cess, decern against the defender for payment to the pursuer, on behalf of the Lords Commissioners of Her Majesty's Treasury, of Twelve pounds twelve shillings and sixpence sterling, being the amount of such expenses, with interest from the date of citation. *Quoad ultra* assoilzie the defender, and decern: Find no expenses due to or by either party."

Counsel for Pursuer (Reclaimer)—Lord Advocate (Gordon) — Dean of Faculty (Watson)—J. P. B. Robertson. Agent—J. A. Jamieson, Crown-Agent.

Counsel for Defender—(Respondent)—Fraser—Thoms. Agents—Drummond & Reid, W.S.

Friday, December 10.

FIRST DIVISION.

[Lord Craighill.

THOMSON *v.* GREENOCK HARBOUR TRUSTEES.

Reparation—Harbour Trustees—Liability—Negligence—Ship.

After a ship had discharged her cargo it was discovered that her keel was injured, and a large stone was found in the berth which she had occupied when discharging her cargo. The owners of the ship averred that the injuries had been caused by the said stone, and raised an action of damages against the harbour trustees.—*Held* (1) that to establish liability against the harbour trustees, negligence on their part, or on the part of their servants, must be proved; and (2) (*diss.* Lord Ardmillan) that on the evidence the pursuers had failed to establish that the injury to the ship was caused by the said stone.

This action was raised by Alexander Thomson against the Greenock Harbour Trustees to recover damages for an injury said to have been caused to a vessel belonging to him while lying in the defenders' dock. The pursuer averred that the injury was caused by a large stone lying in the bottom of the dock, on which the ship settled down as the tide fell. The case turned chiefly on questions of fact, the only question of law being whether it was necessary to prove fault or negligence by the Harbour Trustees. A proof was led, the import of which will be seen from the Lord Ordinary's note and the opinions of the Judges.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 9th April* 1875.—The Lord Ordinary having heard parties' procurators on the closed record, proof, and productions, and having considered the debate and whole process, in the first place, Finds, as matter of fact, that the pursuers have failed to prove that the injuries to their ship, the 'Albatross,' damages for which are sued for in the present action, were received in the East India Harbour at Greenock, the *locus* libelled on the record: In the second place, finds, *separatim*, as matters of fact, (1) that the East India Harbour of Greenock is and always has been a tidal harbour; (2) that the wharf in that harbour to which the 'Albatross' was moored in July 1874, when, as the pursuers allege, the said injuries were received, was formed in the spring of 1873; (3) that after the said wharf was completed — that is to say, between the spring of 1873 and the end of August 1873—the bottom of the said harbour, to the extent of 150 feet outward and southward from the front of the said wharf, was deepened by dredging to the depth of four feet below the eight feet which previously had been the depth of water in that part of the harbour at low water mark of ordinary spring tides; (4) that in the course of and immediately after the close of these dredging operations the said portion of the harbour thus deepened was examined by a diver, that stones or other hard substances, if such there were, not lifted in the process of dredging, by which injuries might be caused to vessels taking the ground at low water, might be discovered and removed; (5) that these dredging operations and the subsequent examination and clearing of the bottom were performed by experienced and efficient workmen under the supervision of the harbour engineer and harbourmaster, who also were persons fully qualified, by reason of their skill and experience, for discharging the duties with which respectively they were entrusted; and nothing occurred in the course of the execution of the said work, or between its completion and the time when the injury to the 'Albatross' is said by the pursuers to have been received, which suggested or was calculated to suggest that the said work had not been properly performed, or that the said portion of the harbour in front of the said wharf was, in consequence of a stone or stones having been left upon the bottom, unsafe for the berthage of ships, or that the time had come when a renewed examination of the bottom of this part of the harbour ought, as a measure of reasonable precaution, to be ordered by the defenders; (6) that the stone by contact with and pressure upon which the said injuries to the 'Albatross' are alleged by the pursuers to have been produced, is a mooring-stone, artificially prepared, and there is nothing in the proof showing or any way indicating the time when it was lowered or thrown into the said harbour; and (7) that the presence of the said stone in the harbour was neither known to nor suspected by the defenders prior to the time when they were informed by the pursuers that the injuries, reparation of which is now sued for, had been received by the 'Albatross:' Finds, as matter of law, that the facts being as set forth in the seven foregoing findings, the defenders, even on the assumption that the injuries received by the said ship were caused by contact with and pressure upon the said stone in the East India Harbour of Greenock, are not liable in damages, nothing constituting fault or negligence on their part having been established: Therefore sustains the defences, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, of which allows an account to be given in, and remits that account when lodged to the Auditor for his taxation and report.

"*Note.*—The pursuers are the owners of the ship 'Albatross,' and sue the defenders, the

Trustees of the Port and Harbour of Greenock, for damages for loss sustained from injuries said to have been received while the 'Albatross' was berthed in the East India Harbour of Greenock. No dispute was in the end maintained as to the amount of the reparation claimed. The defenders at the debate upon the proof admitted that if the pursuers were entitled to damages the sum sued for was not in excess of the loss which had been sustained; but they contended, in the first place, that the pursuers had failed to prove that the injuries to the 'Albatross' were received in the harbour of Greenock; and, in the second place, that even should the opposite conclusion as to this point be adopted, the defenders could not be held liable for the consequences, inasmuch as fault or negligence upon their part had not been established. The Lord Ordinary has sustained these pleas, and an interlocutor assoilzieing the defenders has accordingly been pronounced. 1. On the question whether the 'Albatross' was injured in the harbour of Greenock, the Lord Ordinary has experienced great difficulty in coming to a conclusion. He all along has had doubts upon the point, and he has doubts still; and it is only because these doubts remain unremoved that judgment upon this part of the case has been given against the pursuers. They are suing for damages. The defenders admittedly are not liable if the injuries of which reparation is sought were not received in the harbour of Greenock, and the pursuers must be unsuccessful if this cardinal point has not been established. There are several circumstances which undoubtedly support the view that the 'Albatross' received the injuries complained of when berthed in the East India Harbour at Greenock. In the first place, she was thoroughly overhauled in March 1873 before setting out on a voyage from Greenock to the St Lawrence. It is, the Lord Ordinary thinks, as clearly proved as anything could be that her keel was then unbroken, and that she was every way staunch and strong. In the second place, her voyage across the Atlantic was, as regards wind and weather, an average voyage. So far as known to those on board, nothing occurred which could produce such injuries as those which were ultimately discovered, and the behaviour of the ship, particularly the comparatively small amount of the leakage, seems to prove the improbability, though certainly not the impossibility, that such a disaster was encountered. In the third place, though, according to the evidence of one of the defender's witnesses, there are parts of the St Lawrence over which the 'Albatross' passed in going up and in coming down where injuries to the bottoms of ships navigating these waters are occasionally received, there is no trace in the proof of anything which shows that the 'Albatross' came into contact with the ground. Had she touched while sailing the probability is that the occurrence must have excited observation. This, at anyrate, appears to the Lord Ordinary to be the more reasonable view of the matter, but he is prevented from expressing dogmatically any opinion upon the point, because, while all are agreed that the 'Albatross' was injured, as described on the record, sometime between the end of March 1873 and the end of July 1874, nobody on board had even a suspicion of the accident at the time it occurred. The ship, when taken out of the East India Harbour at Greenock and placed in Caird's graving dock, was, till the water was removed from that dock, believed by all connected with her to be perfectly sound. In the fourth place, the 'Albatross,' on her return voyage from the St Lawrence, showed no signs of such a leak as suggested that serious injury had been sustained. This circumstance, some of the defenders' witnesses tell us, does not exclude the possibility that injuries had been received such as were afterwards discovered. The ship was a wooden ship, timber laden, and, as these witnesses think, an amount of water in the hold which in other circumstances would have caused anxiety, might, as things were, hardly excite observation. The Lord Ordinary is not satisfied that this suggestion should be regarded as a sufficient explanation. His opinion rather is that the evidence furnished by the log-book is to the effect that not only was there no such leak as could in any case create anxiety, but that the water which came in was so small in quantity as to lead presumptively to the conclusion that injuries like those in question had not been sustained. All these considerations favour the view that these injuries were not received before the 'Albatross' entered the harbour of Greenock in the latter part of July 1874. Neverthless, they are not decisive of the question. The most which can be said of them is that they predispose us to regard as sufficient evidence upon the point which otherwise might, or rather must, have been thought inadequate. And yet, though things at the outset beget a presumption in favour of the contention which the pursuers maintain, the conclusion to which the Lord Ordinary has been brought, by a consideration of the proof upon both sides which has been adduced, is that the point in dispute has not been established. The grounds of this opinion will now be shortly explained. The Lord Ordinary thinks it is not proved (1) that the stone by which, as the pursuers allege, the injuries were caused was under the keel of the 'Albatross,' while berthed at the wharf in Greenock harbour. It was near to the keel certainly. Not only, however, is it not shown that it was under the keel, but the contrary, in the opinion of the Lord Ordinary, has been proved; (2) That the 'Albatross,' in consequence of the withdrawal of water at low tide, could have settled upon the stone, even had it been below her keel, with such a weight as to produce the injuries in question. There is a conflict of evidence upon this point, but that adduced by the defenders is as trustworthy as that adduced by the pursuers; and the consequence is the existence of a doubt, to the benefit of which the defenders are entitled. And (3) that if the stone had been under the keel, and if the water at the lowest of the tide fell so low that the 'Albatross' must have come down upon it with a pressure such as was requisite to produce the injuries, the bottom of the harbour was so hard that the stone would break the keel of the ship instead of sinking under her weight into the ground. Here again there is a conflict, and a conflict too which, so far as the Lord Ordinary sees, excludes all idea of reconciliation. The misfortune is that there is nothing in the character or in the position of the witnesses, or in the nature of the testimony they bear, which entitles the Lord

Ordinary to choose between the proof adduced by the pursuers and the proof adduced by the defenders. In place of determining whether the witnesses for the pursuers or those for the defenders are to be believed, he has, from inability to decide this question, come to the conclusion that, in consequence of the conflict which exists, this part also of the pursuers' case has not been proved. (4) A judgment to this effect upon the facts, so far as hitherto considered, entitles the defenders to be assoilzied, and consequently another ground was not required for the decision of the cause. But, in the circumstances, the Lord Ordinary has thought it due to the parties that the other defence should also be disposed of by his interlocutor. This defence is to the effect that, even were it proved that the 'Albatross' was injured in Greenock Harbour, the defenders could not be made answerable for the consequences, inasmuch as fault or negligence upon their part has not been established. As to the law, there is no controversy between the parties. The pursuers cited at the debate the cases of the *Mersey Docks Trustees* v. *Gibbs* and v. *Penhallow*, Law Rep. 1 Eng. & Ir. App. p. 93, and the defenders admitted that the rules of liability sanctioned by these decisions were applicable to the Greenock Harbour Trust. The only question in dispute, therefore, is a question of fact. Has fault or negligence been proved? The Lord Ordinary's opinion is that fault or negligence has not been proved. He thinks the defenders have shown, in the first place, that the part of the East India Harbour at Greenock within which the 'Albatross' was berthed was dredged, examined, and cleared between February 1873 and the end of August in that year; in the second place, that the interval between the close of these operations and the time when, according to the allegations of the pursuers, the 'Albatross' was injured, was not such as, either by custom or in consequence of anything brought to the knowledge of the defenders, ought to have suggested a renewed examination of the bottom of the harbour as a reasonable precaution; and, in the third place, that the defenders neither knew nor ought to have known, or even suspected, that a cause of danger such as the stone by which the injuries to the 'Albatross' are said to have been produced, or any other thing by which the safety of vessels using the harbour was imperilled, lay out of sight under water in the dock. Unquestionably the presence of the stone, assuming that while the 'Albatross' lay berthed it was where subsequently discovered, could have been ascertained by the defenders had men been employed to prosecute the search; but this consideration, the Lord Ordinary thinks, falls short of proof of fault or negligence on the part of the defenders. It would be an unreasonable reading of the rule sanctioned by the House of Lords to hold that to counteract possibilities there must be kept up a constant examination of the bottom of a harbour; and, failing this, should injury be caused by the presence of an unsuspected stone, the Trustees, who are the administrators of its affairs and funds, shall be dealt with as guilty of fault or negligence, and as a consequence be subjected to liability for reparation of the loss which has been sustained. And yet, unless the rule shall be thus read, fault or negligence cannot on the present occasion be brought home to the defenders. Had the interval been such as, according to the usage, suggested a renewed examination as a reasonable precaution, or had anything occurred which ought to have led the defenders to suspect that there lay buried in the mud under water that which was a source of danger to shipping, their omission to do what was thus pointed out as requisite in the circumstances would have been a culpable neglect; but neither of these alternatives has been established. It is perfectly possible, and the circumstance would not be inconsistent with anything which has been proved, that the stone in question was thrown or was lowered into the water the week before, or even the day before, the 'Albatross' was berthed; and the argument for the pursuers on this part of the case involves the conclusion that though the occurrence was neither known nor suspected by the defenders, the non-removal of the stone would of itself be sufficient to render the defenders liable as for fault or neglect. The Lord Ordinary is unable to accept as sound a view of the law by which such a result would be sanctioned. There is, he thinks, nothing hitherto laid down or recognised in any of the decisions which necessitates, or rather which would warrant, the adoption of such a principle, and accordingly his judgment upon this point also is against the pursuers, and in favour of the defenders."

The pursuer reclaimed.

Authorities for pursuer—*Gibbs* v. *Liverpool Dock Trs.*, 27 L. J. (Exch.) 321.

For defenders—*Parnaby* v. *Lancaster Canal Co.*, 11 Ad. and Ellis, 223; *M'Intyre* v. *Wright*, 24 Dec. 1859, 32 Jur. 143; *Winch* v. *Thames Conservators*, 9 L. R. (C. P.) 378.

At advising—

Lord Ardmillan—One question of law is involved in this case; but the case has been treated, and I think rightly treated, in argument, as chiefly depending on questions of fact; and these questions are, I think, three in number. The first is, Was the pursuer's vessel, the "Albatross," injured in the manner alleged by the stone which was found at the bottom of the dock or berthage in the harbour of Greenock, where she lay in July 1874? The second is, Was that stone left in the dock when it was formed or extended in 1873? The third is—If not so left in the dock in 1873, have the defenders, the Harbour Trustees, been guilty of any carelessness or negligence after that date.

On the first of these questions I have felt the very greatest difficulty. There seems no reason to suppose that the ship was injured before she entered the harbour of Greenock after her voyage from Quebec. So far as we have any evidence on the subject, it would appear that she came home uninjured, and was uninjured when she entered the berth at the east end of the dock known as the East India Quay. After her cargo was discharged she lay in that berth for about eight days. It was then ascertained that her main keel was seriously injured; and of the nature and extent of the injury there is no doubt. I think it has not been disputed.

On discovering the injury, a search was made in the dock or berthage where she had lain, and a large stone was found in the bottom of the

dock, certainly very near to the line along which the keel of the vessel must have rested, very near the point calculated from the East Quay, which would longitudinally correspond to the position of the injury on the keel, and also very near the point, calculated laterally from the wharf, which would meet the longitudinal line, and be just below the injury on the keel; the position of the stone perpendicularly from the surface has not been exactly proved, or I think discovered. I am aware that this suggestion of the local position of the stone is disputed; nor can I say that it is clearly made out. But if left where it was discovered, it might have been more clearly made out. Its true position might have been accurately ascertained by examination on behalf of both parties. The stone was removed from the place where it was found, and removed by a diver who was in the employment of the Trustees. I do not impute any blame to him or to the defenders for removing it; but the trustees can scarcely be permitted to plead the difficulty of ascertaining the exact position of the stone, seeing that the stone was removed by one of their own men, and that but for his removing of it the exact position could have been correctly ascertained. In any view of the evidence on this point—evidence which is conflicting, and not very satisfactory—I feel unable to avoid the conclusion that the stone found in the bottom of the dock was in the line of the keel, and in or very near the position to cause the injury.

That under such circumstances the pursuers should readily and strongly suspect that the injury to their vessel was inflicted by this stone is most natural. Every witness has admitted that the stone in such a place was dangerous. Finding it where the injured vessel had been lying, it is not surprising that the pursuers readily formed the opinion that the stone had inflicted the injury. They may be wrong, but their inference was surely natural. The position is like that which Shakspeare describes—

> "Who finds the heifer dead, and bleeding fresh,
> And sees fast by a butcher with an axe,
> But will suspect 'twas he that made the slaughter;
> Who finds the partridge on the puttock's nest,
> But may imagine how the bird was dead,
> Although the kite soar with unbloodied beak:—
> Even so suspicious is this story."

The case must be decided on proof, not on suspicion; but certainly the presumption or implication from probability is on this point rather in favour of the pursuers.

After careful and repeated study of the evidence, I am, however, disposed to think that the stone did cause the injury. On this part of the case we had the benefit of an elaborate and able argument from Mr Trayner. I shall not now enter into any analysis of the evidence, to which in all its parts I have given my best attention. The view which I take is that the distinguished engineers adduced by the defenders are only right in their theory if they are right in their assumed fact. Assuming, as they do, the soft and muddy bottom of the dock, so that the stone, if pressed by the superincumbent weight of the ship, would be so pressed down only into soft mud, and not against a hard substance, then I agree with Mr Stevenson and Mr Robertson that the stone in that case could not inflict this injury to the keel. But I cannot assume that fact. We have some proof that the bottom where the stone would rest was hard; and we have evidence that the groove or bed wherein the ship had lain was discovered and traced in the bottom of the dock, and we have evidence also that at a point along the line of that groove the stone was found. I doubt whether in a dock where the tide enters, such a groove or bed marking the position of a vessel could have been discovered and traced even one tide after the vessel quitted it unless the bottom of the dock had been harder than mud or slime. It is not in such a soft material that a permanent impression like a groove could have been made. But that the groove was there is proved by all the witnesses who had the opportunity of observing it. Gush found the groove, and M'Gee, the defender's witness, and in their employment, says he, "found the stone in the keel track." This view receives additional confirmation from the fact that the counsel for the defenders laboured earnestly and dexterously to prove that the impression or groove at the bottom of the dock had been left by the "Nemesis," a vessel which had previously occupied the same berth in the dock, but had quitted it some months before. No such impression could have been left by the "Nemesis" if the bottom of the dock had been of the description alleged by the defenders, and assumed by the engineers, viz., mud or slime, or some soft substance. In short, if, as Mr Guthrie Smith contended, the bottom of the dock was capable of retaining for months the impression of the "Nemesis," it must have been sufficiently hard to present resistance to the stone when pressed down, and thus to cause the injury to the keel.

Accordingly, on the first question which I have mentioned, I am of opinion that the preponderance of evidence is in favour of the pursuers' theory—that the injury to the keel of the "Albatross" must have been caused by the stone. In saying this I do not mean to throw any doubt on the testimony of opinion given by the eminent engineers, because I think their evidence of opinion assumes as matter of fact the soft and muddy character of the bottom of the dock, an assumption not supported by the proof, and contradicted by the ascertainment of the groove or keel track. On the assumption which they make in point of fact, I think the scientific opinion of these gentlemen beyond question.

On the second question, I am of opinion that it is not proved that this stone was at the bottom of the dock when it was dredged and cleaned and opened in July 1873. It is a large wrought stone with an iron ring in it. It was not found *in situ;* it is not a boulder stone; it is not a stone wrenched or forced from its position in the operation of dredging. All the witnesses concur in describing it as a wrought stone, a mooring stone—used probably as a species of anchor. Now, this stone was a stranger stone—a foreign stone introduced *ab extra* to the place where it was found. No such stone was found at the time of the dredging in 1873; and the dredging was sufficiently thorough and complete to give assurance that it was not then there. The Harbour Trustees were bound to make a thorough work of dredging at that time, and I see no reason to doubt that they did so. Their skill and diligence in that matter has not been questioned. We have evidence that whatever stones were dis-

covered were then removed and brought up. Besides, there were at least two vessels in that dock after the dredging, and before the "Albatross" entered it. Both of them lay there for a considerable time, but both went away uninjured. One of them at least drew more water than the "Albatross," and it is not suggested that there was any injury; but if this stone had been there, the entire absence of injury would have been at least improbable. It is a fact that no complaint was made by any vessel previously occupying the berth. With this fact before us, and in the face of the evidence of complete dredging in 1873, I cannot assume as a fact, proved or even probable, that this stone was in the dock at that time, or that the defenders, as Harbour Trustees, were guilty of any fault or negligence in failing then to discover it, or in opening the dock without sufficient investigation.

On the third question, I do not see difficulty in point of fact. The stone, not there in 1873, has come there, and been found there in 1874. How it came there no one knows. As already explained, I think that the stone, when found, was in the line of the keel of the ship; that it was a dangerous stone, and ought not to have been there; and that having regard to the nature of the bottom of the dock or berthage, the injury to the ship's keel may have been inflicted by her superincumbent weight resting on the stone and forcing it down till it reached a bottom sufficiently hard to cause resistance, and therefore to cause injury to the ship. How long the stone had been there I cannot say. It may have been only a few days.

But then there remains, or arises, the question of law applicable to this state of the facts.

Must fault or negligence on the part of the Harbour Trustees be proved? and if so, has it been proved?

I have no doubt that fault or negligence on the part of the Trustees or of their servants must be proved. There is no guarantee or assurance of absolute safety. It is not expressed, and it is not implied. The defenders can only be liable if fault or negligence by them or their servants has been proved. Then I think it has not been proved.

On this point, which is sufficient for judgment, my opinion is in favour of the defenders. The stone was latent—discoverable only by dredging or by divers. When it came there, or how it came there, we know not. It may have been thrown in, or carried in by the tide; and that may have been a few weeks, or a few days, or a few hours before the "Albatross" entered. No one can say. Therefore I cannot find any safe or sufficient ground for attributing fault or negligence to the defenders, either on their own part or on the part of their servants; and in the absence of proved fault or negligence there is no guarantee, and therefore no liability.

Lord Deas—This is a case of importance, and requiring all the attention it has received. There are two grounds of defence stated, and which have been given effect to by the Lord Ordinary. One is, that the injury to the vessel is not proved to have been got in this East India harbour at Greenock; and the other is, that although it were proved that the injury was got there, there is in the circumstances no liability on the Harbour Trustees for the damage so caused. I am pretty clearly of opinion with the Lord Ordinary that that second ground of defence is well-founded—that is to say, that assuming the injury had been got in that harbour, no liability in the circumstances attaches to the Trustees. I hold the Trustees to be liable for the fault or negligence not only of themselves but of their servants; but the question is, whether we can say that the stone was there by the fault or negligence of the servants of the Trustees. Now, the Lord Ordinary in his interlocutor has seven findings in point of fact which lead him to this conclusion—"Finds, as matter of law, that the facts being as set forth in the seven foregoing findings, the defenders, even on the assumption that the injuries received by the said ship were caused by contact with and pressure upon the said stone in the East India harbour of Greenock, are not liable in damages, nothing constituting fault or negligence on their part having been established." Now, I agree in all these seven findings, and likewise in that conclusion in point of law which the Lord Ordinary has drawn from them. It would be quite superfluous therefore for me to go over all the particulars which are comprehended in these findings, because I do not differ from—on the contrary, I agree with them all—and I think the result the Lord Ordinary has come to is rightly drawn from these findings in point of fact. Everything seems to have been done that was proper to be done at the time when the *solum* of the harbour was lowered, and the time that elapsed from that date to the date of this injury was not so long as to have led to the necessity of overhauling the whole of it again. But the strong ground stated by the Lord Ordinary, and which I particularly concur in, for coming to that result, is that we have no proof whatever, and no presumption, as to the time when that stone got into the place in which it is said to have been, and into the position in which it is said to have caused that injury. It may have been a week or two before; it may have been a day before; it may even have got there after the ship had left the harbour and gone to the graving dock of Mr Caird. It was not a boulder stone—not a stone that could be naturally there, and which had not been removed. It was said that it was probably used as a sort of mooring stone, and very likely it was from the shape of it and the ring in it, but it was an artificial stone which may have dropped in there accidentally. It is not likely that it was done purposely, although it might have been, but it may have been dropped there either immediately before the vessel arrived or immediately after the vessel left the harbour. Now, I do not see that there is any presumption in point of fact on that matter which you can apply against the Trustees. It is rather for the party claiming these damages to make out his case, and if that stone was dropped in there accidentally a week or two or a day or two before the injury happened, and consequently caused that injury, I think that even assuming the Trustees to be responsible for the negligence of their servants, it would be stretching the liability of the Trustees to a very unreasonable length to hold that they were liable in such circumstances. That would be holding that they were liable for a thing which was nothing else than an accident, and an accident in consequence of which an accident had fallen on

the party whose property has been injured. I confess I feel very little doubt in arriving at that conclusion. Something was said about the way in which the accident happened, but it is not necessary to say more about that than the Lord Ordinary has very well said in the note to his interlocutor. If I am right in what I have now stated, it is not necessary to go into the other question, for it is sufficient for the decision of the case, and so the Lord Ordinary holds it. He says, further, that upon the whole matter he is inclined to think it is not proved that the ship sustained the injury in the harbour in consequence of coming in contact with this stone, and I have come to the conclusion upon the whole matter that the Lord Ordinary is right in that view likewise. I think it is not satisfactorily proved. One strong ground for holding that the injury was sustained in the harbour is stated to be the fact which appears from the evidence that in the St Lawrence and on the voyage home there was no such material leakage observed as could lead those on board to suspect that the ship had sustained an injury. That is the main element in the evidence which leads to the inference that the injury must have been got in the harbour. If there had been such a leakage when the ship was in the harbour, and before she went into the graving dock, as to attract attention, and to cause her to be taken to the graving dock in order to be repaired in consequence of that leakage, then the presumption would have been very strong that the injury had been got after she came into the harbour, but no such leakage was observed after she was in the harbour any more than before. On the contrary, it is distinctly proved that the vessel was taken to the graving dock in order to be overhauled, without the slightest suspicion that she had sustained any injury in the harbour at all. That seems to me to take away a great deal of the force which otherwise would have attached to the fact that in the St Lawrence and on the voyage home there was no leakage to attract attention. Then, I must say I had very great difficulty in understanding how that injury could have been caused by the stone in the way in which it is said to have been placed. The theory seems to be that the stone was standing upon its edge, as we see it now in Court, and it is very material to see the stone itself. Although we are not people of skill like the engineers who have been examined, still we are able to form some sort of opinion, like a jury, upon questions of this kind, and it is material to see the stone and what it is like. If the stone was lying flat with the ring uppermost, and if the ship was resting upon it, then it would only be a very small part of it that was resting on the stone; but the theory rather seems to be that it was standing upon its edge. The edge, however, is very narrow—I don't think it will be more than six or seven inches. It is not nearly so broad as the keel of the vessel, and yet, notwithstanding, it was the opinion of the engineers that if the bottom on which the stone lay was very hard, then the pressure of the ship on that stone might have caused the injury. It is very difficult to comprehend how that could occur. I cannot go into particulars as to that difficulty, but I should have liked to have asked some questions at the engineers who said such a thing was possible before I could come to the conclusion that that stone caused the injury. I think it is exceedingly improbable that that could be the cause. Coupling that with the fact that there was no leakage observed in the harbour to cause suspicion, any more than there was upon the voyage home, I cannot say that it is proved to my satisfaction that the injury was caused in that way, and by that stone. Although I would be rather inclined to concur with the view of the Lord Ordinary upon that matter, it is not necessary to have a very strong opinion upon it, because the first matter which I have alluded to is sufficient to dispose of the case, and it is the ground on which I prefer to rest in coming to the conclusion to which I have done.

Lord Mure—I am quite satisfied with the Lord Ordinary's judgment and the grounds on which it is rested,—that there is no such negligence or fault proved against the defenders in this cause, even assuming that the injury was caused by the stone, as can import liability against them for damages to the pursuers. I am satisfied with the findings in fact on which the Lord Ordinary has proceeded, and I have really nothing to add to them. I shall only say that on the last question, whether the injury was so sustained, I have the same difficulties very much as Lord Deas has alluded to. The inferences to be drawn from the facts are of a peculiar nature; and different inferences might be drawn from the same facts in favour of one or other of the parties. What is mainly relied upon, as I understand, by the pursuers is the alleged fact that it never occurred to any of the crew or to the master of the vessel on the way home that the vessel made any water, and that if her keel had been so injured before she arrived here, there would have been more water made on the way home. Now, I see that Mr Steel, who is apparently a person of great experience on these matters, says, "the probability is" — that is the expression — "that she would have made more water on the way home if such a thing had occurred in the St Lawrence than she is reported to have done;" but he merely says it as a probability; he does not say it as a certainty; and Mr Steel's opinion, as that of about the most experienced shipbuilder in Greenock, is a very important one to my mind. But then we have the fact that, with that keel injured as the pursuers say it was, she does not appear to have made any more water at any time before she goes round to her berthage. No doubt she is in stiller water there than in the Atlantic; but they say that that injury to her keel would necessitate her making more water than ordinary. But the captain and the mate never suspect, when taking her round to Caird's, that there had been any more water made than usual in that vessel; and the vessel is regularly pumped in the berthage every day. Now, that is a very curious fact in the case, and I am not satisfied that it is proved that the injury was sustained in that berth. I think it is still a mystery where it took place.

Lord President — As regards the second ground of judgment adopted by the Lord Ordinary, I quite agree with his Lordship both in his view of the evidence and in his application of the law. Indeed, the principle of law which applies to this case is by no means doubtful. The Harbour Trustees of Greenock, like the managers of

any other harbour, provide accommodation for shipping, and invite the masters and owners of ships to occupy that accommodation, and charge them a price for it. The obligation thence arising is not an obligation to insure against accident, but only an obligation to use reasonable diligence to prevent the occurrence of injuries to vessels. It appears to me that in the present case there is no reason whatever for imputing negligence or any other fault either to the Harbour Trustees or to any of their officials or servants. The dredging of this harbour, which was necessary to deepen it to the requisite extent before it could be occupied by vessels of the size which now resort there, were carried on apparently in the most thorough, complete, and perfect manner, and it is impossible for us to read the evidence applicable to the history of the case without being satisfied that the operation was both skilful and complete at the time. After the dredging had been finished, the bottom of the harbour was examined by means of divers, to see whether any stones were still remaining there, or had been brought out of the place by the dredging operation; and that examination having been carefully made, every obstruction was removed that was found still to remain there. How this stone came there nobody can explain. I am satisfied it was not there when the harbour was completed for the reception of vessels. No doubt it is there at the time when the injury is said to have been sustained by the "Albatross," but I do not think that is sufficient to infer liability against the Harbour Trustees. I think, on the contrary, it lies on the pursuer in such an action as this to prove, as matter of substantive fact, that there is negligence upon the part either of the Harbour Trustees or of some one in their employment, and in that I think the pursuers have entirely failed.

With regard to the other ground of defence, which has also been adopted by the Lord Ordinary as a ground of judgment, I think there is much more reason for hesitation; but, upon the whole, I am disposed to agree with the Lord Ordinary upon that point also, and come to the conclusion that the pursuers have failed to prove that the injury to the keel of the "Albatross" was sustained within the harbour of Greenock. I do not sympathise exactly with the view stated by my brother Lord Deas, that supposing that stone to be there, and the vessel to come down and rest upon that stone on her keel, the injury would not be likely to be produced. I rather think, upon the other hand, that nothing would be more likely to produce such an injury. But then I am not at all satisfied that the keel of that vessel and the stone there came in contact at all. I do not think that has been established, and therefore, upon the whole matter, I am inclined to affirm the judgment of the Lord Ordinary as it stands.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for the pursuers Alexander Thomson and others, against Lord Craighill's interlocutor, dated 9th April 1875, Adhere to the said interlocutor, and refuse the reclaiming note: Find the defenders entitled to additional expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuers—Dean of Faculty (Watson)—Trayner—M'Donald. Agents—Mason & Smith, S.S.C.

Counsel for Defenders—Lord Advocate (Gordon) — J. G. Smith — Wallace. Agent — William Archibald, S.S.C.

Tuesday, December 14.

FIRST DIVISION.

[Bill Chamber.

KELLOCK (PETITIONER AND RECLAIMER) *v.* ANDERSON AND OTHERS, *et e contra.*

Bankruptcy — Sequestration — Petitions — Recall — Process.

On a petition in the Sheriff-court by a creditor for sequestration of a debtor's estate, a first deliverance was pronounced granting warrant to cite the debtor within seven days after citation to show cause why sequestration should not be awarded. Pending the running of the *inducice*, the debtor himself and a concurring creditor, on petition to the Bill Chamber, obtained sequestration. In petitions at the instance of each party for recall of the sequestration obtained by the other—*held* (1) that the date of the first deliverance being the statutory date of the sequestration, the Sheriff-court sequestration must stand; and (2) that in conformity with the course followed in *Jarvie* v. *Robertson*, (25 Nov. 1865, 4 Macph.) 79, the Bill Chamber sequestration fell to be recalled *hoc statu*, and the judgment of recall to be entered in the Register of Sequestrations and on the margin of the Register of Inhibitions, in terms of sec. 31 of the Bankruptcy Act.

Upon the 23d October 1875, Joseph Kellock, cattle-dealer, Thornhill, presented a petition to the Sheriff of Dumfries and Galloway, praying, upon grounds therein set forth, for warrant for citing his debtor John Anderson, draper, Thornhill, to appear and show cause why sequestration of his estates should not be awarded, and thereafter to award sequestration and appoint a meeting of creditors, all in terms of the provisions of the "Bankruptcy (Scotland) Act, 1856." The Sheriff-Substitute pronounced an interlocutor ordaining Anderson to appear within seven days, to show cause why sequestration should not be awarded, and the *inducice* having expired, the Sheriff pronounced an interlocutor awarding sequestration of the estate.

On the 29th October Anderson, without any intimation to Kellock or his agent, applied for and obtained sequestration of his estates by the Court of Session. The concurring creditors in that petition were Messrs M'Laren & Co., Glasgow; and the petition bearing to be at the instance of a petitioner craving sequestration of his own estates, with concurrence of creditors to the statutory amount, sequestration was instantly awarded as a matter of course. The interlocutor awarding sequestration appointed a first meeting of creditors to be held in the Faculty Hall, Glasgow, on Tuesday, the 9th November 1875.