

LORD KINNEAR—I am of the same opinion, and agree with your Lordship's exposition of the principles on which expenses as between agent and client are generally allowed in consistorial cases. The case cited by Lord Fraser—*M'Alister v. Her Husband* (1762), M. 4036; Fraser, Husband and Wife, vol. i, 614—as the foundation of the whole practice was that of an action brought, not by the wife, but by the wife's law-agent to recover the difference between the expenses which he had already recovered as taxed between party and party, and the balance of expenses as between agent and client still due by the wife. It was held that expenses incurred by the wife in defending her honour or safety were necessities for which the husband was bound to provide, and so the claim of the law-agent was sustained, and as your Lordship has pointed out the Court has thought it expedient in such cases to avoid this circuitous method by giving decree for expenses as between party and agent in the first instance. But it has never been held that petitions for the custody of children are necessities for which the husband is bound to pay, and Lord Fraser points out that the contrary has been decided in Ireland. I do not see, therefore, that the rule hitherto followed in consistorial cases is applicable to the present. Whether the principle on which the rule was originally based, namely, that since a wife has no means her justifiable expenses must be paid by her husband should be applicable to the case of a wife having a considerable separate estate is a different question which it is not necessary to decide.

LORD PEARSON—I concur.

The Court awarded the petitioner expenses in ordinary form.

Counsel for the Petitioner—Dean of Faculty (Campbell, K.C.)—Hunter, K.C.—J. G. Jameson. Agents—J. & J. Ross, W.S.

Counsel for the Respondent—Lord Advocate (Shaw, K.C.)—R. S. Horne. Agents—Carmichael & Miller, W.S.

Thursday, July 5.

SECOND DIVISION.

[Lord Ardwall, Ordinary.]

CRAWFORD AND ANOTHER
(OWNERS OF THE S.S. "WAR-
SAW") v. GRANITE CITY STEAM-
SHIP COMPANY, LIMITED
(OWNERS OF THE S.S. "LINN
O' DEE").

*Ship—Collision—Fog—Rules to be Observed
by Vessels Navigating in Fog—Regulations
for Preventing Collisions at Sea—
Relation of Article 16 to Articles 19, 21, 23.*

The Regulations for Preventing Collisions at Sea provide:—By article 16—That a steamer in a fog hearing another

vessel's fog-signal forward of her beam shall stop her engines and then navigate with caution. By article 19—That when two steamers are crossing with risk of collision the vessel which has the other on her starboard side shall keep out of the other's way. By article 23—That every steam vessel directed to keep out of another vessel's way shall on approaching, if necessary, stop and reverse.

The steamer "Linn o' Dee," navigating in a fog, heard forward of her beam and upon her starboard side the fog-signal of an unseen steamer. The sound seemed gradually to "broaden," which indicated a possibility that the vessel from which it proceeded was crossing the course of the "Linn o' Dee" from starboard to port. The "Linn o' Dee" stopped her engines in conformity with article 16. A collision took place. *Held* that she had acted rightly, and was not bound to have acted upon article 23 and reversed her engines.

Opinions that while all the articles are to be read together so far as practicable, article 16 contains all the obligatory directions with reference to speed in fog, and is imperative so long as the position of the other vessel has not been ascertained with certainty.

The Regulations for Preventing Collisions at Sea provide as follows:—"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."

Article 19—"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Article 21—"Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. *Note.*—When in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone she also shall take such action as will best aid to avert collision. (See articles 27 and 29.)"

Article 23—"Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop and reverse."

In the present action John Wood Crawford and Duncan M'Intyre, shipowners, Leith, registered owners of the steamship "Warsaw," sued the Granite City Steamship Company, Limited, registered owners of the steamship "Linn o' Dee," for £300 as damages sustained by the "Warsaw" in a collision with the "Linn o' Dee." A cross action at the instance of the owners of the "Linn o' Dee" against the owners of the

"Warsaw" was before the Court at the same time. The collision took place on the 27th of August 1905 in a dense fog, about 3:30 in the afternoon, at a point some few miles to the south-east of St Abb's Head.

The facts of the case are fully set forth in the opinions of their Lordships *infra*, and are briefly summarised in the following passage, which is taken from the opinion of the Lord Justice-Clerk:—"The facts, as I consider them to be established by the evidence, are—(1) That when both the 'Warsaw' and the 'Linn o' Dee' were in a fog which made it impossible for a view to be obtained by one vessel of the other, the horn of the 'Warsaw' was heard upon the 'Linn o' Dee's' starboard bow, and was responded to; (2) that when the 'Warsaw's' signal was heard the 'Linn o' Dee's' engines were stopped; (3) that when the vessels came into view of one another there was but a short distance between them, and the 'Warsaw' was pointing towards the starboard side of the 'Linn o' Dee;' (4) that at this time the way was nearly off the 'Linn o' Dee;' (5) that to avoid the collision, or prevent her being struck amidships, the 'Linn o' Dee' put her engines full speed ahead and her helm hard a-port; (6) that the 'Warsaw' continued to come on at a considerable speed—not less than five knots an hour—and struck the 'Linn o' Dee' and cut clean into her in a slanting direction from her starboard quarter towards her port side; (7) that at the moment of contact there was none, or very little way on the 'Linn o' Dee;' (8) that the 'Warsaw' had been kept at a considerable speed up to the time of the vessels sighting one another, and that when she struck she had still considerable way upon her; (9) that the blow was a direct and horizontal blow, and not a blow by the sea throwing the 'Warsaw' down upon the 'Linn o' Dee.'"

On 9th January 1906 the Lord Ordinary after a proof, at which he was assisted by a nautical assessor, pronounced the following interlocutor:—"Finds that the collision which took place between the steamship 'Warsaw' of Leith and the steamship 'Linn o' Dee' of Aberdeen, on Sunday the 27th August 1905, was caused by the fault of those in charge of the steamship 'Warsaw' in navigating the said vessel at too high a rate of speed in a dense fog, and in not stopping and reversing her engines when it became apparent from the direction of the sound signals coming from the 'Linn o' Dee' that that vessel was proceeding in a direction from port to starboard of the 'Warsaw': Finds that those in charge of the 'Linn o' Dee' were not to blame to any extent for the said collision: Therefore, in the action at the instance of John Wood Crawford and another, the owners of the 'Warsaw,' against the Granite City Steamship Company, Limited, the owners of the 'Linn o' Dee,' assolvies the defenders from the conclusions of the action; and in the action at the instance of the Granite City Steamship Company, Limited, against John Wood Crawford and another, finds the defenders

liable to make payment to the pursuers of such sum as shall represent the damage caused to the pursuers by the said collision."

Opinion.—"The collision which forms the subject of the present action, took place about 63 miles south-east by east of the Bass Rock. The 'Warsaw' was proceeding across the North Sea on a voyage from Leith to Hamburg, and the 'Linn o' Dee' was on a voyage from Libau to Bo'ness, but not having been able to take observations owing to the weather she had kept a little to the south of her true course in order to enable her sooner to pick up lights or landmarks on the coast. Prior to hearing each other's steam whistles the courses of the respective vessels were slightly angled to each other.

"On the day of the collision the 'Warsaw' prior to the collision had passed through patches of fog at full speed, 8 or 9 knots, with no lookout on the fore-castle head, and without any precautionary measures to prevent collisions with vessels which may have been in the patches of fog, and possibly the success of having done so without an accident might encourage those in charge of the vessel to continue at full speed longer than prudent men would have done in the existing foggy weather. It was particularly necessary for the 'Warsaw' to go at a low rate of speed, inasmuch as she had a very awkward deck cargo of thirteen horses and a pony, which, as described by the captain, kept 'stampeding' about the deck and behaving like 'mad things' when the fog whistle began to sound.

"It is stated by the master of the 'Warsaw' that the engines were slowed down upon their entering the fog, and were stopped as soon as they heard distinctly a whistle from the vessel which proved to be the 'Linn o' Dee.' The captain says that when the fog came down and the engines were slowed, the 'Warsaw' was doing about 4 or 5 knots per hour, and that they were going at this pace for about fifteen minutes, till about 3:35 p.m., and that then the engines were stopped, and he and the other witnesses on board the 'Warsaw' say that the result of the slowing and stopping was that the 'Warsaw' was practically stationary at the time the collision happened. I do not believe this evidence. There was no stopping of the engines apparently according to the engine time book till 3:36, almost immediately before the collision, and in the bridge log book there is nothing said about the engines being stopped at all, but only slowed, and the figure opposite that entry has evidently been tampered with. But further, as I shall have occasion to point out afterwards, the nature and direction of the hole cut in the 'Linn o' Dee' by the 'Warsaw' renders it quite impossible that at the time of the collision the 'Warsaw' could have been anything like stationary. On the contrary it would seem that she must have been going at about 5 or 6 knots an hour, which would be explained if the engines were not stopped till immediately before the 'Linn

o' Dee' came in sight. Those on board the 'Linn o' Dee' state that the 'Warsaw' came upon them at a high rate of speed—at least 5 knots an hour—and that the collision became inevitable from the time the vessels sighted each other. In this last point those on both vessels are agreed, for those on board the 'Warsaw' also state that a collision had become inevitable when they saw the 'Linn o' Dee,' because they state that she was bearing down on them at the rate of 5 or 6 knots an hour, and the captain of the 'Warsaw' says that at that time the 'Linn o' Dee' was coming at a great rate of speed, and the second officer says that the 'Linn o' Dee' was going at the rate of 5 or 6 knots an hour, and that the 'Warsaw' was stopped at the time the collision happened. All this evidence I entirely disbelieve, as I think it is disproved by the actual facts of the collision. But on the showing of those on board the 'Warsaw' themselves I think that the master of that vessel was in fault in not reversing his engines as well as stopping them, as he says he did, when it became evident that the sound signals that were heard from another vessel closing and narrowing on the 'Warsaw's' port bow indicated that the vessel, which proved to be the 'Linn o' Dee,' was proceeding in a direction from port to starboard of the 'Warsaw.' Upon such indications the engines of the 'Warsaw' should have been at once reversed and the way taken off her, and signal (b) article 15 of the Regulations for the Prevention of Collisions at Sea should have been sounded. Such precautionary measures would have prevented the collision, and the hearing of the said signal would have been sufficient intimation to the 'Linn o' Dee' and other vessels navigating in the vicinity that there was a vessel stopped with no way through the water. In these circumstances the master of the 'Warsaw' was not entitled, upon the information given him by the sound signals narrowing on his bow, to wait till he saw the other ship before he reversed. In these views the nautical assessor concurs.

"The master of the 'Warsaw,' however, did not reverse, and he did not take such way off his vessel as that he could come to a standstill after the other vessel whose whistle he had heard appeared suddenly out of the fog. As the nautical assessor says, there is no legal rule compelling him to do so, but he observes that if a master of a steamship elects to proceed through a thick fog when the near presence of another vessel is known to him, his speed through the water should be so regulated that he can stop in half the distance he can see ahead. In my opinion the master of the 'Warsaw' being anxious to run up to his schedule time, and being afraid of taking the way off his vessel altogether, with the risk of getting into the trough of the sea, and having his deck cargo rolling about and possibly breaking their legs, took his chance of going through the fog at a greater speed than he was entitled to, having regard to the safety of other vessels, and in particular of the vessel whose whistle he had heard.

"Turning now to the evidence for the 'Linn o' Dee,' it appears that early in the morning of the 27th, when the weather began to get hazy, the master of that vessel at once placed a look-out man on the fo'castle head in order that vessels might be at once reported in time to prevent collisions. There was every indication of caution and care in the navigation of that ship immediately prior to the collision when they passed a fleet of fishing boats and some trawlers. When he got into the fog the captain gave the order to reduce speed to half-speed, which would be about three knots at that time, and then shortly after, hearing a bell from a boat on the port bow, the speed was reduced to slow, which would be between one and two knots according to the master. That rate was continued for about ten minutes, and then the first whistle was heard from what afterwards turned out to be the 'Warsaw,' and as soon as the first whistle was heard the engines of the 'Linn o' Dee' were stopped, and remained so till the 'Warsaw' loomed in sight. The 'Linn o' Dee' had thus practically all the way taken off her except what was due to the following sea. The master of the 'Linn o' Dee,' who of course could not see the 'Warsaw' any more than they could see him, imagined from the direction from which the sound signals were coming from the 'Warsaw' to him that they were becoming broader on his starboard bow, and that the two were passing vessels, as indeed they very nearly were, and that they would pass starboard to starboard, as they probably would have done had the 'Warsaw' not been going at an excessive rate of speed. When the 'Warsaw' came in sight, the master of the 'Linn o' Dee' saw that his only chance of avoiding a collision was to go full speed ahead and put his helm hard to port, so as to send his stern away from the bow of the 'Warsaw,' and this manœuvre would have been successful had the 'Warsaw' not been going at an excessive rate of speed, or if the 'Linn o' Dee' had had some way on her before the engines were ordered ahead, which very properly she had not, as I have already explained. The result was that the engines had only made a few revolutions before the collision took place, and these were insufficient to get up such way as to escape from the rapidly approaching 'Warsaw.' It is clear from the evidence that with the amount of sea following the 'Linn o' Dee' it would have been impossible for her to have gone astern before the lapse of some time had she reversed her engines and attempted that manœuvre. Indeed it is plain that if she had attempted to do so it would have resulted in the 'Warsaw' cutting into the 'Linn o' Dee' amidships. The account given by those on board the 'Warsaw' of what the 'Linn o' Dee' did shows how little they were capable of taking in the situation at the time, owing very probably to the confusion they had just been in with their horses; for, according to them, the 'Linn o' Dee' starboarded her helm, thus sending her head to port, and thereafter ported

her helm and brought her into collision with the 'Warsaw' in the manner described by both parties, which is an impossibility, considering the distance the vessels were from each other, and the length and tonnage of the 'Linn o' Dee.'

"It is noticeable that in the deposition made by the captain of the 'Warsaw' before the Receiver of Wrecks, he says that in his opinion the cause of the casualty was the dense fog and the 'Linn o' Dee' star-boarding, and that it might have been avoided by that vessel having ported her helm. Now it is proved that this last was exactly what the 'Linn o' Dee' did, and further, it is plain that if the 'Warsaw' had been going at a less rate of speed that manœuvre would have been successful in avoiding the collision altogether. The master of the 'Linn o' Dee,' on the contrary, in his deposition states that the cause of the casualty was the 'Warsaw' being navigated at too high a speed, and that it might have been avoided by that vessel feeling her way past the 'Linn o' Dee,' as was required in such weather. This statement is, in my opinion, in accordance with the facts of the case.

"The question of the respective speeds at which the two ships were being navigated is, in my opinion, settled by the nature of the injuries which each vessel received. The nature of these injuries is very well shown by the photographs which have been lodged in process, and it is sufficient here to say that the hole in the 'Linn o' Dee' is 20 feet wide along her bulwark, that its length is 17 feet 9 inches, and that it was delivered in a slanting direction on her starboard quarter. It must have been a blow delivered with very great force, and but for the propeller shaft which the 'Warsaw' came against in cutting into the 'Linn o' Dee,' and which is a piece of solid iron nine or ten inches in diameter, it is apparent that the 'Warsaw' would have sawn the stern of the 'Linn o' Dee' right off. As it was, the propeller shaft was indented and disconnected from the engines by the blow it received. The experts' evidence is that to make a cut of that kind the 'Warsaw' must have been proceeding at from five to six knots through the water. On the other hand, the injuries to the 'Warsaw' were of the most trifling description. The only serious indentation was in her stem where it had struck the propeller shaft of the 'Linn o' Dee.' Beyond that, on the starboard bow, No. 2 plate was broken and No. 3 plate was also broken, and the whole damage done took no more than an hour to repair.

"Now the experts say, and I think it stands to reason, that had the 'Warsaw' been, as those on board of her say she was, at a standstill, and the 'Linn o' Dee' had come scraping across her stem at a speed of from five to six knots an hour, which they also allege, the 'Warsaw's' stem would have been deflected to starboard, and instead of a deep direct cut into the quarter of the 'Linn o' Dee,' the whole of her quarter and stern would have been

torn away in a ragged fashion to her very stern post. The experts for the 'Linn o' Dee, whose opinion is concurred in by the nautical assessor, state that there is really no doubt that the 'Warsaw's' speed was excessive at the moment of the collision, considering the foggy weather that prevailed, and that the 'Linn o' Dee's' headway was practically so small as to be of no consequence. This, I think, settles the matter.

"It was submitted by the counsel for the 'Warsaw' that the 'Linn o' Dee' had broken a great number of the Regulations for the Prevention of Collisions at Sea, and in particular Nos. 16, 19, 22, and 23. With regard to 16, I am of opinion that the 'Linn o' Dee' observed that article, whereas the 'Warsaw' did not; while with regard to articles 19, 22, and 23 they appear to me to have no application to the present case, for these regulations apply only to cases where the party who ought to observe them is aware that they are applicable to the circumstances in which he finds himself, but if the circumstances are such that a competent seaman exercising care could not have discovered that the regulations were in fact applicable, a ship failing to obey one of these regulations is not deemed to be in fault. See *Baker v. The Owners of the 'Theodore H. Rand'*, L.R. 12 A.C. 247; *Windram v. Robertson*, 7 F. 665; and *'The Ceto'*, L.R. 14 A.C. 670. Now, the master of the 'Linn o' Dee' and those on board of her thought, and in my opinion were not to blame in supposing, that his vessel and the 'Warsaw' were passing ships, and indeed they very nearly were so, as their courses were only slightly angled to each other, and the whistles from the 'Warsaw' seemed to be broadening on the starboard bow of the 'Linn o' Dee.' Then, when they did find that they were crossing vessels, it is proved that for the 'Linn o' Dee' to have stopped and reversed would have rendered the collision absolutely inevitable, whereas by adopting the manœuvre which she did she gave herself the only chance of escape, and, as the result showed, she nearly succeeded, and would have succeeded but for the careless navigation of the 'Warsaw'."

The owners of the "Warsaw" reclaimed, and the case was heard by the Judges of the Second Division along with a nautical assessor.

Argued for the reclaimers—The "Linn o' Dee" was in fault in only stopping her engines. Looking to either general considerations of prudent navigation or the regulations she ought to have reversed. The fact that the "Warsaw's" fog-signal was heard on the "Linn o' Dee's" starboard side was consistent with two possibilities—firstly, that the "Warsaw" was a passing vessel, in which case there was no danger; secondly, that she was a vessel crossing from starboard to port, a case of danger. Of the two alternatives, assuming them equally probable, it was the duty of the "Linn o' Dee" to act upon the latter, the law being that a vessel must always assume that the more dangerous of two alternatives

will happen. But in this case the latter was far the more probable, the "broadening" of the sound pointing to a crossing vessel. That being so, the "Linn o' Dee" was under article 19 bound to keep out of the other's way, and under article 23 to reverse. The "*Ceto*," 14 App. Cas. 670, see Lord Watson at 686; the "*Kirby Hall*," 8 P.D. 71; the "*John McIntyre*," 9 P.D. 135; the "*Dordogne*," 10 P.D. 6; the "*Ebor*," 11 P.D. 25; the "*Rondane*," 1900, 82 L.T. 828; the "*Cathay*," 1899, 81 L.T. 391. The articles were all to be read together, and 19 and 23 were not superseded in fog by article 16—the "*Merthyr*," 1898, 79 L.T. 676. But even if article 16 alone applied, "navigation with caution" made reversing necessary.

Argued for the respondents—Article 16 alone applied and furnished a complete code for the guidance of vessels in fog. The second paragraph of the article appeared for the first time in the Regulations of 1897, a fact which detracted from the value of decisions prior to that date. Articles 19, 21, 22, 23 could obviously only apply where the relative positions of the vessels had been ascertained; until then, compliance with these regulations was impossible. See the "*Theodore H. Rand*," 12 A.C. 247; *Taylor v. Burger and Another*, February 15, 1898, 35 S.L.R. 398; *Windram v. Robertson*, May 23, 1905, 7 F. 665, 42 S.L.R. 602; *Marsden on Collisions*, 6th ed., pp. 380, 381.

LORD JUSTICE-CLERK—[*After the narrative of facts set forth above*].—Holding these facts to be established by the evidence, the question where the blame lay can, I think, be easily determined. The counsel for the "Warsaw" maintain that when the "Linn o' Dee" noticed the sound of the "Warsaw's" horn broadening on her starboard bow, she committed a breach of the regulations in not reversing as well as stopping her engines. I am unable to assent to that contention. In my opinion the duty of the "Linn o' Dee" was to adhere strictly to the directions of rule 16, which, for the first time in the navigation regulations, speaks not of stopping and reversing, nor of stopping or reversing, but gives a very distinct and simple order, "shall stop her engines." The purpose of that seems to be to stop as much as possible all sound from throbbing engines, rush of water, or rush of air created by the rapid motion of the vessel, and to give opportunity for accurate observation of sound, while at the same time not executing any manœuvre at all until there is such certainty as to the situation as shall make manœuvring at all a careful act in itself, and not a change of direction or speed done blindly, when the exact position of the other vessel is not known. We are advised by the nautical assessor that it is not possible to ascertain accurately the direction from which a sound is coming, particularly in a fog. That being so, my view is that article 16 is imperative as long as there is not certainty as to the position of the other vessel and what it is doing.

The "Warsaw" further maintains that the "Linn o' Dee," immediately before the

collision, was travelling through the water at several knots an hour, and that she starboarded her helm first and then ported when too late. This must mean that those on board the "Warsaw" saw that the "Linn o' Dee" was put on a starboard helm and then changed and came round on a port helm. It seems to me to be impossible that those on board the "Warsaw" could have seen anything of the kind. The distance between the vessels when a view was possible did not admit of any such double manœuvre being executed, and if it be correct to hold that the way was practically off the "Linn o' Dee," then it was physically impossible that this double manœuvre could have been executed in the circumstances. I am satisfied that the statements made to the effect that starboarding followed by porting took place are untrue. That makes it difficult to accept the evidence given by those on board the "Warsaw" as to the facts of the occurrence in other respects.

The allegation of the "Warsaw" that the "Linn o' Dee" was going several knots through the water at the time of the collision is also in my opinion quite untrue. The position of the two vessels when they came in sight of one another was such that if the "Linn o' Dee" had been going ahead at some speed through the water at that time, she could not possibly have been struck as and where she was. But the real evidence on this matter is conclusive. The "Linn o' Dee" was loaded with timber and had a deck load. The effect of the collision was to cut clean into her, through the side plates, decks, and timber load, and to strike against her ten-inch propeller shaft with such force that it was torn from its bearings and sent several inches laterally to port. (I may point out in passing that these facts are quite inconsistent with the view that the "Warsaw" was lifted by the sea and thrown down upon the "Linn o' Dee.") It is, I think, not matter for doubt that had the "Linn o' Dee" been going through the water at a speed of four or five knots, as is alleged, the injuries could not have presented the appearance which they did. The momentum of the "Linn o' Dee" would necessarily have forced the edges of the sternmost side of the cut against the "Warsaw's" port bow, and either the "Warsaw's" plates must have given way or the edge of slice cut off from the "Linn o' Dee" towards the stern must have been doubled back towards the stern, and the slice more or less pulled off, making the gap much wider than the width of the "Warsaw's" stem so far as it penetrated into the "Linn o' Dee." The fact is, that the cut was practically clean, without any turned-back edge, and was of the width of the wedge which made the cut, and that there was no sign of violence done to the port-bow of the "Warsaw."

The whole evidence points to the way having been practically off the "Linn o' Dee," and it follows necessarily that the way on the "Warsaw" must have been considerable.

Considering the whole case, with the

aid of the advice on technical matters obtained from the nautical assessor, I have no difficulty in moving your Lordships to accept the general view of the case stated by the Lord Ordinary.

It might be well, as suggested by one of your Lordships, to vary the interlocutor by deleting the words "and in not stopping and reversing her engines," which it is not necessary to find in the view I take of the case, and also to delete the words "was proceeding in a direction from port to starboard of the 'Warsaw,'" and to substitute for these words the following, "was in a position near to the 'Warsaw.'"

LORD KYLLACHY—I concur in the opinion which your Lordship has just delivered. I have also had an opportunity of reading the opinion of Lord Stormonth Darling, with which I also concur. I have nothing to add.

LORD STORMONTH DARLING—I agree with the Lord Ordinary that this collision was caused by the fault of the "Warsaw" alone, although I think that we should vary his Lordship's interlocutor by omitting the words "and in not stopping and reversing her engines," and also by substituting (after the words "that vessel") the words "was in the immediate neighbourhood of the 'Warsaw,'" for the words "was proceeding in a direction from port to starboard of the 'Warsaw.'" We shall thereby lay the findings entirely on a failure to observe the 16th article of the regulations, which forms, I think, their true basis. The whole controversy seems to me to be one of speed in a dense fog.

The Lord Ordinary tells us that he disbelieves the evidence of those on board the "Warsaw" both as to the time when they say her engines were stopped and also as to the speed at which she was going when the collision took place. His Lordship also substantially accepts the story of the "Linn o' Dee," both as to her engines being stopped when the whistle of the "Warsaw" was first heard, and also as to the "Linn o' Dee," when the "Warsaw" loomed in sight, having practically "all the way taken off her except what was due to the following sea." It would be difficult for a court of review to go against these clear indications of the opinion of the judge of first instance—difficult in any case, but especially so in a case of collision at sea. But it seems to me that the real evidence in the case supports the Lord Ordinary's conclusion. I refer particularly to the distance which the two ships are known to have travelled after they loomed out of the fog, and to the nature, force, and direction of the blow which the "Warsaw" inflicted on the starboard quarter of the "Linn o' Dee" as contrasted with the slightness of the injury done to her own stem.

The main argument of the Solicitor-General in endeavouring to establish fault on the part of the "Linn o' Dee" (either solely or jointly) was that from the moment when the sound of the "Warsaw's" whistle indicated that she was on the starboard bow of the "Linn o' Dee" the latter was

bound to treat the "Warsaw" as a crossing vessel, and therefore her own duty was to keep out of the "Warsaw's" way, and when approaching her to stop or reverse. This argument involves a calling-in of articles 19, 21, and 23 as supplementary to article 16, which is the main or leading article regulating the duty of vessels in a fog.

Now I do not doubt that all the articles are to be read together so far as they can be so read, and, accordingly, that it may be quite right to read article 16 along with any other article which will live with it. For example, the note to article 21, by its reference to "thick weather or other causes," shows that it may be read along with article 16 when the emergency arises to which it refers. But it is equally clear that article 21 itself cannot be so read, because that would involve the contradiction that in certain circumstances the same vessel was both to stop her engines and navigate with caution and to keep her course and speed. The truth is that article 16, in its two paragraphs, seems to contain all the obligatory directions with reference to speed in a fog. It deals (1) with the case of a vessel finding herself in a fog without knowing of any other vessel near her, in which case her duty is simply to go at a moderate speed, and then (2) with the case of her hearing the fog-signal of a vessel apparently forward of her beam but in an otherwise unascertained position, in which case her duty is to stop her engines, and then to navigate with caution until the danger of collision is over. Plainly, I think if a vessel obeys these directions she is not bound to act as if she saw the other vessel and knew all about her exact position. It is an acknowledged fact (which our skilled adviser corroborates) that sound in a dense fog may be very misleading, and a shipmaster who governed his conduct by conclusions so drawn, instead of following the safe and cautious directions of article 16, might be very much to blame.

Holding, therefore, with the Lord Ordinary, and with your Lordship in the chair, that the "Linn o' Dee" did, and the "Warsaw" did not, observe article 16 by stopping his engines and navigating with caution before the two vessels came in sight of one another, and holding further that the final manœuvre of the "Linn o' Dee" in going full speed ahead and porting her helm was the best thing that could be done in the circumstances, and would probably have succeeded in averting the collision if the speed of the "Warsaw" had not been too great, I cannot hold the "Linn o' Dee" as in any degree to blame; and I am for adhering with the slight variation which I have suggested. It is a satisfaction to know that, so far as the rules of good seamanship are concerned, our nautical adviser concurs in these conclusions.

LORD LOW—This is a case of considerable difficulty, but I am of opinion that the Lord Ordinary was right in holding that the

"Warsaw" was in fault, while the "Linn o' Dee" was free from blame.

In the first place, I think that the evidence of the "Linn o' Dee" witnesses must be accepted as substantially correct. The Lord Ordinary, who heard the evidence, believed that these witnesses were speaking the truth, and the story which they told is entirely consistent with the real evidence, and in particular with the nature of the injuries which the "Linn o' Dee" and the "Warsaw" respectively sustained. The account given by the "Linn o' Dee" witnesses is that that vessel was proceeding with her engines at "slow," and when the "Warsaw's" whistle was heard, the engines were at once stopped. Accordingly, when the "Warsaw" was sighted some five minutes later, the "Linn o' Dee" had but little way upon her—probably between one and two knots an hour.

On the other hand, the evidence of the leading witnesses for the "Warsaw"—the master and second officer—is that when the whistle of the "Linn o' Dee" was heard the "Warsaw" was going at "slow"; that the engines were then stopped; that when the "Linn o' Dee" appeared out of the fog—at a distance of about 400 feet—the engines were put full speed astern; that the way of the "Warsaw" was thereby entirely stopped before the collision happened; but that the "Linn o' Dee" came on at speed and struck the "Warsaw's" stem with her starboard quarter.

Now I think that it is practically certain that that account is not true. In the first place, there is the real evidence afforded by the nature of the injuries sustained by the vessels respectively, which is almost conclusive. It is proved that these injuries were entirely inconsistent with the idea that the "Warsaw" was stationary or nearly so when the collision occurred, while the "Linn o' Dee" was going at a high rate of speed. On the contrary, the plain inference from the nature of the injuries is that the "Warsaw," when going at what in the circumstances was excessive speed, rammed the "Linn o' Dee," and that the latter vessel was going through the water so slowly that her motion had no appreciable effect. Further, careful consideration of the evidence as a whole leads me to the same conclusion. In particular, I think that it is very doubtful if the "Warsaw's" engines were stopped at all until the "Linn o' Dee" was actually sighted.

I am therefore of opinion that fault on the part of the "Warsaw" has been established.

Before leaving this branch of the case, however, there is one argument which was strongly pressed by the Solicitor-General upon which I think it right to say a few words.

The "Linn o' Dee" witnesses say that the whistles given by the "Warsaw" broadened upon her (the "Linn o' Dee's") starboard bow, while the "Warsaw" witnesses say that the whistles given by the "Linn o' Dee" narrowed upon her (the "Warsaw's") port bow. The Solicitor-General contended that that proved con-

clusively that the "Linn o' Dee" was going at a greater speed than the "Warsaw." Now the "Warsaw" was steering S.E. by E. and the "Linn o' Dee" W. $\frac{3}{4}$ S., and I think that it is the case that if the vessels were steering their courses truly, and if the "Linn o' Dee" was sailing the faster of the two, the sound of the "Warsaw's" whistle would broaden on her starboard bow while her whistle would narrow on the "Warsaw's" port bow. The inference therefore which the Solicitor-General asks us to draw from the evidence as to the apparent direction of the sounds, might, if the point had been raised at the proper time, have merited serious consideration. As matters stand however I do not think that we are in a position to deal with the argument the one way or the other. The point should have been put to the witnesses at the proof, and if that had been done the apparent broadening of the sound upon the "Linn o' Dee's" bow might have turned out to be capable of a very simple explanation apart from the respective speed of the vessels; indeed, it is not difficult to figure circumstances which would have afforded such an explanation. Further, I doubt whether in any case much weight could have been attached to the impression received by those on board the "Linn o' Dee" as to the precise direction from whence the sounds came, it being a matter of common knowledge that sounds heard in a dense fog are extremely misleading and difficult to locate.

There remains the question whether the "Linn o' Dee" was not also in fault. It was argued that when the whistle of the "Warsaw" was heard upon the starboard bow of the "Linn o' Dee," those in charge of the latter vessel were bound to contemplate the contingency that (as in fact turned out to be the case) the whistle came from a crossing ship. The "Linn o' Dee" therefore (it was contended), whose duty it was to keep out of the way of a ship crossing her from starboard, was bound in terms of articles 19 and 23 of the regulations not only to stop her engines but to reverse until she was brought to a standstill. Now we were advised by the nautical assessor (and apart from that advice I should have come to the same conclusion) that rules 19 and 23 did not come into operation in the circumstances, but that the rule which applied was number 16. If that be the sound view, then it is plain that the "Linn o' Dee" was not in fault, because she followed precisely the direction given in that rule.

The Court pronounced this interlocutor:—

"Refuse the reclaiming note: Vary the said interlocutor reclaimed against by deleting therefrom the words 'and in not stopping and reversing her engines,' and the words 'proceeding in a direction from port to starboard of the "Warsaw,"' and in lieu of the said second deletion inserting the words 'in the immediate neighbourhood of the "Warsaw":' With the above alterations affirm the said interlocutor reclaimed against, and decern."

Counsel for the Reclaimers—The Solicitor-General (Ure, K.C.)—Horne. Agents—Beveridge, Sutherland & Smith, S.S.C.

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

Saturday, July 7.

SECOND DIVISION.

SCOBIE AND OTHERS v. ATLAS
STEEL WORKS, LIMITED.

Company—Winding-up—Petition for Winding-up Order—“Just and Equitable”—Petition by Individual Shareholders within Six Months from Incorporation and before any Shareholders’ Meeting—Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 79 (1), (2), (5).

Section 79 of the Companies Act 1862 provides that a company may be wound up by the Court “(1) whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; . . . (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up.”

Less than six months after the incorporation of a limited company formed for the purpose, *inter alia*, of working a patent for horse-shoes, three preference shareholders presented a petition under section 79 (5) for winding-up by the Court, averring that the patent was worthless, that no shoes had been manufactured, that the actual cost of making the shoes largely exceeded that estimated in the prospectus, that the capital had all been spent, that the plant was insufficient, that business could only be carried on at a loss, and that there had been mismanagement by the directors. Answers were lodged by the company explaining the delay in commencing business and generally denying the averments of the petitioners. No meeting of shareholders had ever been summoned to consider the question of winding-up.

The Court *dismissed* the petition.

Per the Lord Justice-Clerk—“I can conceive of a case of such a petition as this being granted although a majority of the members were in favour of the company going on, because there might be circumstances in which we should hold that it was just and equitable that the company should be wound up, but that could only be after the domestic tribunal of the company has exercised its function, which here it has not yet done.”

Per Lord Stormonth Darling—“Where a petition is presented under

sub-section 5 of section 79—that is, the ‘just and equitable’ head—it will require a very strong case on the part of the petitioner to induce this Court to interfere when the case contemplated in sub-section 2 of section 79 has not arisen.”

The Atlas Steel Works, Limited, was on the 15th December 1905 registered and incorporated under the Companies Acts 1862 to 1900, with its registered office at Moorepark, Renfrew. The capital of the company was fixed at £10,000 divided into 5000 preference shares of £1 issued to the public and 5000 ordinary shares of £1 each taken by the vendors. The objects for which the company was formed were to acquire the Atlas Steel Foundry, Renfrew, and to carry on general foundry work, also, *inter alia*, to acquire British Patent No. 9404 of 1904 for an improved method of making horse-shoes. The consideration payable to the vendors was £1500 cash, being the price of the foundry and plant, and all the ordinary shares in the company, being the price of the patent. The minimum subscription on which the directors were entitled to proceed to allotment was £2000, and they in fact proceeded to allotment on a subscription of £2007.

On 9th June 1906 Alexander Scobie, the late works manager of the company, 58 West Regent Street, Glasgow, and two others, all being preference shareholders, presented a petition to the Court under the Companies Acts 1862 to 1900, and specially under the Companies Act 1862, secs. 79, 82, 92, for an order for the winding-up of the company by the Court. They stated—“A prospectus dated 15th December 1905 was issued inviting the public to subscribe for the preference shares. . . . In said prospectus the following statement and certificate appeared:—‘The Atlas Foundry was acquired in the winter of 1904, and since then has been put into thorough repair and the furnace into complete working order at considerable expenditure, after which experimental work was carried on making horse-shoes. The work was in charge of Mr Duncan M’Neill, steel works manager, who has for many years held a responsible position in the Mossend Steel Company. Mr M’Neill has granted the following certificate:—“The experimental work in connection with the casting of steel horse-shoes at the Atlas Foundry, Renfrew, a few months ago, was carried out under my personal supervision and instructions. . . . By systematically arranging the moulding, the cost of making steel horse-shoes complete, ready for nailing on, should be less than £8 per ton, melting five tons per day, and if the moulders can deal with ten tons per day (which can be produced from the same furnace), the cost should be under £7, 10s. per ton. From my knowledge of the wearing capacity of steel and wrought iron, I am satisfied that shoes cast in steel of the quality produced at the experimental tests, will wear longer than similar hand-made shoes of wrought iron.” . . . After sundry testimonials to the quality of horse-shoes made in the said