Tuesday, December 18.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Phillimore, and Lord Blanesburgh.)

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

THE "ROWAN" *v.* THE "WEST CAMAK."

(In the Court of Session, January 13, 1923 S.C. 316, 60 S.L.R. 265.)

Ship — Collision—Contributory Negligence —Wrong Order Given in Sudden Emergency, but Countermanded almost Immediately and Correct Order Given—Reasonable Delay.

Two vessels were approaching each other through a dense fog. The master of one of the vessels, which without fault on her part had been put in a position of danger by the action of the other, suddenly saw a white light slightly on his starboard bow and only 1200 feet away, and gave the order "hard a-starboard." Three seconds later he saw a red light close on his starboard bow, and he then gave the correct command "hard a-port and full speed astern." The second order superseded the first at so short an interval that the course of the vessel was not deflected by the first order. *Held* (*rev.* the judgment of the First Division) that the delay of three seconds from the time the first order was given till the correct command was issued was not such negligence on the part of the master as to infer liability on the part of the ship, and appeal *allowed.*

The case is reported *ante ut supra.*

The owners of the s.s. "West Camak" appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN—Shortly after midnight on 8th October 1921 a collison occurred on the coast of Wigtownshire, not far from Corsewall, between the screw steamer "Rowan," the property of the respondents, and the screw steamer "West Camak," the property of the appellants.

The "Rowan" was bound carrying the mails from Glasgow and Greenock to Belfast, and was at the time of collision steering a course S.W. to S. ½ S. The "West Camak," which had come from America, was bound for Glasgow, and at the time of collison was steering N. There was a dense fog at the time. The "West Camak" had previously to the collision been enveloped in fog for some time; the "Rowan" had only recently arrived in the fog area. At the time of the collision the "Rowan" was going at full speed, which was 13 knots. The "West Camak" was going very slow, at from 3 to 4 knots. The "Rowan" was sounding no signal, the "West Camak" was sounding her fog siren. Cross actions were raised by the owners of the two ships and were conjoined.

Lord Anderson, before whom the actions depended, after proof led, found that the "Rowan" was solely to blame for the collision. On a reclaiming note the First Division recalled that interlocutor and found both vessels to blame, but apportioned the loss two-thirds to the "Rowan" and one-third to the "West Camak." Appeal has now been taken by the owners of the "West Camak" to your Lordships' House.

For a vessel to proceed in fog at full speed without sounding her whistle or siren was clearly wrong, and the respondents have not sought before your Lordships to excuse themselves. The only point debated is whether the "West Camak" was also to blame. In the matter of speed and of sounding her signals there was no cause for blame. The whole point depends on the manœuvre immediately before the collision. Now the account of the incidents leading up to the collision as given by those on board the "West Camak" is clear, and no question has been raised as to credibility. The Lord Ordinary believed the witnesses, and the learned judges of the Inner House are content with the story as told by them. It is as follows:—The master of the "West Camak" was on the bridge. The ship was proceeding as already mentioned cautiously on a north course, when suddenly the lookout sounded three bells indicating something ahead, and at the same time the master became aware of a white light half a point on the starboard bow. This was, as it turned out, the masthead light of the "Rowan." He estimated it at about 1200 feet away. The moment he saw it he gave the order "hard a-starboard." Almost immediately thereafter, the period elapsed being calculated at about three seconds, he saw a red light, and he then instantaneously ordered "hard a-port and stop and reverse engines." It is satisfactorily proved that the second order superseded the first at so short an interval that no alteration on the direction of the vessel was effected by the starboard helm. It is also admitted by all that the order given upon the appearance of the red light was the proper order. The account given by those on board the "Rowan" was that the "West Camak" only appeared when a collision was obviously imminent; that upon the appearance of the "West Camak" the order was given to put the helm hard a-port until immediately before the collision, when the order was to put the helm hard a-starboard in order to throw off her stern and minimise the blow. The engines were maintained at full speed. The manœuvre of the "Rowan," so far as manœuvre is concerned, is agreed to have been in the circumstances right. None the less the collision occurred some 40 seconds after the "West Camak" had seen the white light. The "West Camak's" bow struck the port side of the stern of the "Rowan" some 15 or 20 feet from the end of the vessel. It is contended by the respondents that the proper order for the

"West Camak" to have given the moment the white light was seen was the order subsequently given, namely, "helm hard a-port and engines reversed," and that the erroneous order of "helm hard a-starboard" with no order to the engines was a material contributing cause to the collision. Now so far as the helm is concerned, inasmuch as the "hard a-starboard" order was countermanded before it had any effect on the vessel, the order may be disregarded. The point is therefore reduced to the simple question—Was the delay of three seconds from the time the white light was seen till the appearance of the red light such negligence on the part of the master as to infer liability on the part of the ship?

I do not doubt that when a vessel is proceeding in fog and sees a white light ahead the proper order, however slow the vessel is going, is to stop and reverse. But it has been laid down again and again that when a situation suddenly occurs which demands a manœuvre, the person in charge of the ship at the moment cannot be condemned if he does not act quite instantaneously. He is entitled to an interval, however short—and it must be short—for his mind to grasp the situation and to express itself in an order. This was laid down in clear terms by Butt, J., in the "*Emmy Haase*," (1884) L.R., 9 P.D. 81, and the same was repeated in this House in the case of the owner of the s.s. "*Kwang Tung*" v. owners of the s.s. "*Ngapoota*," [1897] App. Cas. 393.

I am of opinion that in this case the interval of three seconds was not excessive, and that the right order was given with promptitude sufficient to exclude the idea of negligence in not having given it sooner. The respondents argue from the event that the ship was struck so very near the stern that three seconds would have made all the difference. That might have been so, though it would be difficult to affirm categorically that it would, but the only reason why this very short time would have made all the difference is to be found in the excessive speed of the "Rowan" itself. Accordingly the "Rowan" is hit by a consideration analogous to that which prevailed in the well-known case of the "*Bywell Castle*" and many others: namely, that it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger. I am therefore of opinion that the judgment of the Lord Ordinary was right and should be restored. The respondents must pay the costs of the appeal.

LORD ATKINSON — I concur and have nothing to add.

LORD SHAW—[*Read by Lord Phillimore*] —I entirely agree with the judgment pronounced by my noble and learned friend on the Woolsack.

The "Rowan" was to blame, grossly to blame, navigating as she was at full speed through a dense fog. That is admitted. The master of the "West Camak," suddenly discerning a white light slightly on his starboard bow and only 1200 feet away, in the agitation of the moment gave the order to starboard the helm, and within three seconds gave the order hard a-port and stop and reverse engines. The first order was erroneous, but it is proved beyond doubt that it did not deflect the course of the vessel, the second order having followed within three seconds. The case is accordingly one in which no act of bad seamanship brought the vessels together. With regard to the second and the correct order, the House has to judge not so much a question of seamanship as a question of psychology. The issue is whether the master of the "West Camak" should have given the order to port the helm and reverse the engines within a less time than three seconds from the moment when he suddenly discerned the white light.

We are not dealing with the psychology of a superman but simply of a ship's captain. One is familiar only too often with cases of collisions being brought about by rashness owing to want of due consideration as to the order to be given, but the present case is different. It is ascribed to the opposite of rashness, and is so minute in its apportionment of blame as this, that the captain of the "West Camak" gave the right order in an emergency, but gave that right order too late by the twentieth part of one minute. I do not see my way to hold in law that that brief and fragmentary period of time for consideration or before the correct order in the emergency was given can be held to be blameworthy conduct, or legitimately entered as negligent, contributing to the collision. I have always held the "*Bywell Castle*" ((1879) L.R., 4 P.D. 219) to be a case of the highest authority, and I will conclude my own opinion by saying that I think the language of the three great Judges, namely, James, Brett, and Cotton, L.JJ., may be said to apply in terms to the present case. For instance, Brett, L.J., says—"I am clearly of opinion that when one ship by her wrongful act suddenly puts another ship into a position of difficulty of this kind we cannot expect the same amount of skill as we should under other circumstances. The captains of ships are bound to show such skill as persons in their position with ordinary nerve ought to show under the circumstances. But any court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances, and the Court ought not in fairness and justice to him to require perfect nerve and presence of mind enabling him to do the best thing possible."

How analogous in point of fact the "*Bywell Castle*" was to this case may be seen from the language used by James, L.J., namely—"Then there comes the very last thing that occurred on the part of the 'Bywell Castle,' which is that she in the very agony, just at the time when the two ships were close together, hard a-ported. The Judge and both of the Trinity Masters were of opinion that that was a wrong manœuvre. I understand our assessors to agree in that conclusion, but they advise us

that it could not in their opinion have had the slightest appreciable effect upon the collision. That view if adopted by us—and I think that it should be adopted—would be sufficient to dispose of the case upon the question of contributory negligence. But I desire to add my opinion that a ship has no right by its own misconduct to put another ship into a situation of extreme peril and then charge that other ship with misconduct. My opinion is that if in that moment of extreme peril and difficulty such other ship happens to do something wrong so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men."

I have thought it right to cite these very authoritative judgments, because if the doctrine there laid down be lost sight of a region of refinement is apt to be entered upon under which the true responsibility for the substantial wrongdoing may be improperly whittled down, and a fanciful wrongdoing may be raised improperly into the region of substance as a contributing cause.

LORD PHILLIMORE—I have a lingering suspicion that all was not so well on board this American vessel as appears.

But on the findings at which the Lord Ordinary has arrived, which the Court of Session has accepted, and which your Lordships are in no position to disturb, the conclusion to which the Lord Ordinary came was right, and his judgment should be restored.

LORD DUNEDIN—I am authorised to say that my noble and learned friend LORD BLANESBURGH concurs in this judgment.

Their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants their costs here and in the Inner House of the Court of Session.

Counsel for Appellants—Butler Aspinall, K.C. — Carmont. Agents — Beveridge, Sutherland, & Smith, W.S., Edinburgh—Thomas Cooper & Company, London.

Counsel for Respondents—The Dean of Faculty (Condie Sandeman, K.C.)—Bateson, K.C.—Normand. Agents—J. & J. Ross, W.S., Edinburgh — Botterell & Roche, London.

COURT OF SESSION.

Saturday, November 24.

SECOND DIVISION.

[Lord Morison, Ordinary.

FRASER *v.* M'MURRICH.

Process—Caution for Expenses—Bankrupt—Action of Damages for Personal Injury—Circumstances Intrinsic and Extrinsic to the Action itself.

A raised in the Sheriff Court an action of damages for personal injury against B in respect of a motor accident of which he was the victim. Before the summons was served, B, who had no permanent domicile in the sheriffdom, had left the house in which he had been temporarily residing and did not personally receive the summons, which was served by registered letter. No defences were lodged, and the pursuer obtained decree in absence against the defender, though warned by the latter's agent of the risk he ran in doing so. A used arrestments on the decree, and an action of furthcoming followed. This action was successfully defended by B, who thereupon brought in the Court of Session an action of reduction of the Sheriff Court proceedings and obtained decree with expenses. A having failed to pay these his estates were sequestrated. While still an undischarged bankrupt A brought the present action, which was similar to the one he had originally raised in the Sheriff Court. The action was intimated to the trustee in the sequestration, who declined to sist himself as a party. The defender having moved that the pursuer should be ordained as a condition of insisting in his action to find caution for expenses, *held* (*rev.* the judgment of the Lord Ordinary) that the pursuer had failed to establish facts and circumstances which excluded the application of the general rule that an undischarged bankrupt was not entitled to sue without finding caution for expenses unless in exceptional circumstances, as to which the discretion of the Court will be sparingly exercised.

Per the Lord Justice-Clerk (Alness)—"I know of neither principle nor authority which constrains me to hold that intrinsic circumstances may furnish an exception to the rule of *Clarke* v. *Muller* ((1884) 11 R. 418, 21 S.L.R. 290), but that extrinsic circumstances may not. If in either case the application of the rule would be harsh and oppressive, I apprehend that it is in the power of the Court to relax it."

Donald Fraser, Glasgow, *pursuer*, brought an action of damages for £500 for personal injuries against Robert S. M'Murrich, Milngavie, *defender*.

The action was raised on 24th April 1923. The pursuer's estates were sequestrated on 25th May 1923, and the record was closed