and being faced with the difficulty occasioned to her in keeping her proper course on the south side of the river furthest away from John Brown & Co.'s dock by the improper navigation of the "Clyde" and her string of barges, first stopped, and then reversed her engines. As she was coming up the river with the tide she at once lost steerage way, got out of control, and sheered right over in the direction of the "Inflexible." The "City of Benares," on the other hand, was perfectly correctly navigated after the "Clyde" and her barges emerged from John Brown & Co. Ltd.'s dock. She was on her proper course and she checked her speed until the barges were sufficiently clear to give her what her pilot termed "a clear eye" to pass on down the river. But though clear of the "Clyde" and her barges, she was suddenly called upon to deal with the situation caused by the sudden change of course of the "Almora," of the cause of which she was necessarily ignorant at the time. But it was evident that a collision between her and the "Almora" was imminent just off the stern of the "Inflexible." The "City of Benares" at once stopped and reversed her engines, which was the only thing that she could do; but though clear, she was on a course that would have taken her past the stern of the "Inflexible," with not much room to spare, and with a right-handed screw it was well known to those navigating her that on reversing her engines she would at once sheer to starboard, with the certainty of colliding with the stern of the "Inflexible," a collision with which would have been very fatal. The auxiliary tug attached to her bows, with commendable promptitude at once starboarded his helm and towed to port sufficiently to save the "City of Benares" from this catastrophe, but in so doing maintained her in such a position that the "Almora" coming inside the angle between the "City of Benares" and her tug, the collision which had been imminent occurred, and when it did occur the starboard bow of the "City of Benares" was within a few feet of the stern of the "Inflexible." Now had the "Inflexible" not been there the "City of Benares" might have been allowed to pay off to starboard for at least 100 feet without coming into contact with anything. This she would have done naturally, as I have said, by the act of reversing her engines, and she might have been assisted by her tug towing to starboard instead of to port. Even if she had come in contact with the Dolphin, the probability is that no ill results would have happened. If, then, there had been this additional 100 feet of sea room in which to manœuvre, the probability is that the collision between the "Almora" and the "City of Benares" would have been averted, and although the entire avoidance of collision cannot be predicated as a matter of absolute certainty, it can be certainly said that the collision, if it did take place, would have been far less disastrous in result. The fault of the "Inflexible," therefore, prevented, if not the entire avoidance of the collision, at any rate the opportunity of minimising it. I think, therefore, with the Sheriff-Substitute that her owners are responsible along with those of the "Clyde" for the result of the collision which took place. Their fault or acts of negligence were independent, but they combined to produce a common result. The "Inflexible" was a dangerous obstruction to navigation, and though the primary cause of the collision was the fault of the "Clyde," that does not discharge the "Inflexible," but only renders her liable along with the "Clyde," the injured vessels being innocent.

I prefer this ground of judgment as against John Brown & Co. Ltd. to that of the Sheriff-Substitute, for I am not by any means satisfied that the "Almora's" course was affected, as he thinks it was, by the fact that the "Inflexible's" stern obstructed the "Almora's" view of the mouth of John Brown & Co. Ltd.'s wet dock, and so somewhat covered the exit of the "Clyde" and her barges. But the result in law is the same as that to which the Sheriff-Substitute has come.

LORD SALVESEN was sitting in the Second Division.

The Court pronounced this interlocutor—

"Affirm the interlocutor of the Sheriff-Substitute of 1st December 1909: Repeat the findings in fact and in law therein: Refuse the appeals: Remit the cause back to the Sheriff-Substitute to proceed as accords; and decern."

Counsel for the Ellerman Lines, Limited (Pursuers and Respondents)—Constable, K.C.—Mair. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Glasgow and Newport News Steamship Company, Limited (Pursuers and Respondents)—Munro, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for the Clyde Navigation Trustees (Defenders and Appellants)—Sandeman, K.C.—Black. Agents—Webster, Will, & Co., W.S.

Counsel for John Brown & Company Limited (Defenders and Appellants)—Morison, K.C.—C. H. Brown. Agents—Macpherson & Mackay, S.S.C.

Wednesday, November 9.

FIRST DIVISION.

[Lord Dewar, Ordinary.

O'KEEFE *v.* THE LORD PROVOST AND MAGISTRATES OF EDINBURGH.

Reparation—Negligence—Personal Injury—Ice on Street—Averment of Failure to Regulate Flow of Fountain—Relevancy.

A woman slipped on a piece of ice which had formed on the pavement near a fountain, and fell, sustaining fatal injuries. Her husband and certain

of her children raised an action against the Magistrates of the City, who had sole control of the fountain and the cleansing of the streets, in which they averred that it was the defenders' business so to regulate the fountain as to prevent an overflow, and that the ice must have been caused by an overflow.

Held—rev. the decision of the Lord Ordinary (Dewar)—that the pursuers' averments were irrelevant.

Per the Lord President—"In such a case I can only imagine negligence coming under one or other of two heads—either that there was some structural defect in the fountain, which made overflows probable, or that the fountain having for some temporary or fortuitous cause overflowed, this dislocation of the ordinary arrangements had been brought to the knowledge of the authorities or had existed for such a length of time that they ought to have known, and that they had failed to remedy the temporary defect."

Statement of law by Baron Pigott in *Shepherd* v. *Midland Railway Company*, 25 L.T. 879, *approved.*

Patrick O'Keefe, husband of the deceased Ann Carty or O'Keefe, who died on 6th March 1910, and Mary Agnes O'Keefe and others, certain of his children, raised an action against the Lord Provost, Magistrates, and Council of the City of Edinburgh for damages for the death of Mrs O'Keefe.

The pursuers averred, *inter alia*—"(Cond. 2) The defenders have through their officials complete control over public fountains, monuments, and streets within the bounds of the city of Edinburgh. The defenders are proprietors of the fountain commonly known as 'Bobbie's Fountain,' which is situated at the junction of the following streets, viz.—Candlemaker Row, Chambers Street, George IV Bridge, Forrest Road, and Bristo Street. The fountain has an upper and a lower basin, and when there is too large a flow of water it flows over the one or the other of the basins, and forms a narrow stream across the pavement in Candlemaker Row. The said fountain is situated immediately at a sharp, dangerous, and dark corner between George IV Bridge and Candlemaker Row, and in Candlemaker Row just at the fountain there is a steep decline. The water when overflowing from said fountain runs across the pavement into the gutter on the north side of Candlemaker Row. (Cond. 3) On 29th January 1910 the deceased Ann Carty or O'Keefe was proceeding from Chambers Street intending to go down Candlemaker Row to the Grassmarket, and on turning the corner at said fountain, at or about 12 noon on that day, she slipped upon a piece of ice about one inch in thickness, and two or three inches or thereby in breadth, as she was passing said fountain in Candlemaker Row. This ice upon which she slipped was formed from water which had overflowed from said fountain. Said ice covered a strip of said pavement, and was caused by an overflow of water from said 'Bobbie's Fountain.' This overflow was due to the water in said fountain being imperfectly regulated by the defenders. It was the duty of the defenders to properly regulate the flow of water in said fountain so that there would be no overflow, but this they did not do, and thus caused said accident to, and subsequent death of, said Mrs O'Keefe. She fell upon her back, her side striking the lower of said two basins, and two of her ribs were broken by said fall. Through slipping and falling as aforesaid she also sustained and suffered injury to the back of her head. . . . (Cond. 4) The said accident was due to the fault of the defenders. The footpath in Candlemaker Row was in a dangerous condition owing to the ice, which defenders or their servants had negligently allowed to form on said pavement. On said 29th January 1910 the streets were dry. The rest of the pavement in Candlemaker Row and immediate vicinity was free from ice, and the deceased did not and could not with reasonable care have seen said strip of ice, and had said flow from said fountain been properly regulated no ice would have formed at the place where the said Ann Carty or O'Keefe met said accident, which resulted in her death. The defenders have sole control of the cleansing and safety of the streets, but they neglected to take the usual precautions to keep this place safe to foot-passengers. It was their habit to strew this place with ashes whenever said fountain overflowed and the pavement was covered with ice, but on said 29th January 1910 they negligently failed to do so until after the said accident happened, although there was ice at said fountain as above mentioned. The pursuer's fall was caused by the said defective and dangerous condition of said pavement, and it was the duty of the defenders to safeguard foot-passengers using said pavement in Candlemaker Row opposite said fountain by properly regulating the flow of said fountain and preventing it from overflowing, or by strewing said pavement with cinders when there was ice thereon, or by removing said ice when formed by an application of salt. One or other of these precautions had been taken prior to said accident on other occasions by defenders when ice had formed through the overflow from said fountain. None of these precautions did the defenders take prior to the hour of said accident on said 29th January 1910, although it was their duty and custom to do so, and thus they caused the accident to and death of the said Ann Carty or O'Keefe on said 29th January 1910. After said accident a servant of defenders strewed the pavement at the spot where the said accident happened with ashes. This precaution would have prevented said accident, but defenders failed to take it in time. They are thus solely to blame for said accident. . . ."

The defenders, who admitted that they had full control over the fountain in question, and sole control of the cleansing of the streets, pleaded, *inter alia*, that the pursuers' averments were irrelevant.

On 18th October 1910 the Lord Ordinary

(DEWAR) approved of an issue in ordinary form for the trial of the cause.

The defenders reclaimed, and argued—The pursuer's averments were irrelevant, for there was no averment either that the defenders knew, or ought to have known, of the danger—*Thomson* v. *Greenock Harbour Trustees*, December 10, 1875, 3 R. 1194, 13 S.L.R. 155; *Keeney* v. *Stewart*, 1909 S.C. 754, 46 S.L.R. 546—or that the structure of the fountain was defective.

Argued for respondents—The averment that the defenders failed to properly regulate the flow of the fountain was a good averment of negligence. They referred to *Dublin United Tramways Company* v. *Fitzgerald*, [1903] A.C. 99; and *Nelson* v. *County Council of Lower Ward of Lanark*, December 11, 1891, 19 R. 311, 29 S.L.R. 261.

LORD PRESIDENT—I do not think that this record contains any relevant averment of negligence against the defenders.

The facts out of which the action arises are alleged to be that the deceased lady, the wife of the principal pursuer, and the mother of the rest, slipped on a piece of ice which had formed on the foot-pavement on the north side of Candlemaker Row in the immediate vicinity of "Greyfriars Bobbie's Fountain."

It is impossible to maintain that a mere averment that a person in Edinburgh slipped in the month of January on a piece of ice on the pavement is tantamount to an averment of negligence on the part of the road authority, that is to say, the Town Council. It would be putting upon them a duty to keep every street in Edinburgh free of ice. The only thing the pursuers do say is that the defenders were proprietors of the fountain, that it was their business so to regulate it as to prevent an overflow, and that the ice must have been formed as the result of an overflow. That does not follow, for it might have been caused by someone drawing water and spilling some of it. Even supposing it was caused by an overflow, it might have been due to causes over which, for the moment, the authorities had no control. I do not say that there would not be liability for letting a fountain get into such a condition as to cause danger to the public, and in estimating what the danger is you must take into account the ordinary weather conditions, one of which is frost.

In such a case I can only imagine negligence coming under one or other of two heads—either that there was some structural defect in the fountain which made overflows probable, or that the fountain having for some temporary or fortuitous cause overflowed, this dislocation of the ordinary arrangements had been brought to the knowledge of the authorities or had existed for such a length of time that they ought to have known, and they had failed to remedy the temporary defect. There is a case (*Shepherd* v. *Midland Railway Company*, 25 Law Times 879) decided in England about ice on a railway platform, in which Baron Pigott said—"The question whether there was any evidence of a neglect of duty is a question of degree. If there had been only a very small piece of ice in a place where the railway servants had no opportunity of seeing it, there may have been no negligence; but when we have a layer of ice three-quarters of an inch thick and extending half across the platform, and that too at three o'clock in the afternoon, there was plenty of opportunity for them to have seen it and to have removed it." It was suggested in the course of the argument in that case that if a passenger had thrown a piece of orange peel from a train on to the platform and a person had slipped on it, the company would not be liable on the ground of negligence; and Baron Pigott remarked—"They might be if the orange peel had been allowed to remain a long time upon the platform without being swept up." I agree with that statement of the law. The pursuers here do not aver either a structural defect nor a failure on the part of the defenders to deal with a temporary overflow, the existence of which either was or ought to have been known to them; they only make the naked averment that the defenders did not so regulate the fountain as to prevent it overflowing, and that is, in my opinion, insufficient.

We have to be satisfied that there is a relevant case before we send it to a jury, as was expressly laid down by Lord Robertson in the recent case of *Toal* v. *North British Railway Company* (1908 S.C. (H.L.) 29), where the judgment of this Court disallowing an issue was reversed on the ground that in that particular case there was a sufficient averment.

I think that the pursuers here have stated no relevant case, and that the issue should not be allowed.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD SALVESEN was sitting in the Second Division.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuers (Respondents)—M'Kechnie, K.C.—A. A. Fraser. Agent—P. Maclagan Morrison, Solicitor.

Counsel for Defenders (Reclaimers)—Cooper, K.C.—W. J. Robertson. Agent—Thomas Hunter, W.S.