation. The case of the "Bogota," or rather of her tug the "Samson," is that if the gap was manifestly inadequate she was not bound to anticipate that it would be attempted; if it was apparently sufficient she was not bound to anticipate that it would be negligently navigated.

The duty of the "Alconda" in the circumstances was according to the appellants' contention to hold back until the "Bogota's" manoeuvre had been completed and the channel cleared—*The "Gulf of Suez,"* [1921] P. 318. The Sheriff-Substitute has found that the duty of the "Alconda" was to stop or at least to slacken speed, and I am of opinion that on this point his judgment is well founded.

The respondents maintained that the evidence establishes that the "Bogota" was also in fault in respect of the collision. It must be kept in mind that it was just as important for the "Bogota" to get up the river as it was for the "Alconda." The "Bogota" was entitled, under proper precautions, to leave the graving dock and proceed to her destination at Princes' Dock. A time was chosen for leaving the dock which was not unpropitious. The necessary flood tide was flowing, the wind was not extreme, and there remained enough of daylight to enable the appropriate manoeuvres to be carried through before darkness intervened. While the "Bogota" was bound to exercise all reasonable care in coming out of the dock—*The "George Roper,"* 8 P.D. 119; *The "Llanelly,"* [1914] P. 40—she was, in view of the difficulty of her manoeuvres, entitled to consideration from approaching vessels.

Five grounds of fault on the part of the "Bogota" were alleged in argument. Two of these, to wit, those relating to the two tugs, are not averred on record. On the other hand certain allegations of fault averred on record were not maintained in argument.

1. It is conceded that the "Bogota" did not observe the provisions of rule 18 by blowing a prolonged blast when leaving the

dock. The Sheriff-Substitute has, however, held it proved that the non-observance of this rule did not contribute to the collision. I agree with this view for these reasons—(1) When the prolonged blast ought to have been sounded the "Alconda" was probably one and a-half miles distant. It is therefore doubtful if she could have heard the blast had it been sounded. (2) If she had heard it, then it is almost certain that at that distance she could not have located it. (3) Long subsequent to the time when the prolonged blast should have been sounded the "Alconda" received ample warning that the river was obstructed. This first point therefore fails.

2. It is said that there was undue delay amounting to fault in attaching the tug "Victor" to the stern of the "Bogota." But any delay that did take place is explained by the presence of a wire from the pier-head to the "Bogota." Until that wire was hauled in the "Victor" could not be attached. There is no evidence that there was any negligence in having that wire where it was.

3. It is alleged that a proper look-out was not being kept on the "Bogota" and on the "Samson." In my opinion this is disproved. The evidence shows that the officers and crew of the "Bogota" were properly placed, and that the pilot was in charge on the bridge. The "Alconda" was sighted long before that vessel sighted the "Bogota." There is no evidence that the "Alconda" should have been seen sooner. The bend of the river and the intervening buildings would doubtless prevent even her lights from being seen prior to her reaching Renfrew Wharf. There is no evidence that the "Samson" was not keeping a proper look-out.

4. It was said that the tug "Samson" was wrongly placed with reference to her tow in two respects—(1) It was maintained that she and the "Bogota" should have been stern to stern, and (2) the tug should, it was urged, have been on the port quarter of the tow.

As to the former of these objections, it is proved that in having her bow to the stern of the tow the tug was following the usual practice, and that this was the best mode of attachment for doing her required work. As to the latter point, it is proved that the tug just before the collision was to some extent on the port quarter of the tow, and that the strain from the tug was operating in that direction.

It must also be kept in mind, as I have already pointed out, that the dock made with the river an angle of 30 degrees. This alignment made it appropriate, and indeed necessary, that the tug at the outset of the manoeuvre should be directly astern of the tow pulling her to some extent down the river. In my opinion this ground of fault is not established.

5. The last ground of negligence alleged is that which requires most consideration, as it is in respect of it that the Sheriff-Substitute has held the "Bogota" in fault. The Sheriff-Substitute considers that bye-law 19 applied, and he further held that in the

circumstances disclosed by the proof it was the duty of the "Bogota" in observance of that rule to hold on to the north bank and leave a sufficiency of channel on the south side of the river to enable the "Alconda" to pass. I shall state in the sequel my reasons for disagreeing with the Sheriff-Substitute as to the applicability of bye-law 19, but even if I thought that it did apply, I am not satisfied that I should agree with him and the Nautical Assessor that it fell to be observed by the "Bogota" in the circumstances disclosed in the Sheriff-Substitute's findings. The important findings are (11) and (12). Finding (11) narrates that the "Bogota" had progressed so far with her manœuvre that she was two-thirds out of the dock with her stern well over to mid-channel. Her manœuvre was evidently more than half accomplished, and was probably at its most critical and difficult stage owing to the action of the tide on the port side of the hull of the "Bogota." The "Alconda" was nearly three-quarters of a mile off at that stage, and was then first sighted by the "Bogota." The Sheriff-Substitute, advised by the Nautical Assessor, has held that the duty of the "Bogota" was to perform the difficult task of maintaining this position till the "Alconda" passed. Bye-law 19 must be interpreted reasonably. It is plain that the "Bogota" was not under obligation to wait indefinitely in the dock or in the channel until a vessel "navigating up" the river had passed. The Sheriff-Substitute suggests a test for the "Bogota's" conduct—could she have expected to get herself straightened in the river in time to pass up ahead of the "Alconda"—but this test seems inappropriate, as it takes no account of the extent to which the manœuvre of the "Bogota" had progressed. The suggestion is that the "Bogota" and her tug ought to have marked time while the "Alconda" steamed three-quarters of a mile at six knots an hour—that is, for five minutes or thereby. On a busy river like the Clyde it is conceivable that by the time the "Alconda" had reached the "Bogota" another vessel would have appeared round the bend, for the passing of which the "Bogota" would have also had to wait, and so on, with the result that the "Bogota" would have had to preserve her *status quo* for an unreasonable period of time. In the circumstances, even if the bye-law applied, I should be prepared to hold that the manœuvre of the "Bogota" had proceeded so far that she was entitled to complete it without delay, and that it was the duty of the "Alconda" to slacken speed to enable her to do so. A very short time—probably no more than seconds—would have sufficed, and would have imposed no material delay on the "Alconda."

I am satisfied, however, that bye-law 19 does not apply. My reasons for so holding are these—1. The "Bogota" was not at the time under her own steam. She had steam in her boilers, but she did not intend to use her engines until the tugs had straightened her up in the channel. She was being moved by the "Samson," and to such a case the rule does not seem to apply. 2.

The "Bogota" was not in the sense of the bye-law crossing from one side of the river towards the other side. The bye-law appears to contemplate two classes of vessels—(a) those crossing the river, and (b) those going up and down the river. The former class must give way to the latter. The "Bogota" in my opinion was in the latter class. She was merely straightening up, not crossing, preparatory to navigating up the river.

The "Bogota" invoked the provisions of bye-law 3, which, it was contended, placed on the "Alconda" the duty of keeping out of the way of the "Bogota." I am of opinion, however, agreeing on this point with the Sheriff-Substitute, that bye-law 3 did not apply. It may be that those in charge of the "Bogota" thought at the time that bye-law 3 did apply, because the signal of four blasts prescribed by the bye-law was given. Or it may be that four blasts were given, as the warning employed by the custom of the river when a vessel was obstructing the channel. The evidence leaves this matter in doubt. In my judgment the "Bogota" was not "turning round" in the sense of the bye-law. The phrase "turning round" is a vague and indefinite expression, as to the exact significance of which it is impossible to be confident. To give effect to the term "round," however, it seems to me that there must have been a definite change of direction—that is, a vessel heading east must have turned round to a westerly direction or *vice versa*. If this view is correct, then only when the turning movement has exceeded a right angle can it be said that there has been a "turning point" in the sense of the bye-law. A turning movement to this extent was in my opinion necessary to notify an approaching vessel that the duty of keeping out of the way had arisen. If any lesser movement sufficed, it might be contended that the bye-law applied when a vessel's head under helm action was shifted a point or two. Now the "Bogota," as I read the evidence, was not turned more than through an angle of 45 degrees or thereby. This was not a "turning round" but a mere straightening movement. I am conscious, especially in view of what has been said by your Lordship in the chair and Lord Hunter that this construction may seem narrow and hypercritical, but it is the only construction by which I am able to give reasonable effect to both terms of the phrase used.

I am also of opinion that the "Bogota" was at no time "not under command" in the sense of the bye-law. It may be that, as the respondents maintained, this phrase applies only to cases where a vessel is disabled so that her propeller cannot revolve or her helm act—*The "Mendip Range,"* [1921] 1 A.C. 556, *per* Viscount Finlay at p. 570; *The "P. Caland,"* [1893] A.C. 207, *per* Lord Herschell at pp. 212-213. It is not necessary to determine this point, as it is plain that the "Bogota" with her steam up and her equipment unimpaired could not be said to be "not under command"—see *The "James Joicey,"* 1908 S.C. 295. The clause which follows in the bye-law seems

to me to be exegetical of the phrase "not under command," the reading therefore being "not under command and so unable to get out of the way of an approaching vessel." I am unable to hold that the "Bogota" was in this helpless condition. The Clyde Trustees, in my opinion, evidently consider that the provisions of bye-law 18 are in themselves sufficient to regulate the occasion of a vessel emerging from a dock.

If, then, bye-law 3 did not apply, the situation was ruled by what I may call the common law of the sea, or the rules of good seamanship, that is, those considerations of comity which should regulate seamanship in circumstances of stress. The same considerations and obligations seem to apply to the use of a highway on land. The points I have already alluded to when dealing with bye-law 19, fall to be given effect to if that bye-law does not apply, with the important consideration in favour of the "Bogota" that her freedom of action was not trammelled by any regulation. The "Bogota," in my opinion, was at the time of the second warning blast, if not of the first also, and certainly after her position in the channel was observed by the "Alconda" and her head tug, so plainly in possession and thus in right of the whole channel to complete a manœuvre already more than half accomplished that she was entitled to go on to finish her manœuvre, and the "Alconda" was bound to slacken speed or stop and reverse to allow the "Bogota" to do so. I am unable to hold that the "Samson" could have done anything beyond what she did to avert a collision. The Sheriff-Substitute's twentieth finding expresses my opinion on this part of the case.

On the whole matter I reach the conclusion that the "Bogota" has not been proved to have been guilty of any negligence in connection with the collision, and that to this extent the judgment of the Sheriff-Substitute must be reversed.

The Court pronounced an interlocutor in which it sustained the appeal and recalled the interlocutor of the Sheriff-Substitute appealed against, dated 22nd July 1922, and after the findings in fact *ut supra*, found in law that the loss and damage resulting from the collision fell to be borne by the "Alconda," and remitted the cause back to the Sheriff to proceed as accords.

Counsel for the Appellants (Pursuers)—Solicitor-General (Fleming, K.C.)—Carmont. Agents—Webster, Will, & Company, W.S.

Counsel for the Respondents (Defenders)—Dean of Faculty (Sandeman, K.C.)—Normand. Agents—J. & J. Ross, W.S.

Thursday, February 22.

FIRST DIVISION.

[Lord Blackburn, Ordinary.]

LORD ADVOCATE *v.* MACALISTER.

Revenue—Succession Duty—Rate of Duty—Succession Arising under a Disposition—“If the First Succession under the Disposition Arises”—Succession Duty Act 1853 (16 and 17 Vict. cap. 51), secs. 2, 10, and 20—Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8), sec. 58 (1) and (4).

The Finance (1909-10) Act 1910, section 58, enacts—“(1) Any legacy or succession duty which under the . . . Succession Duty Act 1853 or any other Act . . . is payable at the rate of five per cent. or six per cent. shall be payable at the rate of ten per cent. on the amount of the legacy or succession. . . . (4) This section shall take effect in the case of legacy duty only where the testator by whose will the legacy is given . . . dies on or after the 13th day of April 1909, . . . and in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date.”

A testator who was beneficial owner of heritable property held by marriage-contract trustees for behoof of his mother in liferent and the testator in fee died in 1900 leaving a testamentary disposition by which he disposed his estate to his mother in liferent and a cousin in fee. The testator's mother died in 1910. *Held (diss. Lord Cullen)* that the first succession to the heritable property, in the meaning of the sub-section (4), arose on the testator's death in 1900, and that succession duty was payable at the rate then current.

The Lord Advocate, on behalf of the Commissioners of Inland Revenue, *pursuer*, brought an action against Captain Norman Godfrey Macalister, Connel, Argyllshire, *defender*, for payment of £185, 11s. 2d., being the balance of succession duty alleged to be due and unpaid by the defender in respect of certain heritable property to which he succeeded on 6th January 1900, under the burden of a liferent which expired on 16th June 1910, by virtue of the will of the late Major Claude Charles Miller Wallnutt. The sum sued for represented the difference between the amount of duty calculated according to the rate introduced by the Finance (1909-10) Act 1910 and the amount calculated according to the rate prior to that Act.

The parties averred, *inter alia*—“(Cond. 1) On the occasion of the marriage of Mrs Eliza Maria Louisa Miller or Wallnutt (hereinafter referred to as Mrs Wallnutt) and Captain Thomas Wallnutt, an antenuptial contract of marriage was entered into dated 6th June 1860. . . . (Cond. 2) By the said antenuptial contract Mrs Wallnutt assigned, disposed, and conveyed to the trustees therein appointed ‘all and whole her just and equal half *pro indiviso* of the