Wednesday, March 7.

SECOND DIVISION.

[Sheriff-Substitute, Glasgow.

HINE BROTHERS *v.* THE TRUSTEES OF THE CLYDE NAVIGATION.

Ship—Navigation—Collision—Wrong Manœuvre.

A steamer, outward bound, proceeding down the river Clyde, opposite Greenock, instead of keeping to that side of the channel which lay on her starboard, the course she should have taken if properly navigated, steered a course which took her close to the south shore, on her port side. A hopper barge, which was coming up the river, also under steam, thinking the steamer was going to touch at Greenock, starboarded her helm in order to let her pass. This was contrary to the rules of proper navigation. About the same time the helm of the steamer was put to port, with the result that she was struck amidships on the port side by the barge. In an action of damages at the instance of the owners of the steamer against the owners of the barge—*held* that the steamer had by wrong manœuvres placed the barge in such a position that she could not be held to blame for starboarding her helm, which in ordinary circumstances would have been wrong.

This was an action of damages in the Sheriff Court of Lanarkshire at the instance of Hine Brothers, steamship owners, Maryport, against the Clyde Navigation Trustees for injuries caused to their vessel the "Horatio," a steamer of 261 tons register, by a collision with a hopper barge belonging to the defenders.

The "Horatio" upon the evening of the 21st October, when it was dark, in the course of a voyage from Glasgow to Hamburg was proceeding down the Clyde in charge of a duly qualified pilot. When she rounded Garvel Point her helm was to starboard, and she continued under a starboard helm, which carried her to port, towards the south bank of the river in the direction of Greenock. The hopper barge No. 4 was proceeding up the river on her way to Port-Glasgow, keeping as near the south bank of the river as possible. When the two vessels came near each other the barge starboarded her helm. The "Horatio," almost at the same moment, ported her helm to try and get into the middle of the channel, and in spite of both vessels reversing their engines, the barge struck the "Horatio" amidships and caused her damage. The place where the collision took place was in Cartsdyke Bay, nearly opposite Greenock. Both parties founded on the Board of Trade rules for preventing collision at sea, which are quoted in the interlocutor of the Sheriff-Substitute *infra.*

The pursuers pleaded—"(2) The said collision having been caused by the fault of defenders, or those for whom they are responsible, the pursuers are entitled to decree as craved."

The defenders pleaded—"(1) The collision not having been caused by the fault of the defenders, or by those for whom they are responsible, the defenders are entitled to absolvitor, with expenses. (3) *Separatim*—The pursuers, or those for whom they are responsible, having caused or materially contributed to the said collision, the loss will require to be apportioned according to law, and the defenders found liable in their share only."

The evidence led before the Sheriff-Substitute showed that the "Horatio," in keeping the course she did under a starboard helm after rounding Garvel Point, did wrong, as a vessel going out to sea ought to have kept to the north side of the river. The barge was so close to the south side that she could not have gone to starboard without running ashore. As she came up the river she saw only the green light on the starboard side of the "Horatio," and saw no other till after she had put her own helm to starboard. The night was so dark that nothing was visible except the lights. The barge thought the "Horatio" was going into Greenock, and accordingly steered for the middle of the river so as to get out of her way. To do so she starboarded her helm, which was contrary to the rules of proper navigation in the circumstances. Almost immediately afterwards the "Horatio" ported her helm, after sounding her whistle, and she thus came across the bows of the barge and the collision occurred.

On 22nd November 1887 the Sheriff-Substitute (LEES) pronounced this interlocutor:—"Finds that on 21st October 1886, while the steamship 'Horatio,' belonging to the pursuers, was proceeding down the Clyde, and the hopper barge No. 4, belonging to the defenders, was proceeding up the Clyde, they came into collision in Cartsdyke Bay, near Greenock: Finds that by article 21 of the regulations for preventing collisions at sea, issued in pursuance of the Merchant Shipping Act 1862, it is required that 'in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fair way or mid channel which lies on the starboard side of such ship': Finds that the place where the collision occurred falls within this rule: Finds that at the time of the collision both vessels were on the southern half of the channel: Finds that by article 15 of said regulations it is required that 'if two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other': Finds that when the master of the barge saw that a collision was imminent, or that his vessel would be driven on shore, he tried to pass on the starboard side of the 'Horatio': Finds that at or about the same time the helm of the 'Horatio' was put to port: Finds that the peril in which the vessels were placed arose from the fault of the 'Horatio' in being on the wrong side of the channel, and would not otherwise have occurred: Finds that the actual occurrence of the collision was caused by the master of the barge trying to pass on the starboard side of the 'Horatio': Finds in these circumstances as matter of law that the peril having originated in the fault of the 'Horatio' in being on the wrong side of the channel, the pursuers are thereby barred from obtaining compensation for the injuries received by their vessel through any fault of the defenders' servants in trying to take the barge past the 'Horatio' on her starboard side: Therefore assoilzies the defenders from the conclusions of

the action, and decerns: Finds the pursuers liable to them in expenses, &c.

"*Note.*— . . . The general requirement as to how vessels shall pass one another where they meet end on, or nearly end on, is that each is to pass on the port side of the other. The pursuers contend that as the barge transgressed this rule the defenders are therefore liable to them in compensation. They found on the well-known case of *The Stoonwart Maatschappy Nederland* v. *The Directors of the Peninsular and Oriental Steam Navigation Company*, 1880, 5 App. Cas. (H.L.) 876, as establishing liability against the defenders. That case, however, did not go quite so far as the pursuers contend, though it did emphatically lay down the rule that disregard of the directions given by the regulations is not to be based on considerations of discretion and expediency, but on actual necessity. The House of Lords accordingly held, in regard to the claim for compensation made by the owners of each vessel, that both were to blame. In the present instance the only claim made is by the pursuers, and therefore the judgment must be the same, whether they fail to prove fault on the part of those in charge of the barge, or whether they prove it if they themselves were also to blame.

"The defenders contend in reply that as matter of fact the ships were not end on, or nearly so; but I am inclined to believe on the whole that they were sufficiently so to let article 15 of the regulations apply.

"But the defenders maintain they are entitled to immunity in respect of the provisions in article 21 of the regulations, which requires that in narrow channels a steamship is to keep on that side of the fairway or mid channel which lies on her starboard side. The pursuers say this rule is inapplicable as the place where the collision occurred was beyond the limits of the river. But in my opinion the rule is not limited to the river. It is not a question of where is the mouth of the river, and that all above that is narrow channel, and all below it is not so. As matter of fact I understand the channel is broader above the spot where the collision occurred than at it or below it. And I should have little hesitation in holding that the rule would apply as regards the Kyles of Bute or Loch Long. The only requirement to make the rule apply is that the place in regard to which it is mooted is a narrow channel, and therefore I should think it applicable to a narrow passage between islands anywhere, or between an island and the mainland. Indeed, it would be absurd to say that the rule was to be applicable at a place where measures of precaution were little needed, and not where they were most needed. It is the narrowness of the channel that creates the danger, and therefore requires that to avoid risk of collision where there is no room to manœuvre each vessel shall keep to her own side of the channel.

"Now, the 'Horatio' transgressed this rule. And this was the source of the danger. It was the *fons et origo mali*, and if the 'Horatio' had kept to her proper side, as the barge did to hers, nothing that the barge could have done would have brought about the collision.

"It is therefore unnecessary to determine whether the master of the barge was right or was wrong in trying to escape injury by passing the 'Horatio' on the starboard side. Possibly the case was one of actual necessity. This, however, is open to argument. But even assuming that it were held that the barge was wrong in trying to pass on the starboard side, the important point is that her election or adoption of this wrong course could not have occurred if the 'Horatio' had kept to her own side of the channel. The barge was close to the shore on her proper side of the channel, the 'Horatio' was where she had no right to be, and as it was her being there created the danger, I think her owners are barred from obtaining the compensation that they seek."

The pursuers appealed to the Court of Session, and argued—It was admitted that the "Horatio" was to a certain extent in the wrong in keeping too near the south shore, but that was entirely a question of degree. According to the Sheriff-Substitute's findings in fact both the ships were in the wrong, and that did not bar the ship injured from claiming damages, it merely divided the amount between the two ships. Even if the fact that the "Horatio" was on her wrong course had caused some confusion on board the barge, that would not relieve them of liability, as their bad navigation was the ultimate cause of the disaster. They were therefore liable, if not for the whole damage, at least for half—*Spaight* v. *Tedcastle*, March 7, 1881, 6 L.R., App. Cases 217; *Cayzer* v *Carron Company*, Aug. 1, 1884, 9 L.R., App. Cases, 873; "*The Benares*," Dec. 3, 1883, 9 L.R., P.D. 46.

The respondents argued—The barge was not at all in fault. The evidence showed that she saw the "Horatio's" green light only as she came up the river. That indicated that the ship was going to touch at Greenock. The crew of the barge, thinking that, did their best to avoid her, and stood out for the centre of the river; then the "Horatio" ported her helm, and that caused the collision. Either the "Horatio" was going to touch at Greenock or she was not. If she was, then the barge had to get out of her road in the best way she could, in which case the "Horatio" ought not to have ported her helm; or she was going out to sea, and then she ought to have been on the north side of the river, and not to the south at all. In either case, if the "Horatio" had acted properly the collision would not have occurred—"*The Oceana*," June 7, 1878, 3 L.R., P.D. 60; "*The Bywell Castle*," July 15, 1879, 4 L.R., P.D. 219.

At advising—

LORD JUSTICE-CLERK—I am of opinion that we should adhere to the judgment of the Sheriff-Substitute—that is to say, that we should find that the owners of the barge are not responsible for the damage done to the steamship "Horatio."

The facts of the case are these:—Upon the evening of the 21st October 1886 the "Horatio," a large ship, was proceeding down the Clyde on her voyage to Hamburg with a cargo of coals, and she had no intention of stopping at Greenock. On the other hand, a hopper barge, which was a coasting vessel kept by the defenders the Clyde Navigation Trustees for the purpose of transporting harbour refuse from one place to another, was proceeding up the river to Port-Glasgow. Shortly after the larger vessel had come round Garvel Point the two ships came into collision—that is to say, the barge ran into the "Horatio"

and did her some damage, for which compensation is now claimed.

There are two grounds on which it is said the barge is responsible, and first, because it is said that in the manœuvring that took place the rules of navigation were not observed by her. If I had to determine that matter I might not say that they had not been observed, but the larger and more important ground is this, that the "Horatio," although outward bound, going down the river with plenty of sea room, came too close to the shore, and by so doing caused the difficulty that arose. I am of opinion that if a vessel of a large size quits its proper course and causes difficulty and confusion to the coasting craft on the other shore without any reason, and contrary to the rules of proper navigation, it is not a sufficient reply to say that the coasting vessel broke some rule, because in the confusion caused, and entirely caused, by the wrong track which the larger vessel took, allowances are to be made for the persons who have been taken by surprise. My opinion is, that if in a moment of extreme difficulty and peril the other vessel happens to do something wrong, so as to be a contributory to the mischief, that will not render her liable for the damage.

There is a passage in the opinion of Lord Justice James, in the case of the "*Bywell Castle*," 4 L.R., P.D. 219, which I think expresses this view entirely—"But I desire to add my opinion that a ship has no right by its own misconduct to put another ship into a situation of extreme peril and then charge that other ship with misconduct. My opinion is, that if in that moment of extreme peril and difficulty such another ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected." And that that was the condition of matters in the present case was clearly brought out in the evidence, especially in that of Alexander Reid, master of the "Princess Royal." His ship was coming down the river behind the "Horatio," and he saw the collision, and he says—"Before the collision happened, when I saw the angle of both vessels, and them so near, I said to the second mate, 'There is a collision going to happen here.' The second mate made a remark to me; he said, 'I do not think they have struck.' I said, 'Yes, they have, because I saw the concussion.' The barge being a little light, I could see her mast giving a little shake. I said something about who was to blame. I did not know the name of the steamer coming down, but I said she was wholly to blame. I thought he had not a leg to stand upon, because if she had been navigated in her proper position in the river there would have been no collision." I think that that is sufficient evidence, and there is plenty of corroboration to show that the "Horatio" was not keeping her proper course. By the course that she took she caused the people on board the barge to think that she was going to touch at Greenock. It has been shown that that was not an unreasonable impression for them to have, and from the course which she felt bound to take the catastrophe occurred. I think that we should affirm the Sheriff-Substitute's judgment on that ground. I give no opinion upon the details of the rules which were adverted to in the case, because I think that that ground is sufficient for our judgment.

LORD YOUNG—I am of the same opinion, and on the same grounds. The case seems to me to involve no legal question whatever, nor any interpretation of the rules and regulations quoted to us. The centre fact is that these two vessels, one a barge coasting along the shore, and the other a vessel making for the open sea, and not intending to call at Greenock at all, came into collision at a point which is quite close to the harbour works of Greenock. The question is whether this was attributable to the fault of anybody, and if so, to whose fault? Now, it is agreed that there was fault on the part of somebody, or the collision ought to have been avoided. Each party blames the other.

The first fault is on the part of the ship, because she came into collision close to the shore at Greenock, when she ought not to have been there at all—she was out of her course. It is not an unlawful course for a ship to be steering, but it was not her proper course, though it is not explained how she came to be there at all. When she rounded Garvel Point she ought to have ported her helm and straightened her course so as not to get to the point she did at all. But she did get there, and the people on the barge coming up saw her green light, so her crew must have seen and did see the barge's red light. Then what were the people on board the barge to think when they saw a ship so close inshore as she was? I think they could only conclude one thing, that she was going to touch at Greenock. The course she was going was the proper course for that purpose, and was an improper course for any other purpose, and they thought that she was going to cross the course of the barge. Their duty, then, was to do as they did, to see if they could pass outside of her, so they starboarded their helm in order to take their vessel to port—that is, that they might take her outside the course of the larger vessel. If the "Horatio," had continued in the course she was holding when quite near the barge, and the barge had continued in hers, then a collision was inevitable; therefore she could not keep on her course unless she was quite sure that the "Horatio" would not continue in hers. Therefore the fault which the pursuers really impute to the persons in charge of the barge is that they ought to have had faith that the "Horatio" would change her course so as to avoid a collision. I do not think that they were called upon to assume that, or to rely on the idea that the "Horatio" would alter her course, although she did so, and therefore I think there was no blame attachable to them for taking such a course as would take them outside the "Horatio's" course. If I were to say where I think the blame lay, I should say that it was on the part of the "Horatio." It was entirely their fault getting into the position they did. But I am not going to put the blame upon the "Horatio." I do not think it necessary for the case. It is sufficient that the pursuers have not succeeded in establishing any fault on the part of those in charge of the barge. Therefore I think that we should simply negative the averments upon which the action was founded, that there was

fault upon the part of the defenders, or of those for whom they are responsible. That would have been the issue put to a jury, either to affirm or to negative it. I think that we should negative it, and assoilzie the defenders.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor—

"Find that the collision between the steamship "Horatio," belonging to the pursuers, and the hopper barge No. 4, belonging to the defenders, was not caused by fault of the defenders, or those for whom they are responsible: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute appealed against: Find the defenders entitled to expenses in this Court," &c.

Counsel for the Appellant—D.-F. Mackintosh—C. S. Dickson. Agent—R. Bruce Cowan, W.S.

Counsel for the Respondents—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, March 8.

SECOND DIVISION.

CRUM EWING'S TRUSTEES *v.* BAYLY AND OTHERS.

Provisions to Children—Election—Marriage Contract Provision—Share of Residue.

A father, in the antenuptial marriage-contract of his daughter, to which he was a party, directed the trustees in whose name a policy of insurance on his life had been effected, to assign the policy to a partial extent to the marriage-contract trustees. He also became bound to pay regularly the premiums of insurance, and failing his doing so he and his executors were taken bound to pay to the marriage-contract trustees, at the first term after his death, a sum equivalent to the amount of the policy to be assigned. The policy was not assigned. Subsequently the father made a settlement under which the daughter was entitled to a share of residue of greater value than the sum to which her marriage-contract trustees were entitled under the policy. The settlement declared that the provisions therein made in favour of the testator's children should be in full satisfaction of all their legal rights, and also that the provision in favour of the daughter should be in full of all provisions in the marriage-contract in favour of her, her husband, or their issue, "and particularly in lieu and in place of all obligations in their or any of their favours so far as still unimplemented undertaken by me by the said antenuptial contract, all of which provisions shall, by acceptance of the provisions hereunder, be held to have been discharged." *Held* that an election must be made between the provision in the marriage-contract and that in the settlement.

Mr Humphry Ewing Crum Ewing of Strathleven died on 3rd July 1887 leaving three children, viz., Alexander Crum Ewing, his eldest son and heir-at-law; John Dick Crum Ewing, his second son; and Mrs Jane Coventry Crum Ewing or Bayly, wife of General John Bayly.

In 1847 Mr Crum Ewing had insured his life for £3000, and the policy was taken in the name of trustees. The trust on which the sums recovered under the policy were to be applied were not specified.

By a deed of declaration of trust dated in 1850, the trustees holding the policy of insurance declared that they held "the said sum of £3000 sterling, or such sum as might be due under the said policy at the death of the said Humphry Ewing Crum, in trust for the use and behoof of the said Alexander Crum, the said John Dick, Crum, and of Humphry Ewing Crum junior, all sons of the said Humphry Ewing Crum," and that in the respective proportions and subject to the declaration set forth in the said deed of declaration of trust. By a subsequent deed of declaration of trust, dated in 1877, the surviving acting trustees, in exercise of a power reserved to the trustees of the policy by the deed of declaration of trust above mentioned to dispose of and apply the funds receivable under the policy in such other way and for such other purposes as they should deem proper, declared that they held the policy and sum thereby assured, and all the benefits accruing thereon "for behoof of the said Humphry Ewing Crum Ewing, to de disposed of and applied as he may think proper and direct by assignation, deed of settlement, or otherwise."

By the antenuptial contract of marriage between General and Mrs Bayly, dated 4th July 1854, Mr Crum Ewing, on the narrative that he was desirous of securing upon his daughter in liferent, and upon her children in fee, certain sums, and on the narrative that he had effected the above-mentioned insurance upon his life, directed and authorised the trustees of the policy of insurance to "assign and transfer the said policy of insurance, to the extent of the sum of £2000 sterling thereof, and of the corresponding emoluments and profits which may have accrued or may accrue thereon, to the trustees hereby nominated and appointed under this contract, or their foresaids, to be held, said policy, to the extent of said sum of £2000, and corresponding emoluments and profits thereof, by the said trustees in trust for behoof of the said Miss Jane Coventry Ewing Crum, in liferent for her liferent use only, exclusive of the *jus mariti*, and the debts and deeds of the said John Bayly as aforesaid, and for behoof of the children of the marriage in fee . . . And in the meantime the said Humphrey Ewing Crum Ewing binds and obliges himself to keep the said policy of insurance in force, and to pay the annual premiums due thereon during his life, and that regularly as they become due, and failing his doing so, then he binds and obliges himself and his foresaids to make payment to the said trustees, for the purposes foresaid, of the said sum of £2000 at the first term of Whitsunday or Martinmas succeeding his death, with the lawful interest thereof from the said term until the same is paid." It was declared by the deed that this provision was accepted by the spouses in full of all legal rights the wife had in her father's estate. By the mar-