

Saturday, January 13.

FIRST DIVISION.

[Lord Anderson, Ordinary.]

LAIRD LINE, LIMITED (OWNERS OF S.S. "ROWAN") v. UNITED STATES SHIPPING BOARD (OWNERS OF S.S. "WEST CAMAK"), *et e contra*.

LAIRD LINE, LIMITED (OWNERS OF S.S. "ROWAN") v. CLAN LINE STEAMERS, LIMITED (OWNERS OF S.S. "CLAN MALCOLM"), *et e contra*.

Ship—Collision—Fog—Excessive Speed in Entering Fog Area—Wrong Order Immediately Countermanded—Regulations for Preventing Collisions at Sea, 1910, Art. 16.

Two steamers, the "Rowan" and the "West Camak," proceeding in almost opposite directions, were approaching each other during the night at an angle of about 28 degrees. The master of the "West Camak" first observed the "Rowan" on his starboard bow, the masthead light only of the "Rowan" being visible. The "West Camak" was then in fog and was proceeding at a speed of about four knots. The ships were not more than 1200 feet apart. The master of the "West Camak" ordered his helm to be put to starboard, but about three seconds later and before the order could be carried out, on the red light of the "Rowan" becoming visible close on his starboard bow, countermanded the order and gave the orders to port the helm and go astern. When the master of the "Rowan" first observed the "West Camak," the masthead light and green light of the latter becoming visible on the "Rowan's" port bow, the ships were not more than 1000 feet apart, and the "Rowan" was passing at full speed from clear conditions into a fog area but was not sounding a fog signal. The master of the "Rowan" at once ordered his helm hard-a-port, and just before the collision hard-a-starboard. The ships collided. *Held* that the collision was caused (1) by the fault of the master of the "Rowan" in passing into the fog area at full speed and without using the fog signal, and (2) by the fault of the master of the "West Camak" in wrongly ordering his helm to be starboarded, the proper course being to reverse the engines; and loss apportioned.

Ship—Collision—Fog—Helpless Ship in Fog—Omission to Give Fog Signals—Excessive Speed on Entering Fog—Regulations for Preventing Collisions at Sea, 1910, Art. 15 (e) and 16.

The steamship "Rowan" while in a helpless condition resulting from a previous collision about midnight, which was partly due to her master's fault, was run into a few minutes later by the steamship "Clan Malcolm" and sank.

The "Rowan" was in fog and stationary but did not sound any fog signal for more than two minutes before the "Clan Malcolm" struck her. The "Clan Malcolm" entered the fog about four minutes before she collided with the "Rowan," at a speed of eleven knots. Her engines were then put to slow and fog signals sounded, and at the time of the collision her speed was about eight knots. When the "Rowan" was observed the ships were about 800 feet apart, and the master of the "Clan Malcolm" put his helm to hard-a-port and reversed her engines, but immediately after put his engines half-speed ahead. *Held* that the collision was caused (1) by the fault of the master of the "Rowan" in not sounding fog signals for more than two minutes before, there being no explanation of why he did not do so, and (2) by the fault of the master of the "Clan Malcolm" in not reducing her speed to less than eight knots, and in manœuvring wrongly when the "Rowan" was observed. Further *held* that in the circumstances the collision could not be attributed to the fault of the master of the "Rowan," to which the previous collision was due.

Ship—Collision—Ship Injured by Collision Sinking after Second Collision—Whether Loss Due to Second Collision—Onus of Proof.

The steamship "Rowan" while in an unmanageable and helpless condition as the result of a collision, was struck by the steamship "Clan Malcolm" about seven minutes after the first collision and sank. The "Rowan" had remained afloat after the first collision without any sign of incoming water or of sinking being observed. The blow struck by the "Clan Malcolm" would have been sufficient to sink the "Rowan" if she had been uninjured by the previous collision. *Held* that in the circumstances the onus of proving that the "Rowan" was at the time of the second collision in a sinking and unsalvageable condition was on the owners of the "Clan Malcolm."

Ship—Collision—Nautical Assessors—Note of Questions and Answers—Nautical Assessors (Scotland) Act 1894 (57 and 58 Vict. cap. 40), sec. 3.

The Nautical Assessors (Scotland) Act 1894, section 3, enacts—"The judge before whom any cause is tried with the assistance of an assessor or assessors summoned under the provisions of this Act, shall make a note of the questions submitted by him to such assessor or assessors, and of the answer or answers thereto."

Observations per Lord President as to the importance of attention to the provisions of the section.

The Regulations for Preventing Collisions at Sea, 1910, *inter alia*, provide—Article 15—"All signals prescribed by this article for vessels under way shall be given—1. By 'steam vessels' on the whistle or siren. . . .

In fog, mist, falling snow, or heavy rain-storms, whether by day or night, the signals described in this article shall be used as follows, viz. . . . (e) . . . and 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 rain-storms, 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.”

The Laird Line, Limited, owners of the steamship “Rowan,” *pursuers*, brought an action against the United States Shipping Board, owners of the steamship “West Camak,” *defenders*, for £100,000, restricted in the course of the proceedings to £11,000, as damages sustained by the “Rowan” in a collision with the “West Camak.” The United States Shipping Board, *pursuers*, brought a counter action against the Laird Line, Limited, *defenders*, for £8000 as damages for injury to the “West Camak” in the same collision.

The Laird Line, Limited, owners of the steamship “Rowan,” *pursuers*, brought an action against the Clan Line Steamers, Limited, owners of the steamship “Clan Malcolm,” *defenders*, for £100,000 as damages sustained by the “Rowan” in a collision with the “Clan Malcolm” which took place subsequent to that with the “West Camak.” The Clan Line Steamers, Limited, *pursuers*, brought a counter action against the Laird Line, Limited, *defenders*, for £7500 as damages sustained by the “Clan Malcolm” in the same collision.

In the action by the Laird Line, Limited, against the United States Shipping Board the *pursuers* averred—“(Cond. 6) The said collision between the ‘Rowan’ and the ‘West Camak’ was due solely to the fault of those in charge of the ‘West Camak,’ for whom the *defenders* are responsible, in respect that (a) she was being navigated at an excessive speed while in fog, (b) her whistle was not being sounded while in fog, (c) those on board her failed to keep a sufficient or any look-out, (d) when it was her duty to keep out of the way of the ‘Rowan’ she failed to do so, (e) she improperly and at an improper time starboarded her helm, and (f) she failed timeously to stop and reverse her engines. Those in charge of her navigation were accordingly in breach of the rules of good seamanship and the Articles for Preventing Collisions at Sea, particularly articles 15, 16, 19, 23, and 29.”

In the counter action the United States Shipping Board averred—“(Cond. 7) The said collision between the ‘Rowan’ and the ‘West Camak’ was due entirely to the fault of those in charge of the navigation of the

‘Rowan,’ for whom the *defenders* are responsible. In particular, those in charge of the ‘Rowan’ were negligent in their failure (a) to keep a sufficiently good or any look-out, (b) to proceed at a moderate speed in the state of the weather which prevailed, (c) to sound her whistle for fog in accordance with the Regulations for Preventing Collisions at Sea, (d) to stop her engines in due time or at all, (e) to stop and/or reverse her engines in due time or at all, (f) they were also negligent in porting their helm on sighting the ‘West Camak’ close at hand, as the effect of this manœuvre was to throw the port quarter of the ‘Rowan’ on to the bows of the ‘West Camak,’ and they were also in fault in failing to indicate by appropriate whistle signal that she was changing her course. Those in charge of the navigation of the ‘Rowan’ failed to comply with articles 15, 16, 27, 28, and 29 of the Regulations for Preventing Collisions at Sea.”

In the action by the Laird Line, Limited, against the Clan Line Steamers, Limited, the *pursuers* averred—“(Cond. 6) The said collision was due to the fault of those in charge of the navigation of the ‘Clan Malcolm,’ for whom the *defenders* are responsible, in respect that (a) she was being navigated at an excessive speed while in fog, (b) her whistle was not being sounded while in fog, (c) those on board her failed to keep a sufficient or any look-out, (d) she failed to stop and reverse her engines timeously, (e) she failed on sighting the ‘Rowan’ to keep out of her way by timeously altering her course and/or by timeously reversing her engines, and (f) having ordered her engines to be reversed those in charge thereafter improperly ordered them half speed ahead. Those in charge of the navigation of the ‘Clan Malcolm’ were accordingly in breach of the rules of good seamanship and the Articles for Preventing Collisions at Sea, particularly articles 15, 16, and 29.

In the counter action the Clan Line Steamers, Limited, averred—“(Cond. 5) The said collision between the ‘Clan Malcolm’ and the ‘Rowan’ was due to the fault of those in charge of the ‘Rowan’ in respect that they failed (a) to sound their whistle in the fog, (b) to exhibit the prescribed signals for a vessel not under command, (c) to show flares or to send up rockets or shells, or to take any steps to warn vessels in the vicinity that she was lying helpless and requiring assistance in the track of incoming and outgoing vessels, and (d) to send out timeously a wireless message of distress.”

The *facts* are given in the opinions.

After a proof had been led by arrangement among the parties in all the actions at the same diet the Lord Ordinary (ANDERSON) on 19th April 1922 found in the actions between the Laird Line, Limited, and the United States Shipping Board that the collision between the “Rowan” and the “West Camak” was entirely due to the fault of those in charge of the “Rowan,” assailed the United States Shipping Board in the action against them, and continued their action against the Laird Line, Limited, for further procedure; and in the actions between the Laird Line, Limited, and the

Clan Line Steamers, Limited, that the collision between the "Clan Malcolm" and the "Rowan" was due to the joint fault of those in charge of these ships, and that the Clan Line Steamers, Limited, were liable for two-thirds of the loss thereby occasioned, and the Laird Line, Limited, for one-third. The Lord Ordinary also found that it had not been proved that at the time of the collision between the "Clan Malcolm" and the "Rowan" that the latter was sinking and unsalvable.

Opinion.—"On 8th October 1921 the s.s. 'Rowan' sailed from Glasgow about mid-day and proceeded to Greenock. At Glasgow a general cargo of 87 tons had been shipped, and at Greenock other 41 tons of cargo were taken aboard. The 'Rowan' also carried passengers, and when she sailed from Greenock at 7:20 p.m. there were 75 passengers aboard. Her crew numbered 35. She was bound for Dublin. The length of the 'Rowan' was 280 feet; her full speed was 14 knots, half speed about 7 knots, slow speed 3 to 4 knots. After the 'Rowan' left Greenock the night at the outset was clear, the weather fine, the sea smooth, and the wind blowing from the south-west was light. At Kildonan the 'Rowan' passed the s.s. 'Clan Malcolm.' Corsewall Point Light on the Wigtownshire coast was passed about 11:54 p.m. About fifteen minutes thereafter, to wit, at 12:12 Greenwich mean time, a collision took place between the 'Rowan' and the s.s. 'West Camak,' which was steaming north, bound for Glasgow. As a result the 'Rowan' sustained somewhat serious damage. A portion of her counter on the port side aft, weighing about 10 tons, was cut away. Her propeller and rudder were dislodged, and she was thereby put completely out of command. The injuries sustained by the 'West Camak' were slight.

"About fifteen minutes after the said collision had taken place, a second collision occurred between the 'Rowan' and the s.s. 'Clan Malcolm,' which was steaming south, bound for Liverpool. The latter vessel struck the 'Rowan' on the starboard side 20 feet or thereby forward of the funnel and sunk her almost immediately. There was a regrettable loss of life, both among the passengers and crew of the 'Rowan.' The 'Clan Malcolm' was not seriously damaged.

"In these circumstances four actions have been raised, concluding for damages sustained by reason of the foresaid collisions.

"On 2nd November 1921 the owners of the 'West Camak,' concluding for the sum of £100,000 as damages in respect of the first collision. In the original pleadings of this action it was averred that 'the "West Camak" struck the "Rowan" on the port quarter, doing damage both above and below the water line, and causing water to enter freely.' In other words, the case against the 'West Camak' as originally laid would seem to have been that she had inflicted a mortal injury on the 'Rowan' and so rendered her unsalvable. On fuller information or maturer consideration a different case is made against the 'West

Camak' by the pleadings as finally adjusted. The petitory conclusion of the summons is restricted to £11,000, and this claim is made on the footing that the injuries caused by the 'West Camak' were not fatal. It is assumed that had the 'Clan Malcolm' not intervened the 'Rowan' would have been salvaged, and the sum now claimed from the owners of the 'West Camak' is the estimated cost of repairing the damage sustained by the 'Rowan' by reason of the first collision.

"The owners of the 'West Camak' on 23rd December 1921 raised a counter action against the owners of the 'Rowan,' alleging that the first collision was entirely due to the fault of the 'Rowan,' and suing for the sum of £8000 in respect of the damage sustained by the 'West Camak.'

"On the said 2nd November 1921 the owners of the 'Rowan' raised an action against the owners of the 'Clan Malcolm,' concluding for payment of the sum of £100,000 in respect of the sinking of the 'Rowan' by the second collision. This claim is made on the footing that the 'Rowan' had not been mortally injured by the first collision but was salvable, and that the 'Clan Malcolm' is thus responsible for the loss of the 'Rowan' and her cargo.

"On 6th January 1922 the owners of the 'Clan Malcolm' brought a counter action against the owners of the 'Rowan,' alleging that the second collision was entirely due to the fault of the 'Rowan,' and suing for £7500 in respect of the damage sustained by the 'Clan Malcolm.'

"The questions raised for determination by these actions are thus—

"1. In reference to the first collision—

- (a) Was the 'West Camak' in fault?
- (b) Was the 'Rowan' in fault?

"2. In reference to the second collision—

- (a) Was the 'Clan Malcolm' in fault?
- (b) Was the 'Rowan' in fault?

"3. As the result of the first collision—

- (a) Was the 'Rowan' rendered unsalvable? or
- (b) Was she salvable thereafter?

"4. There is a further point which is not directly raised by the pleadings, but whereon some evidence was led and as to which I think it proper to state my opinion—Assuming that the 'Rowan' was rendered unsalvable by the first collision, would there have been any loss of life had there been no second collision?

"Taking these various questions in the order above stated, I proceed, in the first place, to deal with the collision between the 'West Camak' and the 'Rowan.'

"(a) Was the 'West Camak' in fault?

"The 'West Camak' is a much larger ship than the 'Rowan' was. The tonnage of the 'West Camak' is 5721 tons gross and 3513 net, as against the 'Rowan's' 1493 tons gross and 622 net. The length of the 'West Camak' is 410 feet. Her speeds are—full, 10½-11 knots; half, 6-6½ knots; and slow, 3½-4 knots. Her draught was 24 feet 1 inch forward and 24 feet 3 inches aft. The chief officer's log of the 'West Camak' shows that in her voyage northwards to Glasgow fog was encountered from 12 midday on-

wards to the time of the collision. From 8 p.m. until 12 midnight the log bears that 'thick fog' prevailed.

"The chief engineer's log shows that from 7.3 p.m., when it began to get dark, until 11.50 p.m., the speed of the ship was altered eight times from 'slow ahead' to 'full ahead' a few minutes thereafter. The chief officer's log shows that the purpose of these changes of speed was to take soundings. The 'West Camak' had thus been steaming in fog from 12 midday until 11.50 p.m. at full speed with several short intervals of slow speed. This was, in my view, negligent seamanship, and was in violation of the provisions of article 16 of the Regulations for Preventing Collisions at Sea. If, after soundings had been taken at 11.50 p.m., the 'West Camak' had as previously gone full speed ahead and continued at that rate until the 'Rowan' was sighted, the 'West Camak' would undoubtedly have been to blame for the collision. But fortunately for that vessel something occurred at the last sounding which kept the 'West Camak's' rate of speed at slow ahead. This was that a sounding of only 17 fathoms was then taken. As the previous recorded sounding (at 10.20 p.m.) was 140 fathoms, the sounding of 17 fathoms showed that the ship had drawn near the shore. It was thus necessary, or at all events expedient, to continue at the speed of slow ahead, and no increase of speed took place before the collision.

"As the 'West Camak' proceeded at slow speed for eleven minutes or thereby before sighting the 'Rowan,' her speed had doubtless then been reduced from full to slow, *i.e.*, 3.4 knots. The 'Rowan's' speed was then about 13 knots, giving a combined speed of 16-17 knots or 1600-1700 feet per minute. As the two vessels, when they sighted each other, were at no greater distance apart than 1000 feet or thereby, this combined speed gave them a period of time of little more than half-a-minute in which to act. I am advised by the nautical assessor (who has given me invaluable aid at every stage of this difficult case) that if both ships at the moment of sighting one another had reversed their engines, then as both vessels were at that moment on a port helm the collision might have been avoided, and in any event the damage to the 'Rowan' would have been greatly diminished. This manœuvre, however, was not adopted by both vessels. When the 'Rowan's' port light opened to the 'West Camak,' Captain Curtis should have given the order to the engine-room 'full speed astern' and to the steersman 'hard-a-port.' What Captain Curtis did was—(1) On seeing the 'Rowan's' mast-head light, he ordered the helm 'hard-a-starboard.' This order—admittedly wrong—was explained by counsel for the 'West Camak' as having been given because the 'Rowan's' light was at first thought to be a shore light. (2) When immediately thereafter the 'Rowan' showed her port light, the preceding order, which the helmsman had only begun to execute, was countermanded, and the order 'hard-a-port' was given, the appropriate blast being sounded

on the whistle. Immediately thereafter the order 'stop' and 'full speed astern' were telegraphed, practically as one order, to the engine-room. Three short blasts were sounded on the whistle to show that the order had been given and executed. I am advised that this manœuvre had probably taken effect to the extent of reducing the 'West Camak's' speed to 2 knots at the moment of impact.

"I shall show later, when I deal with the six charges of negligence which are made against the 'West Camak,' that the only case of fault which has any substance in it arises in reference to the foresaid orders which were given by the master of the 'West Camak.' As to what took place after the 'Rowan's' port light appeared, I am of opinion that there was no appreciable loss of time caused by the order to the steersman having been given first. It was essential to have the helm altered at once to counteract the erroneous order 'hard-a-starboard.' There was in my opinion no appreciable interval of time between the order to the steersman and the order to the engine-room. Captain Curtis, in answer to a question I put to him, said that these orders were given simultaneously, and they might have been given at the same moment, as the one order was oral, the other by telegraph. The helmsman Brannan, a superior type of seaman and a good witness, gave evidence to the same effect. I therefore hold that there was no negligence in connection with these orders.

"There is a little more difficulty in connection with the order 'hard-a-starboard,' but here also I have formed the opinion that the loss of time was negligible and had no effect on the ultimate result. [*His Lordship then considered the evidence, and continued.*]—This evidence in my opinion describes exactly what took place, and shows that the erroneous order to starboard caused no appreciable loss of time. It is to be noted that the order to starboard had not been signalled on the whistle, so rapidly had the countermand been given. I am satisfied that in reference to both of the above-mentioned matters there was not a total loss of time of more than three seconds. There is no case in the books where so slight a loss of time in executing the appropriate manœuvre has been held to amount to negligence. It must be kept in mind that the master of a ship faced with a probable collision is entitled to a reasonable period of time to make up his mind as to what is best to be done. In the '*Emmy Haase*,' 9 P.D. 81, Butt, J., said—'I may add that compliance with rule 18 (to stop and reverse) at the very moment when danger becomes apparent is not necessary, for a man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously—a short but a very short time must be allowed him for this purpose.' This principle was approved by the House of Lords in the case of '*Kwang Tung*,' [1897] A.C. 391, in which it was decided that a delay of a few seconds in giving the proper order did not amount to

negligence. I am satisfied that no longer time elapsed before the engines of the 'West Camak' were reversed than is thus allowed to the master of a ship to execute the appropriate manœuvre. It must further be kept in mind that the onus is on the 'Rowan' to show that but for the alleged delay on the part of the 'West Camak' no collision would have occurred. (*The 'Vindomora'*, [1891] A.C. 1, per Lord Herschell at p. 7.) This onus has not, in my opinion, been discharged.

"Turning now to the specific acts of negligence averred against the 'West Camak' I hold that (a) has been disproved for the reasons already given; (b) also fails, as it is proved that the whistle of the 'West Camak' had been sounded all along up to the time of collision; (c) is disproved, as the 'West Camak' kept a sufficient look-out from the bridge and fore-castle-head; (d) also fails, as the evidence shows that the 'West Camak' did her best to keep out of the way of the 'Rowan.' The manœuvre suggested by the 'Rowan's' counsel in cross-examination of Captain Curtis and in argument, to wit, that the 'West Camak' should have gone full speed ahead on a hard-a-port helm was, I am advised, a risky manœuvre and one which a prudent seaman would not in the circumstances have adopted; (e) and (f) also fail, for the reasons already given.

"I must therefore absolve the 'West Camak' from all blame in connection with the first collision.

"The result is that in the action at the instance of the owners of the 'Rowan' against the owners of the 'West Camak' decree of absolvitor must be pronounced with expenses.

"(b) Was the 'Rowan' in fault?"

"The specific charges made by the 'West Camak' against the 'Rowan' are set forth in the record *S.S. 'West Camak' v. S.S. 'Rowan'* and are six in number. The main allegations of fault against the 'Rowan' are (1) that she was proceeding in or towards fog at a dangerous rate of speed, and (2) that when the 'West Camak' was sighted she failed to adopt proper manœuvres for avoiding a collision.

"(1) *Dangerous rate of Speed.*—The 'Rowan' admits that as she approached Corsewall Point the weather was 'slightly hazy.' The productions (excerpts from the records kept at Corsewall Fog-Signal Station and at Killantringan Fog-Signal Station) show that the fog signal had been sounding from Corsewall from 8:35 p.m. till 12:10 a.m. and from Killantringan from 8:20 p.m. till 12:35 a.m. The latter signal might not have been audible to the 'Rowan' but the Corsewall signal was heard. Further, Killantringan light had never been seen by the 'Rowan's' outlook. All this ought to have warned the 'Rowan' that there was foggy weather at or near Corsewall Point. She ought therefore to have slackened speed when approaching, or at all events when abeam of that point. Instead of doing so she proceeded at what was practically her full speed until the collision took place. I am of opinion, and am advised, that this

was faulty seamanship which was in great measure the cause of the collision—see *The 'City of Brooklyn'*, 1 P.D. 276; *The 'Pennsylvania'*, 31 L.T. 103; *The 'Campania'*, [1901] P. 289; and *The 'Counsellor'*, [1913] P. 70, where it was held that as a general rule speed such that another vessel cannot, after being seen, be avoided is excessive.

"(2) *Improper Manœuvring.*—The 'West Camak' sighted the 'Rowan' on her star-board bow. As the vessels were on crossing courses the duty of the 'Rowan,' had there been sufficient time available, was to have kept her course, and that of the 'West Camak' to have kept out of the 'Rowan's' way by porting and passing astern of her. The note to article 21 of the Regulations, however, laid upon the 'Rowan' the duty of taking such other action as would avoid a collision. Instead of keeping her course the 'Rowan' first ported and subsequently starboarded. The first of these manœuvres, if adopted at full speed ahead for the purpose of avoiding a collision, was not a proper manœuvre. The 'Rowan,' when the white light of the 'West Camak' was sighted, ought at once to have reversed her engines and gone full speed astern, and when the red light of the 'West Camak' was visible, the order 'hard-a-port' should then have been given so as to cant her head to starboard. This was the obvious manœuvre to avoid a collision, or at all events minimise damage. So far from doing this the 'Rowan' did not even reduce her speed from full to slow.

"I am therefore of opinion that the first collision was due solely to the negligence of those in charge of the 'Rowan.' In the action at the instance of the owners of the 'West Camak' against the owners of the 'Rowan' I shall find accordingly and continue the cause to enable the 'West Camak' to prove her damages.

"I proceed in the second place to consider the collision between the 'Clan Malcolm' and the 'Rowan.'

"(a) Was the 'Clan Malcolm' in Fault?"

"The specific charges made against the 'Clan Malcolm' are set forth in the record—*S.S. 'Rowan' v. S.S. 'Clan Malcolm'*. The main charges are these—(1) Steaming through fog at a dangerous rate of speed, and (2) improper manœuvring after the 'Rowan' had been sighted.

"(1) *Dangerous rate of Speed in Fog.*—Captain Harris admits that he had heard Corsewall fog signal sounding. This ought to have warned him to slacken speed as he approached Corsewall Point. He nevertheless continued to steam at full speed until he had passed Corsewall Point. About a minute afterwards the 'Clan Malcolm' is said to have suddenly entered a bank of thick fog. Captain Harris thereupon gave the order 'Stand by' on the telegraph to the engine-room, and immediately afterwards 'Slow ahead.' It has to be kept in mind that the fog was then 'dense' and the 'Clan Malcolm' was navigating a frequented part of the ocean. Article 16 of the Regulations prescribes that in a fog every vessel shall 'go at a moderate speed.' It is her duty to use the best and most expedi-

tious means to attain this moderate speed. I am advised—and it is my own opinion—that the duty of the captain of the ‘Clan Malcolm’ in the circumstances was on entering the bank of fog to have stopped his engines, and if necessary to have gone astern in order to get his way off and reduce his speed from full to ‘moderate.’ Instead of doing so he proceeded for three or four minutes through the fog at a speed which was falling from full to slow. The ‘West Camak’ was sighted and heard, but although this vessel was apparently standing by or steaming slowly the ‘Clan Malcolm’ did not think it proper to stop, but went on until the ‘Rowan’ was seen lying athwart her course. The speed of the ‘Clan Malcolm’ when she struck the ‘Rowan’ is proved to have been 8 knots or thereby. I am satisfied that the last order of ‘half-speed ahead’ did not effect any appreciable acceleration of speed before the collision. It follows that when the ‘Rowan’ was sighted the ‘Clan Malcolm’s’ speed was 8 knots, which I hold in the circumstances to have been a dangerous rate of speed. It was at all events a rate of speed which was not a ‘moderate’ rate within the meaning of article 16 of the Regulations—see *The ‘James Joicey,’* 1908 S.C. 295, per Lord Salvesen, Ordinary, at p. 301, 45 S.L.R. 216; also *The ‘City of Brooklyn,’* *The ‘Pennsylvania,’* *The ‘Campania,’* and *The ‘Counsellor,’* supra.

“I am therefore of opinion that the speed of the ‘Clan Malcolm’ in the fog was too high, and that the second collision was in the main due to this cause.

“(2) *Improper Manœuvring.*—If the ‘Rowan’ was only a ship’s length from the ‘Clan Malcolm’ when first seen by the latter vessel, then it is doubtful if a collision could have been avoided whatever manœuvre had been adopted by the ‘Clan Malcolm.’ I think, however, that the ‘Rowan’ had been sighted by the ‘Clan Malcolm’ at a greater than a ship’s length. I reach this conclusion on the evidence of Captain Curtis. He there says in effect that he re-sighted the ‘Rowan’ at a distance three or four of the ‘West Camak’s’ lengths, and that the ‘Clan Malcolm’ was then passing the ‘West Camak.’ The ‘Clan Malcolm’ ought then also to have seen the ‘Rowan’ and doubtless did so. She had thus a distance of 1200 to 1600 feet available for manœuvring, and if the order which was given ‘full speed astern’ had not been countermanded but had been adhered to, I think it likely that the collision would have been avoided. The ‘full speed astern’ order was unfortunately countermanded and the order ‘half-speed ahead’ given, the helm having previously been put hard-a-port. It seems to me hopeless to have expected that by this combination of orders the collision could have been averted or any good effect secured.

“I therefore reach the conclusion that on this ground also the ‘Clan Malcolm’ was in fault.

“(b) *Was the ‘Rowan’ in Fault?*

“On this topic an interesting and difficult point was taken by the ‘Clan Malcolm’s’ counsel. He contended that if the ‘Rowan’ was in fault in connection with the first

collision, she was necessarily guilty of contributory negligence in reference to the second collision. I was referred to the following authorities:—*Marsden on Collisions at Sea*, p. 16; *The ‘Douglas,’* 7 P.D. 151; *Kidston*, 5 R. 936, 15 S.L.R. 631; *Seccombe*, 1840, 2 Moo. & R. 290; *The ‘Romney Marsh,’* L.R., 5 Ex. 204 and 7 Ex. 247; *The ‘Kjobenhavn,’* 2 Asp. M.C. 213. It is, however, unnecessary to examine and consider these authorities, as the law of contributory negligence has been definitely declared in the recent House of Lords’ case of *The ‘Volute,’* [1922] 1 A.C. 129. In that case the Lord Chancellor (Birkenhead) delivered a judgment which was described by Viscount Finlay as a ‘great and permanent contribution to our law on the subject of contributory negligence and to the science of jurisprudence.’

“The leading propositions affirmed by the Lord Chancellor seem to me to be these—(1) Contributory negligence may be affirmed although the two acts of negligence are not synchronous but are in sequence. (2) It is a jury question whether or not there has been contributory negligence, the test being whether the two acts of negligence form part of one transaction—the second act closely following on and being involved with the first—or whether there is such separation of time, place, or circumstance between the two acts as to make it right to treat the second as the sole cause of the accident.

“The impression I have formed on this point is adverse to the contention of the ‘Clan Malcolm’s’ counsel. What the ‘Clan Malcolm’ complains of is that the ‘Rowan’ was unable to manœuvre. The ‘Rowan’ might have been put into that condition by stress of weather, but I do not think that the ‘Clan Malcolm’ could then have successfully pleaded *damnum fatale*. There was, it seems to me, such separation in time and circumstance between the two collisions as to make the earlier negligence of the ‘Rowan’ have no causal connection with the second collision.

“But I consider myself absolved from reaching a definite conclusion as to the foresaid point, because I find evidence of fault on the part of the ‘Rowan’ which synchronised with the negligence of the ‘Clan Malcolm’ and contributed causally to the collision.

“The specific charges against the ‘Rowan’ are set forth in the record *S.S. ‘Clan Malcolm’ v. S.S. ‘Rowan,’* and are four in number. Charge (d) was not insisted in as the evidence shows that a wireless message of distress was sent out timeously by the ‘Rowan.’ Charge (a) is, in my opinion, disproved as the evidence shows that the ‘Rowan’ whistled, by way of fog signal, for some time between the two collisions. There remain charges (b) and (c).

“Charge (b) alleges that the ‘Rowan’ did not exhibit the appropriate signals for a vessel not under command. These signals are prescribed by articles 4 (a) and 15 (e) of the Regulations. 4 (a) prescribes that two red lights shall be shown. These lights were not displayed by the ‘Rowan,’ but it was maintained on behalf of that vessel

that this breach of the Regulations had no effect upon the happening of the collision, as a white light has at night a greater visibility than a red light. The statutory presumption of fault arising from breach of the Regulations which was established under section 419 (4) of the Merchant Shipping Act 1894 no longer applies, as it had been abolished by section 4 (1) of the Maritime Convention Act 1911. The Court must now determine on the evidence whether any failure to obey the Regulations contributed to the collision (The 'Enterprise,' [1912] P. 207, 211; the 'Gulf of Suez,' [1921] P. 318, at pp. 327 *et seq.*). My view is that as the red lights could not have been seen sooner than the white lights of the 'Rowan' were sighted by the 'Clan Malcolm,' the failure to show red lights did not contribute to the collision.

"But article 15 (e) prescribes that a vessel not under command shall also signal her condition by sounding on her whistle, at intervals of not more than two minutes, one prolonged blast followed by two short blasts. This signal was not made by the 'Rowan.' She certainly whistled after the first collision, but not in this way, and she discontinued whistling altogether for some time prior to the second collision. The 'Rowan's' counsel contended that if the said signal had been made, it would have been ineffective, as the blasts which were sounded by the 'Rowan' were not heard on board the 'Clan Malcolm.' I am unable to accept this suggestion. On the contrary, I am advised and hold the opinion that if this peculiar signal had been sounded continuously, it would in all likelihood have been heard on the 'Clan Malcolm' at such time as would have enabled that vessel to take steps to avoid a collision. It has therefore, in my opinion, been proved that the 'Rowan's' failure to observe the terms of article 15 (e) contributed to the collision.

"Charge (c) alleges that the 'Rowan' failed to show flares or to send up rockets or shells, or to take any steps to warn vessels in the vicinity that she was lying helpless, and requiring assistance, in the track of incoming and outgoing vessels.

"Article 31 of the regulations provides that when a vessel is in distress and requires assistance she shall either together or separately make certain prescribed signals. The 'Clan Malcolm's' counsel further contended (I think rightly) that apart from the Regulations it was the plain duty of the 'Rowan,' lying as she was in an unmanageable condition, and at a frequented part of the ocean, to have taken special steps to indicate to other vessels her situation and state. It is admitted that no such steps were taken by the 'Rowan.' The only excuse offered by the 'Rowan's' counsel for non-observance of this regulation was that the 'Rowan' was not in distress. This contention, in my opinion, is quite untenable. A vessel which has lost her propeller and rudder, and which has a hole in her side, albeit above the water line, is, it seems to me, a vessel in distress and one which requires assistance from other vessels. The 'Rowan,' as the result of the first collision, could never

have reached port without the aid of salvors. I am of opinion that the failure of the 'Rowan' to take any steps to notify her condition to approaching vessels contributed to the collision. I must assume that had she made the signals of distress prescribed in article 31, or some of them, they would have been noticed by the 'Clan Malcolm' in time to enable her to take steps to avoid a collision.

"Although I thus hold that both the 'Rowan' and the 'Clan Malcolm' were in fault in reference to the second collision, I regard the negligence of the 'Clan Malcolm' as so much more serious than that of the 'Rowan' that I propose to apportion the liability in terms of section 1 of the Maritime Convention Act 1911, and I decide that the 'Clan Malcolm' shall be responsible for two-thirds of the joint loss and the 'Rowan' for one-third thereof.

"I now reach the most difficult question in the case, to wit, whether or not the 'Rowan' was salveable after she had been injured by the 'West Camak.' In a question of this sort, where a certain conclusion cannot be reached, the *onus probandi* is of great importance. Counsel for the 'Rowan' maintained that the burden of proof was on the 'Clan Malcolm,' on the authority of such cases as *Davis*, 1830, 6 Bing. 716; *Stiven*, 1 R. 412, 11 S.L.R. 223; *Dominion Bank*, 16 R. 1081, 26 S.L.R. 753; *Alexander Turnbull and Company, Limited*, 7 F. 791, 42 S.L.R. 743. Counsel for the 'Clan Malcolm,' on the other hand, contended that the burden of proof was on the 'Rowan' under the well-settled rule of procedure that a pursuer in an action of reparation must prove damages, that is, in the present case the owner of the 'Rowan' must prove the condition in which the vessel was at the time of the second collision. The view I have formed is that the *onus probandi* is initially on the 'Rowan,' but that on a *prima facie* case being established that the 'Rowan' was salveable before she was struck by the 'Clan Malcolm,' the *onus* then shifts and is on the 'Clan Malcolm' to make out that the 'Rowan' was then sinking.

"I am satisfied that the 'Rowan' has established the foresaid *prima facie* case, and that the 'Clan Malcolm' has failed to prove that the 'Rowan' was mortally injured by the first collision.

"[*His Lordship then dealt with the evidence on this question and continued.*]

"On the contrary, I see no reason why the 'Rowan' could not have been towed to a place of safety. There were vessels standing by which could have rendered effective salvage service, and the weather conditions were very favourable. I am advised that the 'Rowan,' if salveable, could have been towed in four hours, including time for salving vessels to make fast, a distance of 8½ miles to Loch Ryan where she could have been safely beached.

"The only other point which I think it right to mention has reference to the unfortunate loss of life. Even if the 'Rowan' was a sinking ship before the second collision I am quite satisfied that but for the second collision there would have been no loss of

life. The 'Rowan,' in my opinion, would have floated long enough to enable every living soul to have been rescued by her own boats and those of the 'West Camak.'

The Laird Line, Limited, and the Clan Line Steamers, Limited, reclaimed.

Argued for the reclaimers the Laird Line, Limited—1. In the collision between the "Rowan" and the "West Camak" (a) the master of the "Rowan" was not in fault. The "Rowan" was not in fog, and there was no duty to go slow merely because land fog signals were heard, or because the conditions indicated the proximity of fog. Art. 16 of the Regulations for Preventing Collisions at Sea, 1910, did not apply where the ship was not in fog. The manœuvres of the "Rowan" were correct in the circumstances. There was no duty to stop and reverse. To have done so would not have prevented the collision—*The "Zadok,"* 1884, 9 P.D. 114, per Sir J. Hannen at p. 119. (b) The master of the "West Camak" was in fault. By ordering the helm to be starboarded he had committed a negligent act, which although the order was promptly countermanded put upon his owners the onus of proving that the act did not cause the collision. This onus they had failed to discharge—*The "Vindomora,"* [1891] A.C. 1; *Cayzer v. Carron Company*, 1884, 9 App. Cas. 873; *The "Fenham,"* 1870, L.R., 3 P.C. 212; Marsden's Collisions at Sea, pp. 41, 56, and 57; Bevan on Negligence, p. 1087. That the master was entitled to time to think—*"Kwang Tung,"* [1897] A.C. 391—did not excuse delay caused by an improper order. Further, the "West Camak" was in thick fog, and article 16 of the Regulations of 1910 applied. The speed of the "West Camak" was in the circumstances a breach of the rule, which created a presumption of fault on the part of her master which had not been redargued—Marsden's Collisions at Sea, p. 355; *The "Pennsylvania,"* 1874, 31 L.T. 103; *The "City of Brooklyn,"* 1875, 1 P.D. 276; *The "Oceanic,"* 1903, 9 Asp. M. 378; *The "Warsaw" v. "Linn o' Dee,"* 1906, 8 F. 1013, per Lord Ardwall at p. 1017, 43 S.L.R. 732; *The "Zadok" (cit.)*; *The "Counsellor,"* [1913] P. 70. The fact that the "West Camak" was in fog excluded the application of the crossing rules—articles 18 and 19 of the Regulations of 1910; *The "Crown of Cordova,"* 1918 S.C. 303, 55 S.L.R. 312. 2. (a) The collision between the "Rowan" and the "Clan Malcolm" was due solely to the fault of the master of the "Clan Malcolm." He was proceeding in a fog at a speed at which he could not avoid the "Rowan" after he saw her. Such a speed was excessive and in breach of art. 16 of the Regulations of 1910. When the "Clan Malcolm" entered the fog her speed should have been immediately reduced to a much greater extent than it was—*The "Crown of Cordova" (cit.)*; *The "Campania,"* [1901] P. 289. At the speed the ship was going the order should have been to stop and reverse. (b) On the other hand no fault had been proved against the master of the "Rowan." His failure to show red lights in addition to the white light did not contribute towards the collision, and the failure to show distress signals was justifi-

able in the circumstances. It had not been proved that the whistle was not sounded for more than two minutes before the collision, but in any event if it had been sounded the evidence showed that it would not have been heard on the "Clan Malcolm." (c) The "Rowan" was sunk by the collision with the "Clan Malcolm." There was no onus on the owners of the "Rowan" to prove that before the second collision she was not sinking and unsalvageable, but if there was such an onus on the owners of the "Clan Malcolm" it had been sufficiently discharged, and the onus was on the owners of the "Clan Malcolm" of proving that the "Rowan" was not sunk by the second collision—Dickson on Evidence, vol. i, secs. 25, 26, and 27; Tylor on Evidence, vol. i, p. 273; Bevan on Negligence, pp. 83 and 800; *Davis v. Garrett*, 1830, 6 Bing. 716; *Lilley v. Doubleday*, 1881, 7 Q.B.D. 510; *Morrison & Company v. Shaw, Savill and Albion Company, Limited*, [1916] 2 K.B. 783; *Turnbull & Company v. Cruikshank & Fairweather*, 1905, 7 F. 791, 42 S.L.R. 743.

Argued for the respondents the United States Shipping Board—1. These respondents were rightly absolved by the Lord Ordinary. The collision between the "Rowan" and the "West Camak" was solely due to the fault of those in charge of the "Rowan." The evidence showed that she was actually in fog before the collision took place, but her speed was not reduced and fog signals were not being sounded in compliance with articles 15 and 16 of the Regulations of 1910. Even if she was only in the neighbourhood of fog the signals should have been sounded and speed reduced—*The "N. Strong,"* [1892] P. 105. Further, her manœuvres were wrong and she was not keeping a proper look-out. When the "West Camak" was observed the engines of the "Rowan" should have been reversed, and if a proper look-out had been kept the fog signals of the "West Camak" would have been heard—*The "Curran,"* [1910] P. 184. If the "Rowan" was not in fog when the "West Camak" was observed, the crossing rules applied and her manœuvres were wrong under articles 18 and 19 of the Regulations of 1910. 2. There was no fault proved against the "West Camak." Her speed was as slow as could be reasonably required, and if a wrong order was given that was due to the situation created by the faulty navigation of the "Rowan," and in any event had been countermanded at once. The master was entitled to time to think—*The "Kwang Tung,"* [1897] A.C. 391—and the correct order had been given with reasonable promptness—*The "Emmy Haase,"* 1884, 9 P.D. 81; Marsden's Collisions at Sea, pp. 12 and 13; *The "Two Sisters,"* 1 Pritch. Ad. Dig. (ed. 1887) 248; *"Hogstad" v. "Coombe Dingle,"* 1921, 8 Ll. L. Rep. 153.

Argued for reclaimers the Clan Line Steamers, Limited—1. The onus of proving the condition of the "Rowan" resulting from the first collision was on the owners of the "Rowan." They had failed to prove that the ship was sunk by the second collision. The "Rowan" must therefore be regarded

as having been in a sinking and unsalvageable condition as the result of the first collision. There was therefore no loss for which these claimers could be held liable—*Glegg, Reparation*, p. 108; *Kerry v. England*, [1898] A.C. 742; *The "Swanland"*, [1855] 2 Sp. 109; *Marsden's Collisions at Sea*, p. 50; *Dickson on Evidence*, sections 31, 280. In *The "Egyptian"*, 1864, 10 L.T. 910, there was no evidence of previous injury. The cases referred to by the owners of the "Rowan" were contract cases and did not apply to the question of onus here. What was done by those in charge of the "Rowan" after the first collision proved that she was sinking—*Bathgate v. Macadam*, 1840, 2 D. 811. 2. (a) The master of the "Rowan" was alone responsible for the second collision. The real cause was his failure to sound his whistle for more than two minutes before the collision took place. If he had sounded the whistle the collision might have been avoided, for it was to be assumed that the "Clan Malcolm" would then have stopped—*"Rosalia"*, [1912] P. 109; *The "Karamea"*, [1921] P. 76, *aff'd.* [1922] 1 A.C. 68. In any case his failure was a breach of the Regulations of 1910, article 15 (c), which put upon the owners of the "Rowan" the onus of proving that it was not the cause of the collision—*The "Karamea" (cit.)*; *The "Voorwarts"* and *The "Khedive"*, 1880, 5 A.C. 876; *The "Fenham" (cit.)*—and they had failed to do so. And if the master of the "Clan Malcolm" was at fault the failure to sound the whistle of the "Rowan" was contributory negligence—*The "Tempus"*, [1913] P. 166. (b) No fault on the part of the master of the "Clan Malcolm" had been proved. On entering the fog he had taken the proper steps to go slow in accordance with article 16 of the Regulations of 1910. In the absence of fog signals from the "Rowan" there was no duty to stop and reverse. Nor was there any fault in entering a fog at full speed when owing to the darkness it could not be seen. *The "N. Strong" (cit.)* and *The "Crown of Cordova" (cit.)* were cases of entering a fog in daylight and did not apply. If the speed of the "Clan Malcolm" was not excessive there was no fault in the manœuvre when the "Rowan" was observed. The ships were so close when the "Rowan" was observed that the "full speed astern" if adhered to could not have prevented the collisions. 3. The circumstances of the two collisions were so connected that the second collision was attributable to the fault of the master of the "Rowan" which led to the first collision—*Marsden's Collisions at Sea*, p. 16, and cases there cited; *The "Volute"*, [1922] 1 A.C. 129, *per* Viscount Birkenhead, L.C., at pp. 136, 137, and 144; *Kidston v. M'Arthur and Clyde Navigation Trustees*, 1878, 5 R. 936, *per* Lord Ormidale 15 S.L.R. 681. Even though the master of the "Clan Malcolm" was to blame, this fault was to be regarded as a contributing cause. 4. In any event the Lord Ordinary had not apportioned the loss properly. The fault of the "Clan Malcolm" was small compared with that of the "Rowan" and the Court should reapportion the loss—*The "Karamea" (cit.)*

At advising—

LORD PRESIDENT—

I.—*"Rowan" v. "West Camak" ete contra.*
This collision occurred shortly after midnight of 8th October 1921.

First, Courses and Speeds.—The "Rowan's" course when she sighted the lights of the "West Camak" was S.-W. by S. $\frac{1}{2}$ S. and her speed full—13 knots. The "West Camak's" course when she sighted the lights of the "Rowan" was N. and her speed not more than 4 knots. The angle of approach was one of about 28 degrees. I am in agreement with the Lord Ordinary as to the effect of the evidence on these points. I should say, however, that I have felt some doubt as to the "West Camak's" true course and speed. A change of course at some time between 11.50 and midnight from 345 degrees to 360 degrees is clearly spoken to, in the oral evidence, and her witnesses testify to the fact that after putting her engines slow ahead at 11.50 no resumption of full speed occurred prior to the "Rowan's" lights coming into sight. It is proved, however, that for four hours prior to the collision she had been steaming through thick fog at full speed—11 knots—putting her engines slow ahead for a few minutes every half-hour to take soundings. The entry in her log under the hour 11.50 is "slow ahead; took sounding, 17 fathom water; c/c 345° steer." This course was a change from 29 degrees. In answer to leading questions the master of the "West Camak" accepts a suggestion of counsel for the owners—which derives no support from the general evidence—that he was startled by the 17 fathom sounding and altered his course to westward in order to keep away from land. It is therefore to be regretted that no explanation is given of why in a very few minutes he changed his course to eastward again, making it 360 degrees. Besides, if that change was made in consequence of the master being satisfied that he was no longer in any risk of getting too close to the land, it would have been reassuring to have his explanation of why the engines were kept at slow, contrary to the practice followed after every one of the soundings taken during the previous four hours, notwithstanding the thick fog which prevailed. The log does not record the change of course from 345 degrees to 360 degrees, and unfortunately this omission is never referred to in the parole evidence. Neither does the log record any resumption of full speed ahead prior to the collision. The Lord Ordinary has followed the master of the "West Camak" in adopting the suggestion put to him by examining counsel and has built upon it an explanation of why the "West Camak" continued to go slow ahead, which I do not find convincing. But having regard to the parole testimony and the absence of any cross-examination of the "West Camak's" witnesses on the peculiarities of the log, there is, I think, no ground for differing from the Lord Ordinary's conclusions.

Second, Visibility.—The "West Camak" first observed the "Rowan's" masthead light only, close on her starboard bow, at a

distance of not more than 1200 feet and probably less. The "West Camak" was in thick fog at the time. The "Rowan" first observed the "West Camak's" lights close on her port bow at a distance which the "Rowan's" witnesses put at a quarter of a mile, or (say) 1500 feet. The view they present is that the "West Camak" was coming out of a fogbank into which the "Rowan" was about to enter. This is to some extent supported by the fact that while the master of the "West Camak" says he was sounding his fog-signal right up to the time of the collision, the "Rowan" not only did not hear it (which may have been due to the muffling effect of the dense fog in which the "West Camak" was steaming) but had sounded none on her own account. Having regard, however, to the narrow angle of approach, and to the manœuvres executed by the two vessels when they sighted each other's lights, as detailed below, it is impossible that the collision could have occurred if the "Rowan" had seen the "West Camak's" lights at a distance greater than 1000 feet. This goes to show that the "Rowan" was by that time in the area of thick fog. Moreover, the "Rowan" admits hearing the Corsewall fog-signal as she passed that light some minutes before the collision, so that even if she was then herself in comparatively clear weather she was fully apprised of the fact that fog was in her near neighbourhood. Two of her crew, Donald Grant and Lachlan M'Kinnon, admit that when Corsewall was abeam the weather was "slightly hazy"—a description of the conditions of visibility which the "Rowan" applies on record to the time of the collision also. But if ships' lights were then only visible at a distance of 1000 feet at the best it is plain that this description is euphemistic. It is only fair to keep in mind that during the earlier part of the voyage from Greenock the weather had been clear, and that the experience of the "Clan Malcolm" shows that, at some points at any rate, the fog area was abruptly delimited. But on the whole I think the true inference is that at least from the time when the "Rowan" was abeam of Corsewall Light she was passing from clear into hazy atmosphere, and that she knew, or ought to have known, before she sighted the "West Camak's" lights that she had got into a fog area.

Third, the Manœuvres Executed by the "Rowan" and the "West Camak" respectively.—For a reason which will appear in the sequel I think the "West Camak" sighted the "Rowan" slightly earlier than the "Rowan" sighted the "West Camak." I therefore take the "West Camak" first.—The "West Camak" observed the "Rowan's" masthead light close on her starboard bow and immediately altered her helm hard-a-starboard. This order had been partially carried out, but not sufficiently to affect the vessel's course, when the "Rowan's" red light was observed also close on the "West Camak's" starboard bow. The "West Camak" thereupon ordered (and signalled) her helm hard-a-port and ordered (and signalled) her engines astern.

The "Rowan" observed the masthead and green lights of the "West Camak" close on her port bow, and immediately thereafter the green light was shut in and the "West Camak's" red light opened, also on her port bow. It seems clear from this that the "West Camak" was already swinging on her port helm when the "Rowan" picked up her lights, and this is what leads me to conclude that the "West Camak" had sighted the "Rowan" before the latter vessel picked up the lights of the "West Camak." The "Rowan" immediately ordered (and signalled) her helm hard-a-port, and then—just before the collision occurred—hard-a-starboard.

Fourth, the Question of Fault.—The "Rowan" was clearly at fault in passing into the fog area at full speed and without using the fog signal. The Lord Ordinary condemns the manœuvre she adopted when the "West Camak's" lights were sighted, and thinks she should have reversed and ported. It rather appears to me that having regard to the speed to which she was committed at the time and the very short distance between the vessels, to reverse the engines would have been to make the assurance of disaster doubly sure and to aggravate its effects, and that the course she took was the best in the circumstances. It is obvious that the starboarding at the last moment was an attempt to throw her stern out of the way.

The Lord Ordinary held the "West Camak" blameless, but after careful consideration I am unable to exonerate her master from material contribution to the disaster by his first order to put the "West Camak's" helm hard-a-starboard. The master had neither justification nor explanation of this order to give, and the explanation which the Lord Ordinary seems to have accepted from counsel neither derives support from the proof nor supplies any excuse for the order itself. If the master saw the "Rowan's" masthead light alone (before seeing her red light) long enough to call for action before the red light appeared the proper course was to reverse the engines. The order to starboard the helm had been partly obeyed, at least to the extent of three spokes of the wheel being put over before the proper orders were given, namely, to put the helm hard-a-port and to reverse the engines. I put no weight on the sequence of these last orders because the engine-order was given as usual on the telegraph, and I do not think it is proved to have been appreciably later in time than the helm order. But loss of time (albeit only of a few seconds) in giving those orders—caused by the original and erroneous order to starboard the helm—is important when it is considered that the combined speed of approach of the vessels towards one another was nearly 1700 feet per minute, while the distance separating them when they first came into each other's sight was not more than 1000 feet. There was not at the very best more than forty seconds in which to act. When it is realised that the stem of the "West Camak" struck the "Rowan's" port-quarter only some 15 or 20 feet from

the end of her counter, and that the speed of the "Rowan" was more than 20 feet per second, it becomes obvious how important an appreciable loss of time due to the "West Camak's" mistaken first order was. The Lord Ordinary thinks it may be measured by three seconds—a very moderate estimate. Even so, this might well have been sufficient to enable the "Rowan" to get clear, or at least to escape serious damage. It is quite true, as the Lord Ordinary points out, that a master suddenly faced with a probable collision is entitled to a moment of time for observation and decision before taking action—"Kwang Tung," [1897] A.C. 391—but in the present case the action taken by the master of the "West Camak" after opportunity for observation and decision was a wrong order which had to be countermanded and undone so far as implemented before the right course was taken. In these circumstances my opinion is that the "Rowan" has proved that but for the error committed by the master of the "West Camak" either the collision would not have happened, or at anyrate its effects would have been much less serious than they were. I think the Lord Ordinary overstates the onus of proof which the "Rowan" has to discharge by confining it to the former of these alternatives. Lord Herschell's opinion in the "*Vindomara*" ([1891] A.C. 1, at p. 7), on which the Lord Ordinary founds, must be read in relation to the facts of the case in which it was delivered, and does not seem to me to support so extreme a proposition.

I think the loss would be fairly apportioned—two-thirds on the "Rowan" and one-third on the "West Camak."

II. "*Rowan*" v. "*Clan Malcolm*," *et c. contra*.

This collision occurred from seven to ten minutes after that between the "Rowan" and the "West Camak."

First, the Plight of the "Rowan."—The effect of the collision with the "West Camak" was to tear away part of the "Rowan's" port-quarter from a point 15 or 20 feet forward of the end of her counter and to put her propeller and helm out of action—possibly to carry them away. She was thus rendered unmanageable and helpless. Moreover, on disengaging herself from the "West Camak" she was seen to have a list to starboard. Her position and that of the large number of passengers who were on board was thus one of obvious peril, the precise extent of which could not be ascertained without examination of the vessel. The second officer went aft as soon as the collision occurred, and saw that the damage extended to the after-port corner of the deck-cabin in which the first officer had his quarters. He concluded that the first officer had lost his life. That the injury to the ship was a deep and possibly very serious one was plain to him. Quantities of steam were escaping from the pipes which had been connected with the steering gear. In these circumstances he attempted no further examination but immediately reported what he had found to the master, who at once sent out a S.O.S. announcing that the "Rowan" was sinking fast, summoned the "West Camak" to his assistance, and

put all hands on to the work of lowering the boats with a view to the transfer of the passengers to the "West Camak," which at his request proceeded to lower her boats also. Meanwhile the only examination made before the "Rowan" was sunk by the "Clan Malcolm" for the purpose of ascertaining whether the "Rowan" was actually taking in water was being made by the first engineer. He had been awakened by the racing of the engines after the collision. After getting his clothes on he went below to find that the third engineer had got the engines stopped. He then ordered the door in the aft bulkhead of the engine-room to be shut, but before this was done he looked up the shaft tunnel (in which there were six lights) for the purpose of seeing if it showed any signs of incoming water. There were none to be seen. This was, he thinks, three to four minutes after the collision with the "West Camak"—nearly midway in time between it and the collision with the "Clan Malcolm." He also examined the engine-room bilges, but could find no trace of incoming water there. This satisfied him that the vessel was not in any immediate danger. Leaving the third engineer in charge, he went on deck and looked at the damage to the vessel's stern much as the second officer had done. Then hearing the order to lower the boats he proceeded to his boat station without communicating with the master. While the boats were being lowered, and until the "Clan Malcolm" ran into and sank the "Rowan," no increase in the list to starboard (which showed itself after the collision with the "West Camak") is proved to have occurred. There is some evidence of increase in the list, but the clear effect of the evidence of the witnesses for the "Rowan" is that there was none, and the Lord Ordinary was impressed with the reliable character of these witnesses, none of whom observed any sign that the "Rowan" was making water or in a sinking condition. The master is not among the survivors, and his evidence is therefore lost. But I think he acted rightly in treating the case as one of the highest emergency, and in acting in the interests of his passengers on the footing that his ship might have been mortally injured.

Expert witnesses adduced on behalf of the "Clan Malcolm" have made heroic efforts to prove that the "Rowan" was in fact a sinking ship, and so seriously damaged below the water-line by her collision with the "West Camak" that she would have gone down in any case within a brief period of time after the "Clan Malcolm" ran into her. It is reasonably certain from an indentation on the "West Camak's" stem, and from the fact that the "Rowan's" propeller was put out of action, that the "West Camak's" stem had struck either the propeller boss, or the propeller shaft, or its casing at the very end of the "Rowan," and if so it is exceedingly probable that the after-peak was damaged below the water-line. But there was a bulkhead just forward of the after-peak, and the efforts of the experts are directed to show that this bulkhead must have been

involved in the damage, and that the skin of the vessel at or forward of this bulkhead must have been cut below the water-line. The angle of the blow is estimated by the witnesses to have been one of 60 degrees, but the location of the precise point of impact and the course of the cut or tear into the "Rowan's" shell are all matters of pure speculation, and the attempt to bring the area of damage further forward in the body of the "Rowan" by attributing two broken plates in the "West Camak's" starboard bow to contact with the "Rowan's" steering-engine, instead of with her two lines of belting, carries no conviction with it.

Again, the "Clan Malcolm's" experts, using certain marks on the bow of the "Clan Malcolm" (which correspond with the decks of the "Rowan"), present a plausible theory that when the "Clan Malcolm" ran into her—on her starboard side—she must have been lower in the water than, according to her calculated draught, she was when she encountered the "West Camak." From this they seek to infer that the "Rowan" had already taken in a large quantity of water, and from that they calculate that she could not have remained afloat for more than a few minutes longer. I find it impossible to regard this reasoning as anything more than speculative. It depends on minutely estimated measurements, the most critical of which is taken to be of the dimension of 9 inches; it assumes that when the vessels met, the water which supported them was so smooth as to create no temporary variations—even of a few inches—in their theoretical water-lines; and it proceeds on probabilities regarding the effect of the impact on the inclination of the "Rowan." The "Clan Malcolm's" log records "moderate wind and sea" a few minutes before the collision; even a moderate sea may have been enough to upset the basis of the whole theory which the experts have toiled to construct. In any view of it this evidence does no more than establish a might-have-been—a high probability at most. It is sought to support it by the evidence of some of the "Clan Malcolm's" witnesses to the effect that the masthead lights of the "Rowan" appeared to them more nearly level with each other than they should have been. The inference drawn from this is that the "Rowan" was down by the stern owing to her shipment of water through the after bulkhead. The Lord Ordinary did not credit this evidence. His Lordship perhaps exaggerates the extent to which, if the masthead lights had been level, the stern of the vessel must have been depressed, but it must have been so far depressed as to bring the "Rowan's" counter down to the surface of the water, and it is hard to believe that if such had been the case it could have escaped the observation of the witnesses.

We heard a good deal of argument about the burden of proof on this part of the case. It must be kept in view that the parties by consent excluded from the proof

all questions of the quantum of damage, and I desire to say nothing which might prejudice the inquiry with regard to that matter. But it appears to me to be enough that the owners of the "Rowan" proved that serious as was the damage done by the "West Camak," the "Rowan" remained afloat while the boats were being lowered without any sign of incoming water or of sinking being observed, and that she sank only when the "Clan Malcolm" delivered a blow which was admittedly sufficient to send the soundest ship immediately to the bottom. If after that she is to be shown to have been already mortally injured the burden is on the "Clan Malcolm," and I agree with the Lord Ordinary in thinking that this burden has not been discharged.

Second, Course and Speed of the "Clan Malcolm."—The "Clan Malcolm's" course when she sighted the "West Camak" a little forward of the beam on her starboard side, and (very soon after) the "Rowan" right ahead, was S. Her speed when passing Corsewall Light, whose fog-signal was still sounding, was full 11 knots. Just about that time she ran suddenly into dense fog. The engines were then put at slow ahead, and fog-signals were blown on the ship's whistle. When four minutes later the "Clan Malcolm" ran into the "Rowan" her speed had only declined to about 8 knots.

Third, Visibility.—The "Clan Malcolm" was only able to distinguish the "West Camak" and the "Rowan" by a "blur of lights" when she sighted them successively. I think it is safe to say that she was less than two of her own lengths—800 feet—away from either of them when the "blur of lights" first became visible to her lookout, and this gives a fair indication of the density of the fog which she had suddenly penetrated four minutes earlier.

Fourth, the Distress Signals of the "Rowan," the Manœuvres of the "Clan Malcolm," and the Question of Fault.—I think that the effect of the proof is that the "Rowan" sounded distress signals—they may not have been in precise conformity with article 15 (e) of the Regulations for the Prevention of Collisions at Sea—for a considerable time after the collision with the "West Camak," but that no signals were blown for about a couple of minutes before the "Clan Malcolm" ran into her. I do not put any weight on her failure to show distress lights or to send up rockets, the safe transfer of the passengers to the "West Camak" being the paramount consideration during the seven or ten minutes which elapsed between the two collisions. The loss of life on board the "Rowan," and the consequent loss of evidence, makes it difficult to form any idea of why the signals ceased to be blown, but there is, I think, no alternative but to find the "Rowan" in fault for not continuing to blow them. It was argued that the helplessness of the "Rowan" being attributable to her own fault in relation to the "West Camak," was to be regarded as fault in relation to the "Clan Malcolm." There is no doubt that a single fault of navigation may be so closely con-

nected, in a causal sense, with two successive mishaps, as to make the disablement of the faulty vessel (caused by the first mishap) a ground of fault in relation to the second. But this principle has, in my opinion, no applicability to such a case as the present.

As regards the "Clan Malcolm," she was at fault in not bringing the speed down to something much less than 8 knots on entering a fog area so dense that her master likens its effect to that of a train entering a tunnel. It was not enough to put the engines at slow; they should have been stopped, and if necessary reversed, in order to take the speed off the vessel as soon as possible. On sighting the "Rowan" the "Clan Malcolm" immediately ordered and signalled her helm hard-a-port, and reversed her engines, but almost immediately thereafter put them to half-speed ahead. Even though the distance between the "Clan Malcolm" and the Rowan," when the former first observed the latter's lights, was within two ships' lengths, it was I think a mistake to countermand the engine order—full speed astern. A collision was inevitable, and to put the engine half speed ahead could not possibly minimise its effects.

I see no reason to alter the Lord Ordinary's apportionment of loss.

The advice we received from the nautical assessor will appear from the note of our questions and his answers made in terms of the Nautical Assessors (Scotland) Act 1894, (57 and 58 Vict. cap. 40). I desire to call attention to the provisions of that statute and particularly to section 3. In the present case we have been deprived, owing to the neglect of its provisions in the Outer House, of the advantage of knowing precisely what advice the Lord Ordinary asked and received from the assessor who sat with him.

LORD SKERRINGTON and LORD CULLEN concurred in the opinion of the Lord President.

LORD SANDS—I concur in the opinion of your Lordship in the chair subject to two reservations which I think it proper to state, though I do not dissent upon either point.

The position of the claim of the "West Camak" is not a favourable one. She had been deliberately steaming at full speed for many hours through thick fog, and she now seeks to recover damages from a vessel whose fault was not having slowed down when fog threatened. The evidence in support of such a claim deserves severe scrutiny. I am not satisfied that the "West Camak" was steaming at the speed represented—3 to 4 knots—when she sighted the "Rowan," or, in other words, that she was steaming at no higher speed than she would properly have maintained throughout under the conditions prevailing on the night in question if she had been carefully navigated. Your Lordship has stated reasons, which I need not repeat in detail, for receiving with some distrust the "West Camak's" account of what immediately preceded her sighting of the "Rowan." She had been steaming at a dangerous speed in fog for many hours.

She slowed occasionally for the purpose of heaving the lead, and according to her own representation more than the normal period for this operation had passed since the last slowing down when she sighted the "Rowan." A change in her course of which there is no record or explanation was made about the same time. If the view had been taken that in these circumstances the onus was upon the "West Camak" to show that she had reduced her speed to 3 or 4 knots when she sighted the "Rowan" and that she had failed to discharge that onus I do not think that I should have differed.

The other point upon which I have difficulty is in regard to the fault of the "Rowan" in failing to sound her horn continuously during the period after the collision. The Lord Ordinary proceeded upon the ground that the kind of blasts proper to the circumstances were not sounded. Your Lordship does not proceed upon that view, and in this I concur, fortified by the expert advice we have received. The ground of adverse judgment which it is proposed to proceed upon is failure to keep up the short blasts that were sounded until the second collision was imminent. That a number of blasts were sounded is proved. I do not attach weight to the "Clan Malcolm" not hearing blasts. No ship seems to have heard much of another's blasts in the fog that prevailed. There is evidence, however, from the "Rowan" that the blasts had ceased to sound for a minute or two before the collision. I have doubts as to the value of the evidence. A large number of passengers were swarming on deck doubtless in alarm and in some confusion, the "Rowan's" men were working at the boats, nobody knew but that the ship was sinking. The witnesses who now speak to the matter would hardly be listening for horn blasts still less timing them. Unfortunately the evidence of the master, who appears to have been alone on the bridge where it was his duty to remain, and who must have controlled the blasts, is not available. In these circumstances, while treating the matter as one of positive evidence of witnesses whom the Lord Ordinary has not discredited, I do not see my way to differ. I acquiesce with some reluctance in the conclusion reached upon this branch of the case.

The Court recalled the Lord Ordinary's interlocutor in the cases of the "Rowan" and "West Camak," found that the collision between these vessels was due to the joint fault of those in charge of the said vessels, and that the owners of the "West Camak" were liable for one-third of the loss and the owners of the "Rowan" for two-thirds thereof, and found no expenses due to or by either party. In the cases of the "Clan Malcolm" and the "Rowan" the Court refused the reclaiming note and found no expenses due to or by either party in the Outer House, and found the owners of the "Rowan" entitled to two-thirds of the expenses since the date of the Lord Ordinary's interlocutor.

Counsel for the Laird Line, Limited—The Dean of Faculty (Sandeman, K.C.)—Normand—Hill Watson. Agents—J. & J. Ross, W.S.

Counsel for the United States Shipping Board—Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Clan Line Steamers, Limited—The Solicitor-General (D. P. Fleming, K.C.)—Douglas Jamieson—N. M. L. Walker. Agents—Webster, Will, & Company, W.S.

Tuesday, February 6.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

NICHOLSON AND OTHERS v. LEITH SALVAGE AND TOWAGE COMPANY, LIMITED, AND OTHERS.

Ship—Salvage—Services Rendered by Master and Crew of Tug Belonging to Tug-owning and Salvage Company who had Undertaken as Part of their Ordinary Employment to Render such Services when Required—Failure to Prove Agreement by Master and Crew to Abandon Right to Salvage—Admissibility of Evidence of Custom as to Statutory Requirements being Dispensed with—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 156.

The Merchant Shipping Act 1894, section 156, enacts—“(1) A seaman . . . shall not by any agreement abandon . . . any right that he may have or obtain in the nature of salvage, and every stipulation in any agreement inconsistent with any provision of this Act shall be void. (2) Nothing in this section shall apply to a stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by that ship to any other ship.”

A ship having gone on the rocks the owners entered into an agreement with a tug-owning and salvage company, in terms of which the company agreed to save the ship “on no cure no pay terms, the amount of the remuneration for the above services to be settled by mutual agreement or arbitration.” The company having successfully accomplished the operation by means of three of its tugs, made a claim in an arbitration for remuneration for salvage services and obtained an award of £10,000. The claim bore to be a claim by the owners, and “masters, officers, and crews” of the three tugs. In an action by the master and crew of one of the tugs against the company for payment of a portion of the £10,000 the defenders averred that it was a term of the contract of service, known to and accepted by the pursuers when they

entered into the service, that the pursuers’ ordinary duties were to include salvage operations, and that “apart from the remuneration paid to them for such duties they were not to be entitled to any further remuneration in the form of salvage award.” The defenders averred further that “the arrangement is also in accordance with the established custom prevailing between salvage contractors and their servants for the carrying out of all salvage operations. After a proof the Court (*rev.* the judgment of the Lord Ordinary (Blackburn)) granted decree, holding that (1) the services rendered by the pursuers were truly of the nature of salvage services, even if the pursuers had undertaken as part of their employment to render such services; (2) the defenders had failed to prove that any of the pursuers had agreed to abandon claims for salvage; and (3) evidence of custom as to statutory requirements being dispensed with was inadmissible.

Opinion that section 156 of the Merchant Shipping Act 1894 does not apply to the master of a vessel.

Robert Nicholson, Leith, the master, and William A. Gray and others, certain members of the crew of the steam tug “R. Nicholson,” *pursuers*, brought an action against the Leith Salvage and Towage Company, Limited, *defenders*; and also against John Williamson, marine engineer, Leith, and others, the remaining members of the crew for their interest, *defenders*, for payment of £1000 as their share of salvage money paid to the principal defenders, and for apportionment among the pursuers in such manner as the Court should deem just of the aforesaid sum of £1000.

The Leith Salvage and Towage Company, Limited, lodged defences.

The following narrative of the *facts* of the case is taken from the opinion of Lord Hunter *infra*:—“The pursuers were the master and some of the crew of the steam tug ‘R. Nicholson’ at a time when certain services were rendered by the said tug to the s.s. ‘Graciana.’ In this action they seek to recover from the owners of the ‘R. Nicholson’ a portion of the sum recovered by the latter under an award by an arbiter fixing the sum of £10,000 as payable by the owners of the s.s. ‘Graciana’ for salvage services rendered to that vessel. The ‘Graciana’ had in the early morning of Thursday, 27th May 1920, in a dense fog gone ashore on a reef of rocks near one of the Farn Islands lying off the Berwick coast. The defenders, who carry on the business of tug owners and salvors of vessels, employed three tugs, the ‘R. Nicholson,’ on which the pursuers were employed, the ‘Earl of Powis,’ and the ‘Flying Fish,’ in connection with the operations which were successful in pulling the ‘Graciana’ off the rocks and enabling her to dock in West Hartlepool on Wednesday, 2nd June 1920. These services were rendered under an agreement between the defenders and the