

have on several occasions committed faults or errors in judgment which were not brought to the knowledge of the manager are, in my opinion, of no relevancy. I may say, however, that according to the bulk of the evidence I think that Black discharged his duties for the most part in a thoroughly satisfactory way, and the statutory offence to which he pleaded guilty is, I think, the only one which has been brought home to him.

“The pursuer has, however, also an alternative case under the Employers’ Liability Act, and this is the part of the case with which I have found most difficulty, especially in view of the plea of contributory negligence maintained by the defenders. The pursuer’s own case is that the deceased man habitually neglected the rule as to propping, which was incumbent upon him in the first instance, and I am prepared to hold that if the props had been placed as prescribed in the notice the accident would not have occurred. Further, if the fall had occurred in Calder’s working place, and had been rendered more probable by his having excavated coal from the face after the fireman’s inspection, I would have held the claim barred, as his own default would have been the efficient cause of the accident. But in point of fact all but the tail end of the fall took place in a space which had ceased to be a working place, and had been converted into a road, and it was no part of Calder’s duty to put additional props for the support of the roof of the roadway, and I see no reason to suppose that the working at the face had anything to do with the fall which actually occurred. It was the fireman’s duty to see that the road to the working place was secure, and *prima facie* it must be deemed to have been insecure, for the roof was not supported in accordance with the notice which specified the minimum support that was considered necessary for safety. In my judgment the case would have been exactly the same if the accident had occurred fifteen or twenty yards back from the working face, through the original failure of the miner, acting with the knowledge and authority of the fireman, to prop what was then his working place according to the rules of the pit. The negligence of the person injured, in order that it may be described as contributory, must not be past negligence which but for the subsequent negligence of the employers’ official would not have caused the accident, but negligence which is synchronous with the negligence of the employers’ official, or which at all events efficiently contributes to the accident. Now in this case both Whiteside and Black admitted that it was the latter’s duty to have excluded the Calders from their working place until at least the approach to it had been made secure. If that duty had been performed no accident would have happened. I hold on the evidence that the subsequent working of the coal at the face, and the failure to prop the working place as it existed on the day of the accident, did not contribute to the fall. I am therefore of opinion that

the defenders are answerable under the Employers’ Liability Act.

“The amount of the wages of the deceased man is not made the subject of much evidence, but I hold that his ordinary wage did not exceed 5s. 6d. per shift of five shifts weekly—in other words, he could earn 27s. 6d., and therefore that sum multiplied by 156, or £214, 10s., represents the maximum amount of the claim. For this sum accordingly I shall give decree.”

Counsel for the Pursuer — Crabb Watt, K.C.—J. A. T. Robertson. Agent—Alex. Wylie, S.S.C.

Counsel for the Defenders — Horne—Lippe. Agents—W. & J. Burness, W.S.

Wednesday, November 27.

## SECOND DIVISION.

[Lord Salvesen, Ordinary.]

WILLIAM CORY & SON, LIMITED  
(OWNERS OF S.S. “JAMES JOICEY”)  
v. KOPAJTIC (MASTER OF S.S.  
“KOSTRENA”),

*et e contra.*

*Ship—Collision—Fog—Regulations of 1897 for Preventing Collisions at Sea, Art. 15 (e) and 16—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 419 (4)—“Not under Command”—Stopping—Excessive Speed—Foreign Vessel.*

The Merchant Shipping Act 1894, sec. 419 (4), provides that where in a collision it is proved that any of the collision regulations have been infringed, the ship infringing shall be deemed to be in fault unless it is shown that the circumstances made departure from the regulation necessary.

Owing to a previous collision a steamer was reduced from an eight to a four knot vessel, but she could still steer correctly at the reduced speed. The captain hoisted the signal for a vessel “not under command,” but did not give, while navigating in a fog, the fog signal required for such a vessel by Article 15 (e) of the regulations. While still in the fog the vessel collided with another steamer which (a) had failed to stop on hearing the horn of the first vessel apparently forward of her beam, (b) had ported her helm thereby bringing the vessels together, and (c) was travelling at a rate over the ground (the tide with her being about 2½ knots) of between 5½ and 4½ knots.

*Held* (1) that the second vessel was in fault (a) in not stopping, which was an imperative duty under Article 16, second paragraph, (b) in porting her helm, and (c) in going at an excessive speed in the fog, contrary to Article 16, first paragraph; and (2) that the first vessel was not in fault in respect that (a) she was

not a vessel "not under command," and (b) even had she been so, her failure to give the appropriate signal had not contributed to the collision.

*Question*, whether the presumption of fault enacted in the Merchant Shipping Act 1894, sec. 419 (4), applies in the case of a foreign vessel whose country has adopted the regulations only.

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), section 419 (4), enacts—  
" . . . Where in a case of collision it is proved to the Court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

The Regulations of 1897 for Preventing Collisions at Sea, *inter alia*, provide—  
Article 15—"In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, viz.—(e) . . . A vessel under way which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these rules, shall . . . at intervals of not more than two minutes, sound three blasts in succession, viz., one prolonged blast followed by two short blasts. . . ."  
Article 16—"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

It was stated at the bar that the Government of Austria had adopted the Collision Regulations but not the provisions of the Merchant Shipping Act 1894.

On 10th February 1907, during a dense fog, a collision took place between the s.s. "James Joicey," of London, and the s.s. "Kostrena," of the port of Fiume, Austria, at a point north-east of Yarmouth beyond the three-mile limit.

Actions were brought by William Cory & Son, Limited, the owners of the "James Joicey," against Andrea Kopajtic, master of the "Kostrena," and as such representing in this country the owners, *et e contra*, for the damages sustained by these vessels respectively in the collision.

The actions were conjoined and a proof was allowed and led.

The facts appear from the opinion (*infra*) of the Lord Ordinary (SALVESEN), who on 11th June 1907 pronounced an interlocutor finding that the collision was caused solely by the fault of those in charge of the "Kostrena."

*Opinion*—"These counter actions arise out of a collision which took place on the 10th of February 1907 between the Austrian steamship 'Kostrena' and the British steamship 'James Joicey.' At the time of

the collision there was a dense fog. The sea was smooth, and there was a light wind from the south-west. The collision took place some distance north of the Middle Cross Sand Lightship, which is situated off the coast of Norfolk and in a north-easterly direction from Yarmouth. Both vessels were seriously damaged, but the question of liability is the only one which I have to determine at present.

"There is a remarkable agreement as to the point of time at which the collision occurred. Roughly speaking, it may be taken that the moment of impact was about twelve o'clock noon on the 10th, which was a Sunday. At that time the fog was so dense that, according to the evidence of those on board the 'Kostrena,' a vessel could not be seen at a greater distance than four or five hundred yards, while according to the evidence of the master of the 'James Joicey' a vessel could only be seen a hundred yards away. The second officer of the 'Kostrena' says that the 'James Joicey' only became visible at two or three hundred metres from the 'Kostrena,' and probably the truth lies somewhere between his figure and that of the master of the 'James Joicey.' The fog was therefore of such a character that it was incumbent on both vessels to proceed at a moderate rate of speed, more especially in the locality in question, which is in the direct track of all the traffic passing from Scotland and the Baltic southwards to London and through the English Channel.

"The fog had commenced on the evening of the preceding day, and about 9 p.m. the 'James Joicey' was in collision with another vessel called the 'Syria.' In that collision she had her stem from the 13-foot line upwards carried away, and although the damage was somewhat above the water-line, it was so near it that the forward collision compartment soon completely filled. For some time thereafter she was accompanied by the 'Syria,' but about 2 a.m., as there appeared to be no immediate danger to the 'James Joicey,' the vessels parted company and the 'James Joicey' proceeded on her course. At 9.30 a.m. she passed the New-arp buoy at so short a distance that the officer in charge was able to see the buoy itself notwithstanding the continuance of the fog. According to the whole evidence the engines were from that time kept moving dead slow, except for ten minutes between 10.50 and 11, during which they were put to half speed.

"After this collision with the 'Syria' the 'James Joicey' exhibited two red lights, indicating that she was not under command, and next morning the captain had them replaced with two black balls, which constitutes the corresponding day signal. In my opinion this latter signal ought never to have been exhibited. The engines of the 'James Joicey' were uninjured, and so was her steering gear. It is true that she was not able to proceed at full speed, and could not therefore manœuvre so rapidly as if she had been uninjured, but there was nothing to prevent her proceeding dead slow, or even with her engines

at half speed, which according to the expert evidence would give her a movement through the water of about six knots. I was referred on this point to two cases—the ‘Hawthornbank,’ 1904, P.D. 120 and 129, and the ‘P. Caland,’ 1893, A.C. 207. The former was the case of a sailing ship which had been injured by a collision, her foretop mast and head stays with sails and gear having been carried away and her bows stove in. She had hoisted her lower maintop sail, and was moving through the water at about three knots, and she was held to be not under command, although she was being steered in a definite course which she was able to alter, although very slowly. That was a very special case, and the present seems to me to be practically ruled by the decision of the Privy Council in the second case referred to. Here the vessel was able to proceed at five or six knots an hour. She could stop and reverse her engines, which were uninjured; and she could steer, although she would not answer her helm so quickly as when going at a higher speed. A vessel in such circumstances cannot, in my opinion, be described as being ‘not under command’; and I think the master of the ‘James Joicey’ made a mistake in exhibiting a signal to that effect. Fortunately for her, however, it is not said that the signal in any way misled the ‘Kostrena,’ or could have done so looking to the very short period which elapsed from the time that it was seen until the collision. The sounds signal, which in a fog is prescribed with the view of warning vessels that they are in the vicinity of a ship not under command, was not sounded, and strange to say, does not appear even to have been known to the master of the ‘James Joicey.’

“As neither vessel had an opportunity of observing the other until the collision was imminent, the evidence as to speeds, courses, and navigation must be derived exclusively from the witnesses on board each. There is only one matter with regard to which there is a complete conflict of evidence. According to the ‘Kostrena,’ the whistle of the ‘James Joicey’ was heard about three points on her port bow, and before the collision she was seen on the port side crossing at an angle of 45 degrees from port to starboard. The witnesses from the ‘James Joicey,’ on the other hand, deposed that the ‘Kostrena’ was on her starboard bow when her whistle was first heard, and that she was seen crossing at a broad angle on a port helm from the starboard to the port side of the ‘James Joicey.’ This curious conflict is difficult to explain; but the real evidence enables me to prefer the story of the ‘James Joicey.’ The vessels were practically approaching on parallel courses; and I am satisfied, for reasons that I shall afterwards explain, that the ‘Kostrena’ was going at a much higher rate of speed than the ‘James Joicey.’ If therefore the ‘Kostrena’ ported her helm, as her witnesses say, some short time before the collision, it was impossible that the col-

lision could have occurred unless the ‘James Joicey’ had previously starboarded and was proceeding at a much higher rate of speed. On the other hand, the collision is amply explained by the ‘Kostrena’ porting her helm when she had the ‘James Joicey’ on her starboard bow. The only evidence for the ‘Kostrena’ that tends to support her case is that given by Captain Tait, who says that, taking the courses of the two vessels described in their logs, the ‘James Joicey’ would pass to the westward of the ‘Kostrena.’ The value of that evidence, however, depends on the distance at which the ‘Kostrena’ passed the Middle Cross Sand Lightship, which is a mere matter of estimate, and also on the assumption that the courses of the two vessels were maintained with mathematical accuracy.

“The next question is, what were the respective speeds of the two vessels prior to the collision? It is admitted that for an hour the ‘James Joicey’ had been going against the tide, while the ‘Kostrena’ had the tide with her. If, therefore, each vessel had her engines going dead slow, which would represent a speed through the water of three knots, the actual speed over the ground of the ‘Kostrena’ would be much greater than that of the ‘James Joicey.’ The only scientific calculation of the strength of the tide during the hour preceding the collision is made by Captain Cowie, who puts it at 2.64 knots per hour. On that assumption the ‘Kostrena’ would be moving at least 5.64 knots as against a speed of .36 knots for the ‘James Joicey.’ Even if the tide was only flowing a knot and a half an hour, as some of the witnesses estimate, the ‘Kostrena’ would still be going at 4½ knots or three times as fast as the ‘James Joicey.’ Mr Dickson asked me to hold that the ‘James Joicey’ must have been going at high speed. There is no evidence whatever from which I could draw that inference. The engineer’s log book, which is carefully kept, records that for nearly an hour before the collision her engines were kept moving dead slow; and the distance she covered in the previous four hours is entirely consistent with the entries in the log. The Solicitor-General in the same way asked me to hold that the ‘Kostrena’ had her engines moving at half speed. I think I am not at liberty to draw this inference either, and I cannot hold it proved that the ‘Kostrena’ was going at a greater rate of speed over the ground than 5½ or six knots. Considering the fog which prevailed, I am of opinion that this was in excess of a moderate speed. It was sought to be justified on the ground that the ‘Kostrena’ would not have steerage way unless she were going at least three knots through the water. I cannot accept that evidence, because cases frequently occur of vessels moving only from one to two knots through the water, and yet having sufficient steerage way to navigate narrow channels. The ‘Kostrena’ was therefore to blame for infringing the first part of article 16 of the Regulations for Preventing Collisions at Sea.

“The ‘Kostrena’ was also, in my opinion, further to blame for infringing the second paragraph of article 16. This paragraph is in the following terms:— . . . [*Quotes supra*]. . . . On her own showing the ‘Kostrena’ did not observe this regulation. At 11:45 she heard the whistle of a vessel that she now believes to have been the ‘James Joicey’ about three points on her port bow. It was imperative that she should then stop her engines. The reason of the rule, as explained by the Lord Justice-Clerk in the case of ‘*The Warsaw*,’ 8 F. 1013, is ‘to give opportunity of accurate observation of ‘sound;’ and it is noticeable that according to the engineer’s log the ‘Kostrena’ had done this on previous occasions. The excuse suggested for not complying with the rule is, that if the ‘Kostrena’ lost steerage way her position might be endangered because of the number of vessels whose signals she heard on all sides, is untenable. The fact that the locality was crowded with shipping made it all the more necessary for the ‘Kostrena’ to observe the rule. It does not of course follow that the engines should remain stopped, but I think it may be assumed in this case that if the rule had been complied with the ‘Kostrena’ would in all probability have correctly located the position of the ‘James Joicey’ as on her starboard bow and not on her port bow, and that she would further have made the collision less likely by having had her way considerably reduced.

“It follows from what I have said that the ‘Kostrena’ was still further to blame in porting her helm before she had ascertained the correct position of the approaching vessel. On the theory that that vessel was still three or four points on the ‘Kostrena’s’ port bow the manœuvre is unintelligible, although if the position of the ‘James Joicey’ had been correctly located it would of course have been harmless. It was this manœuvre which directly led to the collision, and brought the ‘Kostrena’ across the ‘James Joicey’s’ bows at an angle variously estimated at from 60 to 90 degrees. The only possible explanation seems to be that the master of the ‘Kostrena’ realised when he heard the second blast from the ‘James Joicey’ that she was not in the position he originally believed, and that for the moment he lost his head.

“It is a more difficult question whether the ‘James Joicey’ was also to blame, and no less than seven charges are made against her in cond. 3, some of which, however, are no longer insisted in. I have already dealt with the first two [*in being under way in the fog when not under command and there were a number of steamers in vicinity; and in proceeding at excessive speed in the fog*], and the seventh [*in failing to give the proper signals for a vessel not under command*]. The fourth, fifth, and sixth are not supported by the evidence, and as I understood from the counsel for the ‘Kostrena,’ were not insisted in. There remains the third charge, which is to the effect that

the ‘James Joicey’ was to blame in failing to stop her engines on hearing forward of her port beam the fog signals of the ‘Kostrena,’ and thereafter to navigate with caution. This charge rests on a single entry in the mate’s log, which puts the time when the ‘Kostrena’s’ whistle was heard at 11:50 a.m., whereas according to the evidence the engines were not stopped until a few minutes before the collision. The complete entry is as follows:—‘About 11:50 a.m. heard a steamer’s whistle on her starboard bow, our engines were stopped, and a whistle was again heard on starboard bow, and almost at the same time a steamer loomed out of the fog.’ The engineer’s log records that the engines were stopped at 11:57, and were put full speed astern at 11:59. Reading these two documents together, it was powerfully argued that the ‘James Joicey’ must be taken to have heard the first whistle of the ‘Kostrena’ on her starboard bow at 11:50, that the engines were not stopped until seven minutes later, and that the collision occurred about 11:59 or 12 o’clock. In my opinion this is not the only construction of the documents. The mate’s log, which records the time of hearing the first whistle as about 11:50, may also be read as implying that the engines were thereafter immediately stopped; and that is what the captain and mate say in their evidence, the only difference being that they place the time when they heard the first blast at 11:54 or 11:55, and put the collision at 11:57, or two or three minutes earlier than the engineer. It is no doubt strange, if the ‘Kostrena’s’ whistle was being regularly sounded, that it had not been heard by those on board the ‘James Joicey.’ But the *onus* of proving a breach of a statutory regulation which raises a presumption of fault is on the person who alleges it, and in my opinion the evidence is insufficient to justify the conclusion which the ‘Kostrena’s’ counsel pressed upon me. Even if the ‘James Joicey’ heard the whistle at 11:50 and failed to stop, I do not see how that could have contributed to the collision. Moving, as she was, only from a half to one knot per hour over the ground, she could not have remained stopped for more than a fraction of a minute before she would entirely lose her way, and it is difficult to suggest how she could have been navigated with greater caution than she actually was. I accordingly pronounce the ‘Kostrena’ solely to blame for the collision.”

The master of the “Kostrena” reclaimed. The reclaiming note was heard with a nautical assessor.

Argued for the “Kostrena” (reclaimer)—  
(1) The “Kostrena” was not in fault. (a) Her speed was not excessive. Where both vessels were in motion speed over the ground was not the test but speed through the water, *i.e.*, the speed at which her engines were running—Marsden on Collisions at Sea, 5th edition, p. 374, *et seq.*; the “*Resolution*,” 1889, 6 Asp. Mar. Cas. 363; the “*Germanic*,” the *Times*, February 22, 1896. The Lord Ordinary had consequently erred

in adding the rate of the tide (about 2½ knots) to her engine speed. (b) Neither was she in fault in not stopping her engines on hearing the whistle of the "James Joicey." As there were other vessels round it was important not to lose steerage way. Though Austria had adopted the Regulations, that did not imply that the statutory presumptions of fault in the Merchant Shipping Act 1894, sec. 419 (4), applied to an Austrian vessel outside the three miles limit—Merchant Shipping Act 1894, section 418 (2), and section 424; *Mortimer v. Peters*, July 19, 1906, 8 F. (J.) 93, 43 S.L.R. 872; the "*Fanny M. Carvill*," 1875, 13 App. Cas. 455 (note), 2 Asp. Mar. L.C. (N.S.) 565; the "*Magnet*," 1875, L.R., 4 Ad. & Ec. 417; the "*Hibernia*," 1874, 2 Asp. Mar. L.C. (N.S.) 454; the "*Saxonia*," 1862, 1 Lush. 410; *The Queen v. Keyn*, 1876, L.R., 2 Ex. D. 63. (c) The "Kostrena" was not in fault in porting her helm. The "James Joicey" was on her port bow, and the courses were not parallel courses. (2) The "James Joicey" was in fault. (a) Her speed, i.e., her speed through the water (see argument above as to speed), was excessive. (b) She was in fault in not stopping on hearing the "Kostrena's" whistle. According to the mate's log she heard the "Kostrena's" whistle "about 11'50," and according to the engineer's log her engines were only stopped at 11'57. This was *prima facie* evidence of delay in stopping her engines. The evidence of a ship's log was very strong when against its interests—The "*Eleanor*," 1809, 1 Edwards 135; *Campbell v. Tyson*, December 22, 1841, 4 D. 342; the "*L'Etoile*," 1816, 2 Dodson 106; *Clyde Shipping Company, Limited ("Flying Wizard") v. Miller ("Sunbeam")*, July 11, 1907, 44 S.L.R. 920. Moreover, the *onus* was on the "James Joicey," as the ship alone within whose knowledge these facts were, to free herself from this charge—The "*John Harley*" v. the "*William Tell*," 1865, 13 L.T.R. 413. (c) The "James Joicey" was in fault in starboarding her helm just before the collision. (d) She was in fault in not giving the signal of one long and two short blasts prescribed by article 15 (e) for a vessel "not under command." Owing to being partially waterlogged and unable to go at full speed ahead she could not get out of the "Kostrena's" way as quickly as the latter was entitled to expect. She was accordingly "not under command"—The "*P. Caland*," [1893] A.C. 207, Lord Herschell at p. 213; the "*Hawthornbank*," [1904] P. 120. If the appropriate signal had been given the "Kostrena" might have stopped and gone astern, but it was not for her to say what she would have done. The "James Joicey" must be deemed to be in fault unless she could show that her omission could not have contributed to the accident—the "*Duke of Buccleuch*," [1891] A.C. 310; the "*Fanny M. Carvill*" (*cit. sup.*); the "*Arratoon Apar*," 1889, L.R., 15 A.C. 37.

Argued for the owners of the "James Joicey" (respondents)—I. The "Kostrena" was in fault. (a) Her speed was excessive, (b) At any rate, the admission of the failure to stop was practically an admission of fault, for whether the statutory presump-

tion of fault in the Merchant Shipping Act applied to the "Kostrena" or not, the failure to stop was a breach of good seamanship—a breach of the articles for preventing collisions which admittedly applied. (c) She was in fault in porting her helm. She had made a wrong guess as to the position of the "James Joicey," who was really on her starboard bow and on a nearly parallel course. In a dense fog she had no right to change her course without having located the vessel whose whistle she heard—*Crawford ("Warsaw") v. Granite City Steamship Company, Limited ("Linn o' Dee")*, July 5, 1906, 8 F. 1013, 43 S.L.R. 732; the "*Resolution*" (*cit. supra*). (2) The "James Joicey" was not in fault. (a) Her speed was not excessive, even though speed through the water was taken as the test. That, however, was an artificial test. A speed of half an knot or one knot over the ground could not be regarded as excessive whatever the tide against the vessel. (b) She did stop on hearing the "Kostrena's" whistle. The logs of the mate and of the engineer were not inconsistent with each other, nor with the view that she stopped at once on hearing the "Kostrena's" whistle. (c) She was not in fault in starboarding her helm. (d) She was not in fault in not sounding one long and two short blasts. She could not be properly regarded as a vessel "not under command." That was a question depending on the circumstances, and in view of the fog she would not have been entitled to go fast. At the slow rate of which she was capable she steered quite well. To say that she was "not under command" because she could not get out of the way quick enough, was inconsistent with the former accusation of excessive speed. Moreover, it could not be said that the "Kostrena," which did not stop for the one signal, would have stopped for the other. The duty to stop was imperative in both cases. Accordingly, even assuming the correct signal was not given, that omission did not contribute to the accident.

LORD JUSTICE-CLERK—We have had a very able debate in this case, and have had very able assistance from the nautical assessor. The conclusion to which I have come, and in which your Lordships concur, is that the decision of the Lord Ordinary is right. As in those cases generally, so in this case, there is a considerable conflict of evidence. I have found myself quite unable to accept the estimate given by the captain of the "Kostrena" as to her distance eastward from the Middle Cross Sand Light when she passed. It is quite certain that she was a great deal nearer than the captain thought, and that if she had not been a great deal nearer this collision could not possibly have happened whatever the "James Joicey" might have done. That they were approaching one another, the "James Joicey" going southwards towards the Middle Cross Sand Light, and the "Kostrena" going northward, and that they were within narrowish limits as regards their courses, I cannot doubt. It is clear that if the "Kostrena" had kept the course

her captain says she was keeping she could hardly have got into the position of being on the "James Joicey's" starboard bow. I am not satisfied that she kept that course accurately. I am not well satisfied with the accuracy of the evidence given by those on board the "Kostrena." It seems that this steamer was steered by hand, and steering in the fog the steersman may often have got off his course, and before he got on to it again he might be on a line which, while it looked quite correct, was only parallel with the course originally intended to be steered. That he came up to the eastwards of the Middle Cross Sand Lightship I have not the slightest doubt. Now, when he got a certain distance up he heard the sound of a steamer, as he says, broadish upon his port bow. That was his belief, and I shall assume that it was his honest belief, but in that he may have been considerably mistaken, and unless he looked at his compass at the very time at which he heard the blast he could not be certain that at that moment the head of his vessel was exactly on the course which he intended. If so, that might make a great difference.

Now what was his duty when he heard that sound? I think the whole question turns upon this. I think his duty under the regulations plainly was at once to stop his engines until he had located the sound correctly. The regulation ordering the stoppage of a vessel in such circumstances is imperative, being a regulation based entirely upon the necessity of stopping as much as possible all sound on board the vessel in order that those in charge may more accurately locate the sound when they hear it again. The captain of the "Kostrena" did not do that but went on, and in that I think he was distinctly at fault unless he can put forward circumstances which made it impossible for him to obey the rule. What are the circumstances that he says necessitated his disobeying that rule? They are that there were a number of other vessels there blowing horns. There was no corroboration of that, although there was a special signal given probably by a fishing boat at anchor. But even if he had heard several other horns blowing round him in different directions, then, wherever they were, there was no reason in the world why he should not stop. By stopping he would not be any the more in danger from these other vessels, and hearing several signals the duty to stop so as to locate sound correctly was all the more essential. So far as I can see, therefore, we have the "Kostrena" in direct violation of one of the most imperative regulations applicable to foggy weather. Then what happens is that the captain, without having stopped so as to locate the sound, took it for granted that he had a right to port his helm, and did port his helm; and the case against him is that he should not have altered his course until he had located the vessel, which he certainly had not done. Now there the "Kostrena" is found committing two distinct faults. One was going on without

stopping and thereby preventing the locating of the sound, and the other was porting the helm when nothing had been done to ensure correct location.

Now let us turn to the "James Joicey." The "James Joicey" was going south upon a course S. half W., having passed close to the North Cross Sand buoy, and her case is that when the "Kostrena" loomed in sight she was on her starboard bow and was upon a port helm. That the "Kostrena" was upon a port helm is true, and that she was upon the "James Joicey's" starboard bow may be taken to be true in the whole circumstances of the case. She stopped her engines and the order was given to reverse the engines and to starboard the helm. Now the nautical assessor told us that when that order was given the effect of the starboarding action would not take place without some time elapsing—within the time probably that the two vessels might meet. The assessor tells us that so far as the course of the vessel is concerned if the Master of the "James Joicey" did that—reversed his engines and went astern on a starboard helm—the effect would necessarily be the same as if he had ported and gone ahead; and he would be right in reversing his engines and starboarding if the other vessel was going to starboard upon a port helm, seeing that the starboarding of the helm when the vessel was going astern would produce the same effect as porting the helm when going ahead. Up to this point I can see no fault that can be attributed to the "James Joicey." But then it is argued that the "James Joicey" was in fault in respect that she did not give the signal for a vessel not under control. I am not satisfied from all that we have learned that she was a vessel not under control. The only thing that was in question as to whether she was under control or not was the effect of the injuries to her in a previous collision, resulting in water coming in at the bows and setting her down forward so that she could not steer. But the fact is that she could steer and did steer. But then it is said, further, that she was giving signals in daylight and at night, which indicated that she was a vessel not under control. That, of course, would be prudent on the part of the master of a vessel not under control, even in degree. But we must hold on the advice we have received that she was a vessel under control—that is to say, she was under control at the speed at which she could move, and in the circumstances was quite capable of doing what another vessel could do in the case of an emergency. No doubt it was not a high speed; a high speed could never have been attained in her state, and would have been wrong even if possible, as she was in fog, but going at this slow speed she was under control. We were referred to the case of the "*P. Caland*," in which Lord Herschell gave an opinion, and in which the vessel in question was a great deal more out of control than the vessel in this case. There it was held that it could not be said reasonably that the vessel was out of control. Even if it

were otherwise, and the question was whether she might have misled the "Kostrena" by not giving the signal that she was not under control, that question would resolve itself into this, did that in any way contribute to what happened? In my opinion it did not, because what the "Kostrena" had to do according to the regulations, and knowing that a steamer was there, was to stop and wait until she could locate the position. The purpose of the stopping is for location, and she should have stopped and located the other vessel, and that was an absolute duty on the part of the master whether the other vessel was a vessel under control or a vessel not under control. Therefore I come to the conclusion that the Lord Ordinary is right in holding that the "James Joicey" was not to blame for what occurred. There is another point to which I need to refer, and that is the question whether the regulations in the circumstances apply to a foreign vessel. I can only say this, I never heard of that question being raised before. We had a case of exactly the same kind as this in this Division and the point was not raised, and there was also a case in England in which it was not raised. In these circumstances I do not think that we are called upon to decide any such question, nor do I think it would affect the decision in this case, because I am clearly of opinion that the "Kostrena" was to blame by taking the wrong course. What she did was essentially bad seamanship.

I would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD STORMONTH DARLING—I concur.

LORD LOW—I also concur.

LORD ARDWALL—I am of the same opinion. The "Kostrena" was undoubtedly in fault. The first and very serious fault on her part was that she did not comply with article 16 of the regulations as soon as she heard the fog signal of the other vessel in a position which she had not ascertained. The imperative requisition in article 16 is that "a steam vessel hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until the danger of collision is over." It is unquestionable, according to the evidence of those on board of the "Kostrena" herself, that she did not stop. Of course, the object of stopping in such a case is to locate the sound so as to find the position of the other vessel. She cannot locate the sound well until her engines are stopped. As was pointed out in the passage read from the Lord Justice-Clerk's opinion in the case of the "Warsaw," the object of a vessel stopping in these circumstances is that those on board should be freed from the noise of her own engines and of rushing through the water, so as to be able to distinguish by the sounds made by the other vessel the direction and distance from which they come. Now, the

"Kostrena" failed to stop her engines. The only excuse given for that failure is that there were a great number of steamers about, but the evidence shows that that really was no excuse at all. The second mistake which the "Kostrena" made was that she improperly ported her helm. That raises the question of the position in which these two ships approached each other. We have had the advantage of a consultation with the nautical assessor, and he is of opinion that taking the courses that the vessels were on, the "Kostrena" must have had the "James Joicey" not on her port bow but upon her starboard bow. Of course the "Kostrena" must have been very much further to the west than we are led to suppose from the evidence, but in the circumstances the "Kostrena" might easily have got inshore of the course of the "James Joicey" owing to her shifting her course to avoid vessels and owing perhaps to the tidal currents. It is absolutely certain that if she had not been inshore of the course of the "James Joicey" just before the collision, the two courses never could or would have crossed each other. I must hold that somehow or other the "Kostrena" must have got inshore of the course of the "James Joicey," and therefore when she approached the point where the courses were to cross each other she must have had the "James Joicey" on her starboard bow. Now in that state of matters it was a wrong manœuvre on the part of the "Kostrena" to port her helm and thereby run straight across the bows of the "James Joicey." With regard to her excessive speed, which is the third fault charged against the "Kostrena," that is shown by the nature and direction of the injuries inflicted on the two ships by the collision, and I am satisfied that although the speed may not have been very great, yet it was a speed greater than she should have been proceeding at through fog. With regard to the "James Joicey," the first point made against her is that she did not stop when she heard the whistle of the "Kostrena," and that is founded upon the entries of the time in the mate's log. I agree with what was said by your Lordship in the chair in the course of the discussion that the mate's log must not be read too literally or strictly in a case of this sort. At that moment when the whistle sounded those in command of the "James Joicey" were all concerned with trying to escape from a collision, and I have no doubt that the log was written afterwards, for the simple reason that it could not be written up at the time when the mate was on the bridge. On the other hand, the engineer's log is in a totally different position. The engineer is in the engine room, and when he gets a signal from the bridge he looks at the clock, and after he has carried out the order he marks down the very moment that the telegraph rang, so that it is a record which, unless it can be clearly shown that it was written up afterwards, is a record of the highest importance and is most reliable. I am therefore of opinion on the best evidence we have, and comparing it with the

other evidence in the case, that the "James Joicey" did stop when she heard the fog signal of the other vessel. It is said that she manœuvred improperly by starboarding her helm and reversing her engines. The order to starboard and the order to reverse are two distinct orders given at the same time, one to the man at the wheel by word of mouth, and the other to the engineer by the telegraph. These orders were proper in the circumstances, and did not contribute to the collision; on the contrary, they tended to lessen the risk of collision, and mitigated, so far as was possible, the force with which the vessels collided. The evidence as to speed shows that the "James Joicey" was not being navigated at too great a speed in the fog. There is a fourth point of blame brought against the "James Joicey," and that is that she failed to comply with article 15 (e) of the regulations in not giving one prolonged blast followed by two short blasts. The first thing to be said about that is that it is really irrelevant to the present case, because it cannot be said that those on board the "Kostrena," who did not stop under article 16 when they heard the ordinary foghorn, would have stopped if they had heard this other signal. But apart from that altogether I consider that this ship the "James Joicey" could not well be regarded as a ship not under command. It is true that it is a duty to put up or give by sound a signal appropriate to a ship not under command, but whatever may be said about that in ordinary circumstances it is clear that it did not matter here, because the ship was going at a low speed, and that at that low speed she was quite under command. In short, the fact of the matter was that the "James Joicey" was practically reduced from an 8 or a 9-knot vessel to a 4-knot vessel by reason of the fact that it would be dangerous to force her through the water at great speed. At the slower speed she was quite under command, and as that speed was the proper speed in going through fog the master was not required to sound the number of whistle signals prescribed by article 15 (e). Accordingly, I think that the charges put forward against the "James Joicey" have broken down, and that, for the reasons I have already mentioned, the "Kostrena" was alone to blame.

The Court adhered.

Counsel for the Reclaimer—Murray—Carmont. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondents—Hunter, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

## REGISTRATION APPEAL COURT.

Friday, November 29.

(Before Lord Stormonth Darling,  
 Lord Pearson, and Lord Johnston.)

NIVEN v. STEWART.

*Election Law—Burgh Occupation Franchise—Tenant and Occupant—Joint Tenancy—Occupancy—Lease—Valuation Roll—Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV, cap. 65), secs. 11 and 12—Representation of the People Act 1884 (48 and 49 Vict. cap. 3), secs. 5, 7 (7) and (8), and 12.*

The names of four persons were entered in the valuation roll as joint-tenants and joint-occupants of premises in a burgh, of a yearly rent of £45, and they claimed to be entered on the voters' roll in respect thereof. The premises were used as reading and billiard rooms by the members of an organisation, 100 in number, and were held under a written lease in favour of the four persons appearing on the valuation roll, and a fifth whose name had, on appeal, been deleted therefrom, on the ground that he had ceased to be a member of the organisation.

Held that as the fifth party still remained tenant under the lease and responsible for its obligations, irrespective of his name being taken off the valuation roll, there were five joint-tenants, and consequently each of them had not an interest to the extent of £10, the necessary qualification.

Question (per Lord Johnston), whether, supposing the value of the premises had been sufficient to give each of the joint-tenants the necessary interest, their occupation of the premises was of the character contemplated by the statutes?

The Representation of the People (Scotland) Act 1832 (2 and 3 Will. IV, cap. 65), enacts:—Section 11—" . . . every person, not subject to any legal incapacity, shall be entitled to be registered as hereinafter directed, and to vote at elections for any of the cities, burghs, or towns, . . . who, when the Sheriff proceeds to consider his claim for registration, shall have been, for a period of not less than twelve calendar months next previous to the last day of July in any future year, in the occupancy, either as proprietor, tenant, or liferenter, of any house, warehouse, counting-house, shop, or other building within the limits of such city . . . which . . . shall be of the yearly value of £10. . . ." Section 12—" . . . Where such premises shall be of the yearly value of £20 or upwards, and shall be jointly occupied by more than one person, each of such joint-occupiers shall be entitled to be registered and to vote, provided his share and interest in the same shall be of the yearly value of £10 or upwards."