interpretation clause of the Act (section 3) a summary clause is, so far as we are here concerned, an action for payment of money exceeding £20 and not exceeding £50. Now in the *Duke of Argyll's* case the sole and whole conclusion of the action was for payment of £30 in money; and on the face of the summons, therefore, I thought and still think that the action fulfilled the criterion of a summary cause. It was only when the defences were tabled that it came to be seen that, if the matter raised by the defences was to be entertained in that summary cause, a very large question involving a great deal more than the mere sum of £30 in money would have to be decided. But that did not affect the applicability of the statutory definition. The present case, however, is quite distinguishable. On the face of the summons, or of what is now to be called the initial writ, it is apparent that the case is not merely one for recovery of a certain sum of money above £20 and under £50, but one to determine a continuing obligation, and virtually involving declarator of the meaning and effect of an obligatory document.

The claim of the pursuer is for payment of two sums making *in cumulo* £26, 12s., being the interest due at Martinmas 1908 on two bonds and dispositions in security over certain subjects in M'Lean Street, Plantation, Glasgow, belonging to the late James Burden held by the pursuer, "payment of said interest having been undertaken by the defender in terms of letter of obligation granted by him to that effect" to Messrs Fyfe, M'Lean, & Company, agents for the pursuer. When the letter on which this claim is founded is looked at, it is at once apparent that it governs not merely the pursuer's claim of interest for the half-year ending Martinmas 1908, but that for subsequent half-years. The pursuer cannot succeed in her claim without obtaining a favourable interpretation of the letter of obligation founded on. If the pursuer is well founded in her claim, the interpretation which she seeks to have placed upon this letter imports a continuing obligation so long as the defender's present relation to the property continues. If necessary this is made still more clear by a subsequent passage in the initial writ, whereby the pursuer reserves her "whole other rights and interests under said letter of obligation with reference to the said two bonds and dispositions in security" respectively. Accordingly I do not think that the present is a claim for £26, 12s. merely, or the action a summary cause in the sense of the statute; and this being apparent on the face of the initial writ, and not dependent upon matters raised in defence, I think that the case falls to be distinguished from that of *Duke of Argyll* v. *Muir*, and that we are not concerned with the application of the 8th section of the statute. The action is then an ordinary action, and the right of appeal is dependent upon section 28, which provides that "subject to the provisions of this Act it shall be competent to appeal to the Court of Session against a judgment of a Sheriff-Substitute or of a Sheriff, but that only if the value of the cause exceeds £50 and the interlocutor appealed against is," *inter alia*, a final judgment. The judgment appealed against is a final judgment, and though the sum concluded for is only £26, 12s., inasmuch as the decision which involves the interpretation of the obligatory document in question affects future termly payments of the same amount, there is no doubt that, following authority, the value of the cause is more than £50, and that the appeal is therefore competent. The Sheriff has, *ob majorem cautelam*, granted leave to appeal, but that was unnecessary and may be taken *pro non scripto*.

In conclusion I would advert for a moment to section 9 of the statute, which at first sight makes the Sheriff sole judge of the value of the cause. But in the collocation in which that section is found I think it clear that its provision applies only to proper summary causes, and does not preclude the inherent right of the Court of Session, when necessary, to determine the value of a cause for the purposes of appeal.

LORD KINNEAR intimated that the LORD PRESIDENT, who was absent, concurred in the judgment proposed by Lord Johnston.

LORD KINNEAR—I also agree, subject only to a reservation as to what my learned brother said about my own opinion in the case of the *Duke of Argyll*. I agree that that case is distinguishable, and therefore I do not think it is necessary to examine in detail the precise effect of the judgment, although it may be necessary to do so in some future case which may not be so distinguishable as this. Otherwise I entirely concur in Lord Johnston's judgment.

The Court repelled the defender's objections to the competency of the appeal.

Counsel for the Pursuers and Appellants — Cooper, K.C. — Stevenson. Agent — Campbell Faill, S.S.C.

Counsel for the Defender and Respondent — M'Kechnie, K.C. — Mackenzie Stuart. Agent—Alexander Ramsay, S.S.C.

Thursday, March 17.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

BEUCKER *v.* ABERDEEN STEAM TRAWLING AND FISHING COMPANY, LIMITED.

Ship—Collision—Regulations for Preventing Collisions at Sea, Articles 19, 21, *and Note*, 27, *and* 29*—Observance of Regulations—Onus when Regulations Departed from.*

Article 19 of the Regulations for Preventing Collisions at Sea (in force since 1st July 1897) provides—"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."

Article 27—"In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary to avoid immediate danger."

Article 29—"Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The S. and the I. were approaching one another so as to involve risk of collision. The S. had the I. on her starboad side. The S. executed no manœuvre which would keep her out of the way of the I. The I. kept on her course till the S. was within one and a half ship's lengths from her, and then ported her helm to ease the impact of the shock. The owner of the I. brought an action against the owners of the S., who averred on record that the collision was due solely to the fault of the I. At the proof none of the crew of the S. were examined as witnesses, and it was admitted that the S. was in fault, but it was contended that under the note to article 21, articles 27 and 29, the I. was also at fault, inasmuch as she failed to take action to avert the collision.

Held that the collision was caused solely by the fault of the S.

Opinion (*per* Lord Justice-Clerk) that the note to article 21 applied only to thick weather and to cases *ejusdem generis*.

Ship—Collision—Damages—Vessel Temporarily Repaired at First Port of Call and Afterwards Permanently Repaired at Home Port—Assessment of Damages—Cost of Repairs—Compensation for Detention—Loss on Cargo through Postponed Market.

Where a ship, injured by collision, was, at the orders of her owners, only temporarily repaired at the first port of refuge, and sailing thereafter for her home port was permanently repaired there, *held*, in an action by her owners against the owners of the other vessel, (1) that the damages should be assessed on the same footing as if the vessel had been repaired at the first port of refuge, (2) that compensation for detention during repair fell to be calculated on the basis of her probable profits and not at a demurrage rate, and (3) that no account could be taken of loss of profit on the cargo, that not being a natural and reasonable result of the collision.

On 29th July 1908 Otto Beucker, shipowner, Geestemunde, Germany, registered owner of the steam trawler "Irmgard," brought an action against the Aberdeen Steam Trawling and Fishing Company, Limited, owners of the steam trawler "Strathfillan," in which he sued for £1000 as damages caused by a collision between his vessel and the "Strathfillan."

The pursuer pleaded—"The pursuer having sustained loss and damage to the amount of the sum sued for, through the fault of those in charge of the 'Strathfillan,' for whom the defenders are responsible, is entitled to decree as concluded for, with expenses."

The defenders, *inter alia*, pleaded—"(3) The said collision being entirely due to the fault of those on board the 'Irmgard,' the defenders should be assoilzied. (4) The collision having been at least materially contributed to by the fault of the 'Irmgard,' the damages fall to be divided between them according to the rules of Admiralty practice."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (SALVESEN), who on 20th February 1909 pronounced this interlocutor:—"Finds that a collision occurred between the pursuer's steam trawler, 'Irmgard,' and the defenders' steam trawler, 'Strathfillan,' about 4·30 a.m. on the 19th February 1908: Finds that the said collision occurred in consequence of fault on the part of those respectively in charge of both vessels: Assesses the damages caused by the collision to the pursuer at £325, 10s. sterling, and to the defenders at £81 sterling: Finds that the total damage sustained by both vessels amounts to the sum of £406, 16s., of which each vessel falls to bear a moiety of £203, 8s.: Therefore decerns against the defenders for payment to the pursuer of the said sum of £203, 8s. under deduction of the said sum of £81, with interest on the sum of £122, 8s. as concluded for."

Opinion.—"This action arises out of a collision which took place between the pursuer's steam trawler 'Irmgard' and the defenders' steam trawler 'Strathfillan,' about 4·30 on the morning of 19th February 1908. It was a clear moonlight night; both vessels had their regulation lights burning brightly, and there was no obstacle of any kind to occasion difficulty in the navigation. Notwithstanding, the 'Strathfillan' and the 'Irmgard' collided while they were both going at full speed, the 'Strathfillan's' bow cutting into the 'Irmgard' some 25 feet from her stern.

"No members of the crew of the 'Strathfillan' have been examined in the case, that vessel, as it is now conceded, having been grossly to blame. She was steering about S.W., while the 'Irmgard' was on a

S.S.E. course; and as the 'Strathfillan' had the 'Irmgard' on her starboard side, it was her duty to have kept out of the way. She could easily have done this, if there had been a proper look-out or any look-out at all, by porting her helm at no great distance from the 'Irmgard.' According to Captain Cowie, the pursuer's expert, she ought to have done this when the vessels were not more than a quarter of a mile apart; and even when they were only five ships' lengths distant a collision would have been avoided if she had obeyed the regulations and put her helm hard aport. Instead of doing so she proceeded without alteration of her course or speed to the point where the collision occurred.

"The defenders, however, say that the 'Irmgard' was also to blame for the collision. She had noticed the 'Strathfillan' approaching on her port bow for some time; and when the vessels were still half-a-mile apart sounded a long blast on her whistle to attract the attention of those on board the 'Strathfillan.' Her mate, who was in charge, observed that in spite of this warning the 'Strathfillan' did not change her course, but he says that he relied upon her doing so up to a very short time before the collision occurred, and made no alteration on his own course or speed. I think he was entitled to do so, so long as the collision might reasonably have been averted by the 'Strathfillan' acting in a seamanlike way, although it would have been wiser in the circumstances if he had repeated the signal which he had already given. In cross-examination, however, the mate admitted that when the vessels had approached within five ships' lengths of each other he realised that there was danger of a collision if they both proceeded on their respective courses and speeds. Nevertheless he took no means at that time to avoid a collision, and it was only when the 'Strathfillan' was one and a half ship's lengths away that he ported his helm, not to avoid a collision, which was then inevitable, but if possible to mitigate the blow. The 'Irmgard,' however, had only gone a very little way to starboard when the 'Strathfillan' struck her as before described. The angle of impact is proved to have been about 6½ or 7 points, 8 points representing a right angle.

"Under the Sailing Rules of 1884 there can be no doubt that the 'Irmgard' would also have been to blame. By article 18 of these regulations it was imperative on a vessel in the position of the 'Irmgard' to slacken speed or to stop and reverse. (The '*Beryl*,' 9 P.D., page 137.) Rule 18 has now been superseded, and its only equivalent in the regulations now in force is to be found in the note to art. 21. The article itself provides that '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'; and the note is in these terms—'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 will take such action as will best aid to avert collision (see arts. 27 and 29).' The two articles last referred to had their counterparts in the earlier regulations, and provide in effect that where there are any special circumstances which render departure from the rules necessary in order to avoid an immediate danger, there must not be blind compliance with the rules, but the proper precaution must be taken to avoid danger that would occur to a careful navigator. The question here does not involve any difficulty of construction of the rule but merely of its application. At five ships' lengths it was still possible for either of the vessels to have avoided a collision by porting their helms or by stopping and reversing immediately. The primary duty of adopting one or other of these manœuvres lay upon the 'Strathfillan,' but as soon as the mate of the 'Irmgard' ought to have realised that the 'Strathfillan' could not by her own action avoid a collision, at that point if not sooner, I think it was his duty to have stopped and reversed his engines and not to have continued to rely upon the 'Strathfillan' doing something by which a collision, contrary to his own view, might have been averted. Had he done so, it is demonstrable that the collision would not have occurred, and although his fault is not comparable to that of those in charge of the 'Strathfillan,' it was, in my opinion, fault which materially contributed to the collision. I accordingly hold both vessels to blame.

"I may note in passing that while the evidence of Captain Grieve proceeds on the assumption that the vessels were approaching each other at right angles, the case against the 'Irmgard' is stronger the more acute was the angle at which the courses were crossing. If they were approaching at right angles at a distance of five ships' lengths between them, each of them would have to run four ships' lengths to the point of collision, whereas if the angle was one of 6 or 6½ points there would be an extra 50 feet at least within which they could have been brought to a standstill. The mate of the 'Irmgard' seems to have thought there was a chance of his vessel getting across the bows of the 'Strathfillan' before the collision, but in my opinion he was not entitled to act upon this view. It would have been a much safer manœuvre to have ported his helm, by which means also, if timeously done, the collision could have been avoided.

"On the matter of *damages* some questions of principle arise. The collision occurred about a hundred miles from Aberdeen, and both vessels at once proceeded to that port. The chief damage to the 'Irmgard' was above water, but she was also injured near the water line. She had a catch of fish amounting in weight to 50,000 lbs. with which she had been proceeding to her home port, Geestemunde. The owner was apprised of the collision, and without making any inquiry as to the extent of the damage or as to the prices of fish at Aberdeen, he at once wired to the master of the 'Irmgard' to proceed to Geestemunde if at all possible. The vessel

accordingly proceeded to sea, after some slight temporary repairs, a little more than twelve hours after her arrival at Aberdeen, and reached Geestemunde on the 22nd of February. Other three trawlers from Iceland arrived that day and in consequence the price of fish fell. Had the 'Irmgard' arrived on the previous day, as she would in all probability have done but for the collision, her catch would have realised approximately the same prices as the catch of her sister ship the 'Greeta.' As soon as the fish had been discharged the vessel was put into dry dock and repaired by Messrs Seebeck, who are shipwrights in Geestemunde, under the supervision of the Underwriters' Surveyor. The repairs occupied fourteen days. Three claims are accordingly made for (1) the cost of the repairs; (2) the loss sustained by selling the catch on the 22nd instead of the 21st; and (3) compensation for detention for fourteen days. All these claims are disputed.

"(1) *Repairs.*—The main controversy on this subject arises out of the relative cost of executing repairs at Aberdeen and at Geestemunde. The defenders apparently anticipated a claim, and at once sent two shipwrights on board to note the damage and to prepare estimates. The ship, however, had sailed before the estimates were actually prepared; and these must be treated rather as valuations of the damage done than as commercial estimates for repairing it. Treating them so, I hold it proved that the repairs could have been accomplished in Aberdeen at a cost of £220. The estimates of the eminently respectable shipbuilders examined for the defenders did not approach this sum by from £40 to £60; but I add the difference for contingencies which always occur in the course of such work and cannot readily be appraised either from a mere statement of what was done or a general survey of the actual damage.

"The question then arises whether the cost at which the repairs could have been executed at Aberdeen or the actual cost of the repairs at Geestemunde (which I assume for the present is moderately charged according to German prices) is the true measure of the loss which the pursuer is entitled to recover. Mr Sandeman argued that unless the pursuer acted unreasonably in ordering the ship to its home port, the defenders must pay the actual cost of the repairs there; and he carried his proposition so far as this, that while £220 would have been all that an Aberdeen trawl owner could have claimed in respect of a similar collision, a German trawl owner would be entitled to compensation on a higher scale. I cannot assent to this view. It was natural enough that the pursuer should prefer his vessel to be repaired at home, and he had the additional motive of ordering her there (while the liability for the collision was still unknown) that there was a prospect of his obtaining high prices for her catch—a prospect which unfortunately was not realised. In my opinion, however, such considerations do not entitle the pursuer to throw upon the defenders a heavier liability than they would have incurred if the ordinary course had been followed of repairing the ship at Aberdeen. I am prepared to affirm as a general rule in collision cases that the amount recoverable in respect of injury to a vessel falls to be measured by the cost of repairing her at the first port at which she takes refuge, if repairs can be conveniently effected there. The owner of a damaged ship has a perfect right to order her to proceed elsewhere to be repaired, but I think when he takes that course the *onus* is upon him to show that the repairs were executed as cheaply as they could have been in the first port of refuge. It has even been held in an unreported case, referred to in Williams and Bruce's Admiralty Practice, that when a ship was injured off Ramsgate, where she could have been repaired, but proceeded to the Tyne, the owners were not entitled to recover any more by way of the cost of repairs than would have been incurred at Ramsgate. I should not be prepared to go so far in all circumstances, or to have held in the present case that if she had proceeded direct from the scene of collision to Geestemunde, a reasonable bill for repairs there would not have been a good item of damage; but having once elected to go into Aberdeen, where repairs could be cheaply executed, she was not entitled to be withdrawn therefrom to her home port, so as to swell the bill of damage against the defenders, still less when the motive for ordering her to proceed there was the desire to take advantage of a temporary inflated market for her cargo.

"(2) I have already stated the basis on which the claim for loss of profit on the sale of the fish is made up. If the fish had been sold at Aberdeen, there might have been a good ground for claiming the difference in price between what the catch realised there and what it would have realised at Geestemunde had there been no collision; but no evidence has been given as to the price which the 'Irmgard's' catch would have realised at Aberdeen on the day of her arrival or next morning; and the loss sued for represents an entirely unexpected fluctuation, due partly to other vessels arriving at the same time, and, perhaps still more, to anticipation of further arrivals. On this subject I was referred to three cases—the '*Parana*,' 2 P.D. 118; the '*Notting Hill*,' 9 P.D. 105; and *Dunn*, [1902] 2 K.B. 614. In the '*Notting Hill*' it was held that loss of market by delay arising from a collision was too remote a consequence to be considered as an element of damage, the contention upheld being that it is not the natural and reasonable result of a collision at sea; and the decision in the case of *Dunn*, while it explains and modifies the rule laid down in the '*Parana*,' does not impinge on the validity of the decision in the '*Notting Hill*.' *Dunn's* case was one of breach of contract, and the award of damages proceeded on the footing that it was known to both parties at the time of the shipment

of the goods that a better price would be got if they arrived at one time than if they arrived at a later time. This reasoning is, of course, not applicable to a case of delict. Here it might well have been that a day's delay in arrival would have secured for the 'Irmgard's' catch a higher price if, for instance, she had been the only vessel to arrive that day; and again, a very few hours' delay through adverse winds or other causes would have been sufficient to make her lose the market on 21st February although there had been no collision. In short, to use the language of Lord Justice Mellish, 'loss of market in the sense that persons are entitled to the difference between the price when the goods arrived and the price when they ought to have arrived is on an ordinary voyage so uncertain that it cannot be the natural and reasonable consequence in every case,' and is not the natural and reasonable result of a collision at sea. These words appear to me to be peculiarly applicable to the kind of loss which is here claimed for.

"(3) The third head of damage is for the loss caused by the detention of the vessel during her repairs. I have already held that these repairs ought to have been executed in Aberdeen, and I think it has been demonstrated that, at the outside, they would not have occupied more than ten days. From this I deduct the four days that would have been saved on the next voyage to Iceland, making the effective detention not more than six days, laying out of view the saving of coals and other stores that would also have been made. Mr Horne suggested that for this period a demurrage rate of from £6 to £10 per day is the proper measure of the damage. I do not think that a demurrage rate has any relation to claims for damages as the result of a collision. On the assumption that a fixed sum per day was to be awarded according to the size of the ship, no cognisance would be taken in the case of a cargo steamer of whether freights were high or low, and while a demurrage rate would more than compensate the owner during a period of low freights, it would not compensate him when freights were good. In the same way, when the best part of a fishing season is lost in consequence of a collision it seems to me that the fishing vessel must be compensated for her probable loss of profits, not on an assumed low rate of profits which might be a sufficient interest upon her capital if continued during the whole year. On the evidence I think it clearly proved that February is one of the best months in the year for German trawlers fishing in Icelandic waters, and it is not to be compared, for instance, with the summer months, when the fishing is frequently conducted at a loss. I know of no fairer method of assessing the damage than that which the pursuer has here taken, by ascertaining the average profits of some fifteen or sixteen trawlers similar to the 'Irmgard,' which all started from Geestemunde for the Iceland fishing on the 23rd of February. That works out roughly at some £21 per day, from which has to be deducted a sum to cover the cost of coals, ice, and engine-room stores which were not consumed. I fix this at £6, leaving the net sum per day out of which the pursuer had to meet the cost of crew, insurance, &c., at £15 per day. This method of estimating the loss is in accordance with the rule laid down in the '*Risoluto*,' 8 P.D. 109, and the prior cases therein referred to. I accordingly assess the loss owing to detention at £90. The other item, £24, 10s., as 'agency fee to the managing owner,' cannot be allowed, and was not seriously insisted in, nor in the view that I take can an account for temporary repairs be an item of charge against the defenders.

"The total sum at which I assess the loss which the pursuer would have been entitled to recover if the defenders' vessel had been alone to blame is thus £325, 16s. The cost of repairing the defenders' vessel was, however, £81, and this falls to be added in order to apportion the loss equally between the two. The result is that I shall decern against the defenders for a moiety of the loss in accordance with the Admiralty rule, or £203, 8s."

The pursuer reclaimed, and argued—The "Strathfillan" now admitted that she was in fault, but she had made definite and specific averments of fault against the "Irmgard" on record. None of her crew had been examined as witnesses, and she had failed to present any account of the accident from her point of view to the Court. The "Irmgard" was therefore entitled to the benefit of every reasonable doubt. The "Irmgard" was not in fault. Under article 21 her duty was to keep her course and speed. She was bound to stick to the rules at her peril. If she had departed from the rule and a collision had occurred the *onus* would have been on her to justify her departure therefrom—"*The Voorwarts*" v. "*The Khedive*," 1880, L.R., 5 A.C. 876. It was true that it was the duty of the "Irmgard" not to adhere blindly to the rule but to take action to avoid the collision when it became clear that it could not be averted by the action of the "Strathfillan" alone. She had done so by porting when the vessels were a length and a-half apart from each other. It was proved that until the vessels were a length and a-half apart the "Strathfillan" might have avoided the collision by porting and going astern of the "Irmgard." Until that moment the "Irmgard" had to keep her course under the penalty of being held to blame for the collision, whether her action in fact contributed to it or not—"*The William Frederick*," 1879, L.R., 4 A.C. 669; "*The Voorwarts*" v. "*The Khedive*," 1880 (*sup. cit.*) Even if the "Irmgard" had stopped and reversed at five ships' lengths the collision would have occurred unless the "Strathfillan" had also taken steps to avert it. And as a matter fact she did nothing. The "Strathfillan" having admitted that she was to blame, the *onus* was upon her to show that the "Irmgard" was also to blame—Marsden's Collisions at Sea (5th edition), 36 and 37. If the vessel which

ought to hold on was placed suddenly in a position of danger through the fault of the vessel which ought to give way, perfect presence of mind and accuracy of judgment were not to be expected—"*The Bywell Castle*," 1879, L.R., 4 P.D. 219 (*per* Brett, L.J., and James, L.J.); *Hine Brothers* v. *Clyde Trustees*, March 7, 1888, 15 R. 498 (*per* Lord J.-C. Moncreiff at 503), 25 S.L.R. 364; "*The Tasmania*," 1890, L.R., 15 A.C. 223 (*per* Lord Herschell at 226). Those in charge of the "Irmgard" could not be held to be in fault because they did not do what was absolutely the best thing that could have been done. It must be shown that they were clearly guilty of negligence, having in view the very exceptionally difficult circumstances in which they were placed. (2) The Lord Ordinary was wrong upon the question of amount of damages. The wrongdoer had to compensate the injured party for the damages naturally resulting from the wrong. The pursuer was entitled to recover his loss on the cargo, what he had *bona fide* paid for the repairs, and to damages for detention during the time of repair, unless it could be shown that he had acted unreasonably and that the bill of damage had been swollen by his unreasonable conduct—Mayne on Damages (8th ed.), 207; *Hochster* v. *De la Tour*, 1853, 2 E. and B. 678; *Brown* v. *Müller*, 1872, L.R., 7 Ex. 319 (at 322); *Frost* v. *Knight*, 1872, L.R., 7 Ex. 111; *Roper* v. *Johnson*, 1873, L.R., 8 C.P. 167; *Roth & Company* v. *Taysen, Townsend, & Company*, 1896, 1 Com. Cas. 306; *Nickoll & Knight* v. *Ashton, Edridge, & Company* [1900], 2 Q.B. 298. Damages for the period of detention ought to be calculated on the basis of the probable profits which the "Irmgard" would have made as ascertained by the profits actually made by other ships in the same trade, and not on demurrage rate—"*The Risoluto*," 1883, L.R., 8 P.D. 109.

Argued for the defenders (respondents)—No doubt the "Strathfillan" was to blame, as she failed to manœuvre as required by article 19. The "Irmgard," however, was also to blame. Her primary duty was to hold on (article 21), but when it became apparent that the collision could not be avoided by the action of the giving-way vessel alone, she ought to have taken action to aid in avoiding the collision—Regulations, articles 21, note, and 27; Marsden on Collisions (5th ed.), 453; "*The Underwriter*," 1877, 3 Asp., M. C. 361; "*The Rosalie*," 1880, L.R., 5 P.D. 245; "*The Beryl*," 1884, L.R., 9 P.D. 137; "*The Benares*," 1883, L.R., 9 P.D. 16; "*The City of Berlin*," [1908] P. 110; "*The Koning Willem II*," [1908] P. 125. It was clearly proved that when the vessels were five lengths apart the collision could not have been averted by the "Strathfillan" alone. At that point it was the duty of the "Irmgard" to act. She should have stopped and reversed. If she had, there would have been no collision. She had broken the regulations by her failure to act. It was her absolute duty to obey them. The *onus* lay on her to show that her failure to obey was justified by necessity—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 419 (4); *Windram* v. *Robertson*, May 23, 1905, 7 F. 665 (*per* Lord Dunedin at 671), 42 S.L.R. 602; "*The Corinthian*," [1909] P. 260. The note to article 21 no doubt laid a difficult task on a master—Marsden on Collisions, p. 409; "*The Albano*," [1907] A.C. 193. Still the regulations clearly laid a duty upon him, and the owners were liable if he failed to perform it. This was not a case of sudden and unforeseen peril. The observations made in the cases of *Hine* v. *Clyde Navigation Trustees* (*cit. sup.*) and the *Bywell Castle* (*cit. sup.*) were not in point here. The case of *Radley* v. *London and North-Western Railway Company*, 1876, L.R., 1 A.C. 754, was also referred to. (2) The Lord Ordinary's view of damages was well founded. The pursuer had acted unreasonably in going to Geestemunde, when he could have had his vessel repaired in Aberdeen. The repairs could have been executed more cheaply in Aberdeen and with greater despatch. Four days would have been saved on the next voyage to Iceland if the vessel had been repaired at Aberdeen. The pursuers could not claim damages for detention caused by his own act—"*The Aurora*" (referred to in Williams & Bruce's Admiralty Practice, 116). Moreover, the question of damages was a jury question. The Lord Ordinary's award should not be disturbed unless unjustifiable in the light of the evidence—*Wilson* v. *Hicks*, 1857, 26 L.J., Ex. 242; *Duff & Company* v. *Iron and Steel Fencing and Buildings Company*, December 1, 1891, 19 R. 199, 29 S.L.R. 186. The Lord Ordinary had assessed the damages for detention on too high a scale. A demurrage rate of £6 to £10 per day was the proper measure of damage.

At advising—

LORD JUSTICE-CLERK—The collision which occurred in this case took place in circumstances of no complication, there being nothing in the state of weather that was abnormal in any way, the vessels having a full view of one another for a long time, and there being no difficulties created by there being other vessels in the way which might interfere with the following out of the Regulations for Prevention of Collision with exactitude, more particularly as both vessels were of the same class—steam trawlers. The rules to be followed are free from dubiety. The vessels were approaching upon courses which if adhered to would cross one another. The "Strathfillan" had the "Irmgard" on her starboard side, and was showing her green light to the "Irmgard." The "Irmgard" had the "Strathfillan" on her port side, and was showing her red light to the "Strathfillan." In these circumstances the rule applicable to the "Strathfillan" was article 19, which declares that "the vessel which has the other on her own starboard side shall keep out of the way of the other." The rule applicable to the "Irmgard" was 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." In the present case

the "Strathfillan" not only did not keep out of the way as she was bound to do, but did absolutely no manœuvre tending to keep her out of the way. She came straight on, although her attention was called by the foghorn of the "Irmgard." She was not in any way out of hand, as she was plainly being steered on a course the whole time. The "Irmgard" on the other hand obeyed the rule by which she was bound. She committed no breach of that rule, and if she is to be held blameable it must be because she failed to obey some other rule by which she was bound in the circumstances in which she was placed to act contrary to the primary rule, viz., article 21. The owners of the "Strathfillan" found on three things—the note appended to article 21 and articles 27 and 29, which are referred to in that note. The note says—"When in consequence of thick weather or other causes such vessel"—that is, a vessel having the other on her port side—"finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she shall take such action as will best aid to avert collision." Now in this case the primary cause suggested of difficulty is not applicable. There was no "thick weather." But it is said that the words "other causes" makes the note include every case in which "collision cannot be avoided by the action of the giving-way vessel alone." I cannot so read it. It appears to me to have no application where the two vessels have a full view of one another at long distance, but to relate only to a similar case to that of thick weather, as, for example, a small steamer suddenly appearing from behind the hull of another or from behind an obstruction to view, such as a rock. I cannot read "other causes" as meaning "any cause," otherwise there was no reason for naming a particular cause at all; and according to the accepted rules of construction, where a particular description is given followed by "or other," the word "other" must be read as "other similar." The words must be read as referring to things having a reasonable analogy to the thing particularly described. Here there were no circumstances which could possibly be described as having an analogy to "thick weather," nothing which could be described as abnormal in any sense. The weather was clear, the view was open. The holding-on vessel did not by any cause other than the misconduct of the "Strathfillan" "find herself" so close that collision could not be avoided unless she departed from article 21. I cannot read into the note any such words as would make it apply. I cannot hold it to be intended to express among "other causes" the idea of her "finding herself so close" being caused by the refusal of the vessel approaching to do her duty, as she was entitled to expect the other vessel to do, and she was not entitled to take any action which might thwart the success of the manœuvre, whatever it might be, which the keeping-out-of-the-way vessel was bound to make. I therefore cannot accept the argument for the "Strathfillan" founded upon the note to article 21.

I hold therefore in this case that the duty of the "Irmgard" must be tested by considering what she did, upon the footing that if she obeyed article 21 she must be held to have been negligent and blameworthy for not departing from it sooner than she did and executing some manœuvre to avoid collision, seeing that the "Strathfillan" by what she was doing or failed to do was causing a collision to be imminent.

In dealing with this question it is most important to consider what the position is of a master who is bound to obey article 21, and is obeying it. He is bound to expect that the vessel approaching him on his port side will manœuvre to clear him, and he is bound not to manœuvre himself, but his duty to the other vessel is to act as the other vessel in manœuvring is entitled to assume that he will act, viz., by doing nothing which may interfere with the course of the manœuvre. To do so may be fatal. His position is the most difficult into which a seaman can be put. If he alters his course at the same moment that the crossing vessel does the same he may precipitate a collision of the very worst kind, and will be accused of having disobeyed article 21 and be held solely liable for the collision. If he waits until it is too late for a manœuvre to be made by the crossing vessel, he may be held liable because he for two seconds too many acted on expectation of a manœuvre by the crossing vessel. His position is I think well described by Mr Justice Barnes in the case of "*The Gloamin*'" v. "*The Ranza*," where he said—"The 'Ranza' had to keep out of her"—the 'Gloamin's'—"way, and the 'Gloamin' had to keep her course and speed, obviously, up to a certain point. I think it is quite impossible to be absolutely certain where that point is, mathematically speaking, but these rules have to be construed in order that men may act reasonably upon them. It seems to me to result from that that the ship which has to keep her course and speed must do so up to such a point as, if the other vessel acts at that point or up to that point, will enable the giving-way vessel to keep out of the way. Then after that point is passed, there comes a position in which the wrongdoing ship cannot by her own action avoid the collision. The common-sense of it, therefore, is that the rule really means that at that time and after that time the ship which is concerned to keep her course must take action, and take such action as may best avert the collision. The burden of taking action and departing from the rule is cast upon the master, who has to determine when that point of departure occurs. I cannot say it can be pressed too severely in any case, but it seems to me that if you find a man watching what the other vessel is doing, and endeavouring to do his best to make up his mind when the time to depart from the rule has arrived, then you ought not to say 'You waited a moment too long,' because if he acted a moment too soon the other ship will at once say—'If you had not

acted there would have been no collision.' Therefore it resolves itself into this, that he must wait until the other ship cannot avoid the collision, and then he must act."

I have quoted this part of Mr Justice Barnes' opinion at length, as it exactly expresses the view I formed upon this case before I studied his opinion. My view was very clearly expressed in an earlier case of the "*Bywell Castle*" in 1879, and I would have been prepared to have decided in terms of that case had it stood alone, but this later case gives in Justice Barnes' opinion recent confirmation of the older case. And every word Justice Barnes says is specially applicable to this case. Both the vessels were trawlers, corresponding in speed, and both according to the evidence being extremely quick and handy in steering so that they could come round rapidly on the helm being put over. Therefore the master of the "Irmgard" might quite naturally suppose that the "Strathfillan" would not, because she need not, execute her manœuvre at such a considerable distance as would be essential in the case of a large and unhandy ship. For the master of the "Irmgard" to have assumed when the "Strathfillan" was some distance off that she would not manœuvre, and that therefore he must take action, would, I think, have been wrong, for if both vessels in such circumstances acted at the same moment, the result, as I have already said, might be disastrous, as if the "Strathfillan" did manœuvre, on the proper assumption that the "Irmgard" would hold on, the manœuvre must probably miscarry, if at the same time the "Irmgard" manœuvred also.

The fact that both were trawlers, which can act very quickly on their helm, added greatly to the difficulties of the master of the "Irmgard" in forming a judgment, for it compelled him to hold on longer than he would have done if she had been a heavier and a larger vessel, which would be expected to alter her course a considerable distance off in order to clear him. He was not called on to imagine such an extraordinary proceeding as that the vessel bound to give way would do nothing at all. He was necessarily put to the last moment to form an opinion whether he should do anything contrary to art. 21, whether under the note to art. 21, or art. 27, or art. 29, and was thus in most trying and exceptional circumstances. I am of opinion that he did not act negligently in what he did. The general case under art. 19 and 21, and the note is one of the most difficult of all the many difficult positions in which a master can be placed—bound to do nothing till it may be too late to do anything with effect, and almost certain to do harm if he acts a moment too soon.

Further, while I am of opinion that the master of the "Irmgard" is not open to the charge of negligence or bad seamanship, I should, even if it could be held that he failed, be prepared to exonerate him from responsibility for negligence or fault, and to hold that in the very exceptionally difficult circumstances in which he was placed, caused by the wholly unaccountable bad conduct of those on board the "Strathfillan," nothing more could be attributed to him than an excusable error of judgment. And as it is expressed in the case of the "*Bywell Castle*," in the sudden emergency caused by the fault of the vessel which ought to give way, and does not do so, "perfect presence of mind, accurate judgment, and promptitude in giving effect to that judgment are not to be expected." I may add that I do not think any assistance is to be got in considering the case from the articles referred to in the note to article 21, viz., art. 27 and 29. Art. 27 relates to special circumstances, presumably such, for example, as narrowness of channel, of which there is an important illustration in one of the cases quoted, the presence of more vessels making ordinary manœuvre difficult, or similar special circumstances. Here there was nothing special, unless the specialty that the "Strathfillan" was in fault in a degree that could scarcely be supposed possible.

Art. 29 relates to the practical precautions of lights, signals, and lookout, and refers to precautions to be taken according to the ordinary practice of seamen, or the special circumstances of the case. Here there was no question of precautions to be taken. "Precaution" implies something thought out, as applicable to circumstances. There was nothing of that kind possible in the present case. Anything to be done at the last moment by a vessel towards whom the navigation rules were being disregarded cannot be described as a precaution. It is a necessarily hastily resolved on last resort.

As regards what was done by the "Irmgard" at the last, viz., porting, I am satisfied that the manœuvre was right. Collision had become practically inevitable, and all that could be done was to endeavour to mitigate the effect. By porting the chance was given of making the blow more slanting, and therefore less likely to sink the "Strathfillan" or cut deep into her than if the "Irmgard's" course remained unaltered. On these grounds I differ from the result arrived at by the Lord Ordinary, and hold that the interlocutor must be recalled, and the owners of the "Irmgard" found entitled to damages against the owners of the "Strathfillan," and that the "Strathfillan" has no counter claim against the "Irmgard."

I agree with the views expressed by the Lord Ordinary in his opinion upon the question of damages, and would propose to decern for the amount found by him.

LORD LOW—I have found this case to be attended with considerable difficulty. In the first place, the Lord Ordinary, to whose judgment, especially in a case of this kind, I attach great weight, is clearly of opinion that the "Irmgard" as well as the "Strathfillan" was to blame; and in the second place, it is clear, as events actually happened, that if the mate of the "Irmgard" had, when within four or five lengths of the

"Strathfillan," stopped and reversed there would have been no collision. Further, I think, that for the "Irmgard" to have stopped and reversed while there was yet time to bring her to a standstill before the point of intersection of the courses of the vessels was reached would have been (I am again speaking in view of what actually happened) the best thing which could have been done in the circumstances. That is the opinion of Captain Cowie, who was a witness for the pursuer, and who is a gentleman of great experience. It cannot be disputed that by the time the vessels had approached within four or five lengths of each other the risk of collision was very grave indeed; and if the "Strathfillan" had been navigated with care she would, considerably before that point was reached, have altered her course so as to pass behind the "Irmgard," and the fact that she was still continuing her course, and apparently her speed, unaltered would, I think, have gone far to justify the "Irmgard" in concluding that she (the "Strathfillan") intended, as was in fact the case, to carry on.

But there are very weighty considerations on the other side. There was a perfectly plain and unambiguous statutory rule wich applied to the circumstances in which the "Irmgard" found herself, according to which it was her duty to keep her course and speed. No doubt the note to rule 21 and rules 27 and 29 show that the master of a ship is not bound to adhere slavishly to a rule if and when it becomes apparent that to do so will lead to disaster, and that by departing from the rule and adopting another course disaster will be avoided. In such a case it is the master's duty to adopt that other course. But if he does so it is at his own risk, and if a collision nevertheless takes place the *onus* is upon him to justify his departure from the rule. That was laid down by the House of Lords in the case of the "*Voorwarts*" v. "*Khedive*," 5 A.C. 876. That is a very instructive case, because it was held that the master of the "Khedive" had been in fault in not having at once followed the rule (then in force) that ships approaching one another so as to involve risk of collision should slacken speed, or if necessary stop and reverse, although the noble and learned Lords recognised that he (the master) had acted with great promptitude and skill.

I think that it follows that if the master of a ship is, by the gross negligence of another ship, suddenly put into the position of having to make up his mind whether he will adhere to a statutory rule applicable to his case, or take the risk of breaking that rule and adopting some other course, he cannot be held to be in fault merely because he does not do that which, as events turn out, is absolutely the best thing which could be done. More cannot be required of him than the exercise of reasonable care and skill as a seaman, and if he adheres to the rule he cannot, in my judgment, be held to be in fault, unless it can be said that a master of reasonable care and skill should have seen that in order to avoid a collision it was necessary to break the rule and adopt some other definite course.

Now in this case it was not, I understood, and at all events I am of opinion that it could not be, disputed that the "Irmgard" was bound to keep her course and speed until she was so close to the "Strathfillan" that no more, or substantially no more, space intervened between them than was necessary for the "Irmgard" to be brought to a standstill before reaching the point of intersection of the courses of the vessels. It is said that then, although not till then, it was the duty of the "Irmgard" to stop and reverse.

Now the mate of the "Irmgard" says (what indeed is well known) that steam trawlers are very handy vessels which can be quickly manœuvred, and he also says (what I do not doubt is true) that a trawler which is bound to give way is very apt (trusting, I suppose, to her handiness) to wait until the last moment before altering her course. He therefore says that he feared that if he stopped and reversed, the "Strathfillan" might at the same time port her helm, in which case a collision would almost inevitably have resulted. I think that that fear was well founded, because my impression from the evidence is that if at the time when it is said the "Irmgard" should have stopped and reversed, the "Strathfillan" had ported her helm she would have cleared the "Irmgard," assuming that the latter kept her course and speed, while if the "Irmgard" had stopped and reversed when the "Strathfillan" ported, it is difficult to see how a collision could have been avoided. Accordingly if the "Irmgard" had stopped and reversed, and at the same time the "Strathfillan" had ported and a collision had resulted, the mate of the former would have been in a very awkward position, because he would have had to justify a breach of a rule which resulted in a collision in circumstances in which if he had adhered to the rule there would have been no collision.

Further, it is to be observed that the vessels nearly cleared each other. No one seems to have taken the trouble to measure the exact distance from her stern at which the "Irmgard" was struck, but I think that the distance taken by the Lord Ordinary of 25 feet is probably very near the truth. But if so, it seems to me that the strong probability is that even when the vessels had approached considerably nearer to each other than the point at which it is said the "Irmgard" should have stopped and reversed, the "Strathfillan" might have kept clear by porting her helm or reversing. But if that view be sound, it goes far to justify the "Irmgard" in keeping her course and speed, beyond the point where it is said she should have stopped and reversed. The mate, however—although for the reasons which I have stated he did not think he was justified in stopping and reversing—acted with promptitude when he saw that a collision was unavoidable, and did the only thing possible under the circumstan-

ces, namely, starboarded his helm so as to put his ship as nearly as might be on a course parallel to that of the "Strathfillan," and thereby modify the directness of the impact.

There is one other consideration which seems to me to be of some importance. In the defences pointed averments of fault on the part of the "Irmgard" are made, and the pursuers were entitled to expect that evidence would be led in support of these averments. That, however, was not done, and the result was that not a single person who was on board the "Strathfillan" was put into the witness-box. The consequence is that we only know what I might call one side of the story, and it seems to me that what actually happened on board the "Strathfillan" might have had a material bearing upon the question whether the "Irmgard" was in fault. For example, suppose (what there is some reason to believe actually occurred) that the master, or whoever was in charge of the "Strathfillan," suddenly realising that if he held on he would run into the "Irmgard," had lost his head, and had put the helm to starboard instead of to port, and had thereby steered right into the "Irmgard" instead of passing under her stern, that would obviously have been a very material fact in considering whether the "Irmgard" was in fault. That is merely an example, and other circumstances equally pregnant might have been disclosed had the crew of the "Strathfillan" been examined. It therefore seems to me that the pursuer was prejudiced, or may have been prejudiced, by the defenders abandoning the defence which they had stated, and that, in my judgment, is an additional reason for giving the "Irmgard" the benefit of every reasonable doubt.

The conclusion, therefore, at which I arrive is, that although the mate of the "Irmgard" may have committed an error of judgment (which I am not prepared to say that he did), he cannot be held to have been guilty of fault or negligence which makes the "Irmgard" equally with the "Strathfillan" responsible for the collision.

In regard to damages, although I am not prepared to assent to all the views expressed by the Lord Ordinary, I substantially agree with the line of argument upon which he proceeds, and I think that the sum (£325, 16s.) at which he has assessed the damages due to the pursuer is fair and reasonable.

LORD ARDWALL concurred with the LORD JUSTICE-CLERK.

LORD DUNDAS concurred.

The Court pronounced this interlocutor—

"Recal the . . . interlocutor reclaimed against: Find that the collision between the pursuer's steam trawler 'Irmgard' and the defenders' steam trawler 'Strathfillan,' which took place on February 19, 1908, was due to the fault of those in charge of the 'Strathfillan': Find that the damage sustained by the 'Irmgard' amounted to the sum of £325, 16s.: Therefore ordain the defenders to make payment to the pursuer of the said sum of £325, 16s., with interest thereon as craved, and decern," &c.

Counsel for the Pursuer (Reclaimer)—Hunter, K.C.—Sandeman, K.C.—F. C. Thomson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Respondents)—Dean of Faculty (Dickson, K.C.)—Horne. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, March 17.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

MIDDLEMAS *v.* GIBSON AND OTHERS.

Compensation—Specific Appropriation—Failure of Purpose for which Moneys Appropriated—Right to Retain.

A handed a sum of money to B (his law agent) wherewith to effect a composition settlement with his (A's) creditors. The composition having fallen through, B claimed right to retain from the sum so handed to him the amount of certain business accounts due to him by A.

Held that as the money had been placed in B's hands for a specific purpose which had failed, he was not entitled to plead either compensation or retention, but was bound to return it.

William Middlemas, writer, Kilmarnock, pursuer and real raiser, brought a multiplepoinding against (1) John Gibson, writer, Kilmarnock, as trustee on the sequestrated estates of Stephen Haddow, butcher, Newmilns, and (2) John M'Gaan, retired innkeeper, Newmilns, and others, creditors of Haddow, defenders, in which he sought decree of exoneration as holder of a sum of £63 odd held by him for behoof of Haddow and which was claimed by his creditors.

From the averments of parties it appeared that in April 1908 Haddow, whose affairs had become embarrassed, handed to Middlemas, his law agent, a sum of £100 with a view to his arranging a composition settlement with his (Haddow's) creditors. The composition having fallen through, Middlemas claimed the right to deduct the amount of certain business accounts due to him by Haddow, and he accordingly brought the present action for exoneration *quoad* the balance. His right to make these deductions was disputed by certain of the defenders, who averred that they had advanced to Haddow the said sum of £100 on the understanding that if the composition were not accepted the amount advanced was to be returned to them.

The pursuer pleaded—"The sum of £100 having been paid to the pursuer as afore-