is not for payment of damages but for payment of hire.

LORD GUTHRIE—The decision of this case turns, in my opinion, on the sound construction of article 9 of the minute of admissions. Towards the end of his opinion the Lord Ordinary says that the defenders "have produced no evidence that the ship was not still a ship on 25th October." But there is no room in this case for considering a balance of evidence. The parties superseded the order for proof allowed on 19th March 1919 by their minute of admissions, and the only question to be determined is the question of construction above mentioned, or alternatively, the sound construction of article 9, taken along with the other articles of the minute and the letters addressed by the defenders to the pursuers dated 24th September and 25th October 1917. In whichever form the question be stated I think the defenders are entitled to absolvitor.

The Lord Ordinary holds that the minute of admissions, read as a whole, necessitates a limited construction for the words "total loss" in article 9, the construction applicable to a contract of insurance, and excludes the wider construction that as at 9th September the subject had perished because it was impossible to salve the vessel. Taking article 9 by itself, I do not know that the Lord Ordinary would have reached this conclusion. It is difficult to see how he could, for article 9 contains its own interpretation of a total loss, namely, a ship which had not only become an unhireable subject, but which had perished because it was impossible to salve it. This element was not present in the case of *Barr* v. *Gibson*, 3 M. & W. 290, relied on by the Lord Ordinary. In that case instead of it being impossible at the date in question to salve the vessel, Baron Parke refers to "the possibility, though not the probability, of the vessel being got off." The Lord Ordinary indeed founds on the introductory words of article 9 and glosses them thus—"It was the weather conditions alone which rendered salvage of the vessel impossible after 9th September." But no such positive assertion is made in article 9. All that is said is "that it is uncertain whether the 'Fiona' could have been salved if the weather conditions had been favourable"—an academic statement which could be made in many cases of undoubted "total loss" in the fullest sense of the words.

I find no sufficient reason to limit the ordinary meaning of the words "total loss," or their meaning as defined in article 9, by anything either in article 10 of the minute or in the letters above mentioned. Article 10 does not refer to salvage of the ship, but to salvage of particular articles which it was possible to retrieve from a wreck which, as previously admitted, it had become impossible to salve.

As to the letters, the representation therein made seems to me irrelevant in the present question. It may be that if the pursuers can prove loss incurred by them through action taken by them on the faith of these representations, they may in a properly averred and proved action of damages have a remedy by way of damages. No such averments are made in this case. But even if they were, they would be irrelevant to what is the only issue, namely, at what date did the "Fiona" become a total loss, in the sense of a vessel the salvage of which was impossible? As I read the minute of admissions, the parties fixed that date as at 9th September 1917. I therefore agree that the Lord Ordinary's interlocutor must be recalled and the defenders found entitled to absolvitor, subject to the adjustment agreed on at the bar.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuers (Respondents)—Dean of Faculty (Murray, K.C.)—Carmont. Agents—Beveridge, Sutherland, & Smith, W.S.

Counsel for the Defenders (Reclaimers)—Sol.-Gen. (Morison, K.C.)—Black. Agent—Thomas Carmichael, S.S.C.

Wednesday, February 4.

SECOND DIVISION.

(BEFORE SEVEN JUDGES.)

[Lord Sands, Ordinary.

CIE DES FORGES ET ACIERIES DE LA MARINE ET D'HOMECOURT *v.* GEORGE GIBSON & COMPANY, LIMITED.

Ship—Collision—Duty of Holding-on Vessel—When Departure from Collision Regulations Justified—Regulations for Preventing Collisions at Sea, Art. 21 *and Note.*

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

In order to justify a departure from Article 21 of the Regulations for Preventing Collisions at Sea it is not necessary for the holding-on vessel to prove that by no possibility could a collision have been avoided had she maintained her course and speed, but only such facts and circumstances as would justify a skilled seaman in believing that a collision could not be avoided by the action of the giving-way vessel alone.

Circumstances in which, in a collision between two vessel, *held* (*rev.* judgment of Lord Sands, Ordinary, *dis.* Lord Justice-Clerk) that the holding-on vessel was justified in departing from Art. 21

of the Regulations for Preventing Collisions at Sea.

Process — Record — Notice — Allegata et Probata.

In an action of damages for collision between two vessels, *opinions per* the Lord President and Lord Guthrie, Lord Cullen concurring with the Lord President, that where pursuers obtained judgment on a ground of fault not averred on record, inconsistent with the pursuers' averments, and not supported by their evidence-in-chief, that judgment would not be sustained.

The Regulations for Preventing Collisions at Sea, made by Order in Council of 13th October 1910 (Statutory Rules and Orders 1910, p. 457), provide :—

"*Steering and Sailing Rules.*

Preliminary.—Risk of Collision.

"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 and note are quoted *supra in rubric.*

"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, or reverse.

"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 in order 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."

Cie des Forges et Acieries de la Marine et d'Homecourt, Paris, and Messrs Boyd, Jameson, & Young, W.S., Leith, their mandatories, *pursuers,* brought an action against Messrs George Gibson & Company, Limited, registered owners of the steamship "Gala" of Leith, *defenders,* for £1700, 17s. 4d., being damages for the loss of a cargo of coal of which the pursuers were the consignees, and which was being carried from Newcastle-on-Tyne to Rouen on the s.s. "Eidsvaag," which was sunk in collision with the s.s. "Gala" belonging to the defenders on 3rd February 1918.

The parties *averred*—"(Cond. 3) The s.s. 'Eidsvaag' left the Tyne on her voyage to Rouen at 8 a.m. on Saturday, 2nd February. All went well till shortly after midnight of that date, when the 'Eidsvaag' was sailing on a course S.S.E. ½ E. at a slow and reduced speed in view of the weather conditions as after mentioned. The captain of the 'Eidsvaag' and the second officer were together on the bridge and an able seaman was at the wheel. The night was very dark and somewhat hazy, with occasional showers of rain. There was a light breeze from the south-east. About twenty minutes after midnight on the morning of 3rd February the master of the 'Eidsvaag' observed a ship's light about three points on his starboard bow, and on examining same with his night glasses he made out the masthead light and also the green light of a vessel, which afterwards turned out to be the 'Gala' proceeding on an opposite and parallel course to his, and at a distance not exceeding half a mile. The 'Eidsvaag' continued her course, and if the 'Gala' had also continued her course, as she ought to have done, both vessels would have passed clear of each other on the starboard side. The 'Eidsvaag' had both her side lights exhibited, and they were burning brightly, and if the 'Gala' had been keeping a proper lookout she would have seen the 'Eidsvaag's' green light on her own starboard bow at a distance of at least half-a-mile. Shortly after the master of the 'Eidsvaag' had picked up the masthead and green light of the 'Gala' the 'Gala' suddenly altered her course to starboard under a port helm and exhibited her red light to the 'Eidsvaag,' but failed to give any sound signal of such alteration to the 'Eidsvaag.' The 'Gala' was then not more than two cable lengths from the 'Eidsvaag,' and was approaching her at a high speed, and was heading for her starboard side. The 'Gala' being in ballast, and with wind and tide behind her, was travelling very fast. The master of the 'Eidsvaag' at once gave two short blasts of his whistle and ordered the helm hard a-starboard as the only manœuvre which afforded a chance of avoiding a collision. The 'Gala' did not reply to the 'Eidsvaag's' two-blast signal, which the master of the 'Eidsvaag' accordingly repeated, and almost immediately after he had given his second two-blast signal the 'Gala' crashed into the starboard side of the 'Eidsvaag' about amidships, her stem penetrating nearly to No. 2 hatch. Immediately after the collision the 'Gala' backed out, leaving a gaping hole in the starboard side of the 'Eidsvaag' through which water poured into the vessel, and the 'Eidsvaag' immediately began to sink. The master of the 'Eidsvaag' ordered his crew to take to their boats, and during the operation of launching one of the boats the second officer of the 'Eidsvaag' fell into the sea and was drowned. The 'Eidsvaag' sank in about an hour after the collision, and her master and crew were taken on board the 'Gala' and were landed at Newcastle. With reference to statements in answer, it is believed to be true that those in charge of the 'Gala' imagined that the light of the 'Eidsvaag' was a light marking the Smithic Buoy. Denied that the 'Gala' altered her course by porting her helm when a mile or so from the 'Eidsvaag.' Explained that she did so when not more than 2½ cables off. *Quoad ultra* the statements in answer, in so far as they do not coincide herewith, are denied. (*Ans.* 3) Denied. Explained that the s.s. 'Gala,' which was on a voyage in ballast from Dunkirk to Leith, was on the early morning of 4th February 1918 near Flamborough Head,

when those on board of her, who were in the slightly hazy weather then prevailing looking out for North Smithic Buoy which marks the eastern limit of the shallow water in the neighbourhood of the Head, observed a dim light very low down in the water distant from about a mile to a mile and a-half, and bearing about ¾ of a point on their port bow. The master examined the light through glasses, and came to the conclusion from its position that it was the North Smithic Buoy Light. As the water is dangerously shallow to the westward of this buoy, the helm of the s.s. 'Gala' was ported, and after her head had gone off about 3 points she was steadied on the course N. by E. ½ E. (compass). The bearing of the said light, thought to be on the North Smithic Buoy, was then taken, and it was found to be bearing N. by W. ½ W. and still distant between one and one and a-half miles. The s.s. 'Gala' proceeded for a short time until she was about a mile distant from the light in question, when the master, who was watching it closely through his glasses, perceived that it was not altering its bearing as he had expected, and made out that it was the green light of a vessel which was not showing any mast-head light, and which was, it is believed and averred, proceeding with her side lights reduced in strength. As this vessel and the s.s. 'Gala' were crossing vessels, and the former had the latter on her starboard bow, the master of the s.s. 'Gala' maintained his course and speed. The two vessels continued to approach each other without any appreciable alteration of bearing until the master of the s.s. 'Gala' saw that the other vessel, which turned out to be the s.s. 'Eidsvaag,' was not keeping out of the s.s. 'Gala's' way by porting her helm and passing under the 'Gala's' stern, as it was her duty to do, and that it would be necessary for him to take action if a collision was to be avoided. He accordingly put his helm hard a port and at the same time gave one short blast on the whistle. The 'Eidsvaag' replied to this signal with two short blasts. The s.s. 'Gala' immediately repeated the one short blast signal, to which the 'Eidsvaag' again replied with two short blasts. The 'Eidsvaag,' however, did not starboard her helm as she had signalled she was about to do, but continued to cross the course of the 'Gala,' and eventually, notwithstanding that shortly before the collision the engines of the 'Gala' were stopped and put full speed astern, got across the course of the 'Gala' with the result that the latter vessel struck her a little aft of the bridge. After the vessels had cleared the 'Eidsvaag' continued to go ahead for about half a mile, and the 'Gala' thereupon steamed alongside, hailed those on board of the 'Eidsvaag,' and took her crew on board the 'Gala.' The 'Eidsvaag' sank about an hour after the collision. The second officer of the 'Eidsvaag,' who was in charge of her navigation at the time of the collision, was drowned. (Cond 4) The said collision was entirely due to the fault of the defenders, or those for whom they are responsible, who failed to observe the rules of good seamanship. No proper lookout was kept on board the 'Gala.' Had those in charge of the 'Gala' been keeping a good, or in any event an efficient lookout, as they were bound to do, they would have seen that the light of the 'Eidsvaag' was a moving and not a stationary light. Furthermore, those in charge of the 'Gala' were at fault in navigating their vessel at an excessive speed considering the weather conditions that prevailed at the time. The respective vessels were on parallel not crossing courses, and the duty of each was to continue on her course, which duty those in charge of the 'Gala' failed to carry out. The said collision was solely due to the master of the 'Gala' porting his helm and altering his course to cross the bows of the 'Eidsvaag,' when the approaching vessels were so close to each other that it was impossible for the 'Eidsvaag' by any manœuvre on her part to avoid the collision. In so navigating the 'Gala' those in charge of her failed to observe the rules of good seamanship. The statements in answer are denied. Explained that when the 'Gala' first showed her red light to the 'Eidsvaag,' the vessels were so close as to compel the master of the latter vessel to resort to the manœuvre of putting his helm hard a starboard as the sole chance of avoiding a collision. (*Ans.* 4) Denied. The collision was entirely due to the fault of the owners of the 'Eidsvaag,' or those for whom they are responsible through their failure to observe the regulations for the prevention of collisions at sea, and the rules of good seamanship. In particular (1) the two vessels being on crossing courses, and the 'Eidsvaag' having the 'Gala' on her starboard side, the 'Eidsvaag' was in fault in failing to keep out of the way of the 'Gala' in accordance with articles 19 and 21 of the said regulations; and in failing either to port her helm and pass under the 'Gala's' stern, which is the usual and proper manœuvre, or to starboard her helm as she approached the 'Gala' in conformity with the signal which she had given; (2) those on board the 'Eidsvaag' were in fault in failing to keep a sufficient or indeed any lookout; and (3) those on board the 'Eidsvaag' were in fault in failing to stop and reverse her engines when risk of collision became apparent."

The defenders pleaded, *inter alia*—"3. The collision having been entirely due to the fault of the owners of the 'Eidsvaag,' the defenders ought to be assoilzied."

On 7th March 1919 the Lord Ordinary (SANDS) sitting with a nautical assessor, after a proof, found—"(1) That on the occasion in question those in charge of the 'Gala' sighted a light at a distance of about a mile and bearing ¾ of a point on her port bow; (2) that said light was the starboard light of the steamship 'Eidsvaag,' but was at the time mistaken by the master of the 'Gala' for the light on the North Smithic Buoy; (3) that on observing said light the 'Gala' went to starboard and steadied on a course N. × E. ½ E. (compass); (4) that this change of course on the part of the 'Gala' was not attended with danger if thereafter

both vessels had been properly navigated; (5) that the vessels were at the time the 'Gala' sighted the 'Eidsvaag' on crossing courses, the 'Eidsvaag' having the 'Gala' on her starboard side; (6) that thereafter for some time both vessels kept their course and speed; (7) that the 'Eidsvaag' failed to keep out of the way of the 'Gala' by timeously porting her helm and passing under the stern of the 'Gala' as she ought to have done; (8) that when the vessels were just under a quarter of a mile apart the 'Gala' went hard a-port and came round to starboard some 5 or 6 points, finally striking the 'Eidsvaag' with her port bow abaft the bridge and in a slightly forward direction; (9) that on suddenly coming to observe the 'Gala's' red light on her starboard bow the 'Eidsvaag' starboarded her helm, but that the proper course was to have stopped and reversed her engines; (10) that the 'Gala' was in fault in failing to maintain her course and speed, and that the 'Gala' has failed to prove that if she had maintained her course and speed a collision would have occurred; (11) that both vessels are in law to blame for said collision: Apportions the blame two-thirds to the 'Eidsvaag' and one-third to the 'Gala': Grants leave to reclaim."

Opinion.—"The s.s. 'Eidsvaag' was sunk in collision with the s.s. 'Gala' a few miles off Flamborough Head upon the morning of 3rd February 1918 between 12 and 1 o'clock. The night was dark, and there was some haze, but there was no such obscurity as to make navigation dangerous. The conditions as to lighting were abnormal owing to the submarine danger. But the 'Gala' exhibited all her lights, and the 'Eidsvaag' her side but not her masthead light. The two vessels were steaming at approximately the same speed—8½ knots. Each vessel alleges fault against the other and denies fault on her own part. (This action is at the instance, not of the 'Eidsvaag' but of the consignees of her cargo, but it is more convenient to speak simply of the vessels as if this were an action between them.)

"The 'Eidsvaag's' theory of the collision is this. The two vessels were approaching green to green, which was a safe position. Suddenly the master of the 'Gala' made out the green light of the 'Eidsvaag' which owing to the state of the atmosphere was visible only at a short distance. He mistook this light for the North Smithic Buoy, and thinking he was getting into dangerous water, he suddenly ported his helm, and this brought his ship right across the course of the 'Eidsvaag,' which had not time to manœuvre to avoid a collision, though she starboarded her helm in an endeavour to do so. That is quite an intelligible theory, and if the statement of the 'Gala's' crew that they mistook the 'Eidsvaag's' light for the buoy is to be accepted and the rest of their evidence to be rejected, this might perhaps be accepted as the explanation of the collision. But the representation that the vessels were green to green stands upon the uncorroborated evidence of the master of the 'Eidsvaag.' The second mate was drowned; the man at the wheel did not see the 'Gala' at first, and when he saw her the light was red. The only other man on the 'Eidsvaag's' deck was said not to be available as a witness. But the story of the master and chief officer of the 'Gala,' corroborated by two seamen who were on deck, is that they saw the light of the 'Eidsvaag' on their port bow when she was a mile distant, and mistaking it for the North Smithic Buoy the master ported to carry his ship well out of the shoal water. Keeping an observation upon the light he saw that its bearing did not alter, and concluded that it was not the Smithic Buoy but a ship. As however the light was green on his port bow, it was his duty to keep his course, and he did so and held on for four or five minutes until, a collision being imminent, he put his helm hard-a-port, but too late to avoid the collision. There was nothing in the demeanour of any of the five witnesses that impressed me unfavourably. In these circumstances, as a matter of oral testimony, I must hold it proved that the master of the 'Eidsvaag' is in error when he says that he saw the 'Gala's' green light, and that the 'Gala' suddenly ported, changing green to red, when the vessels had approached very near each other.

"The Dean of Faculty proposed to show that the story of the 'Gala's' witnesses was incredible, except upon the assumption, which is not suggested, that the 'Eidsvaag' was steaming twice as fast as the 'Gala.' Otherwise, he maintained, the evidence that the 'Eidsvaag' maintained the same bearings from the 'Gala' up to almost the moment of collision cannot be true. The matter is somewhat technical, but I think that I understand his argument. The course which the 'Eidsvaag' had set intersects the course which the 'Gala' says she set, at a certain point. This point of intersection must be the point of collision (approximately, for there was a final porting of the 'Gala' and starboarding of the 'Eidsvaag' at the last moment). Now if a point be assumed on the line of the 'Gala's' course as the point where this course was set on the 'Gala' sighting the 'Eidsvaag,' if the 'Gala's' original course be laid off by a line passing through that point, and a bearing three-quarters of a point on the port bow of a vessel on that (the Gala's original course) be taken, the intersection of this bearing with the 'Eidsvaag's' course gives the position of the 'Eidsvaag' at the moment when she was sighted by the 'Gala.' This position, it is said, is double as far from the point of collision as is the position postulated for the 'Gala' when she sighted the 'Eidsvaag.'

"Upon the assumption, which is not matter of definite evidence, but is capable of expert verification, that the result is as the Dean of Faculty states, the validity of the argument appears to me, in view of the nicety of the angles, to depend upon all the data being strictly accurate and not approximate only, viz.—the course of the 'Eidsvaag,' the original course of the 'Gala,' the new course of the 'Gala,' the bearing of the 'Eidsvaag's' light from the old course of the 'Gala,' and the fixity of the bearing

during the time that intervened before the collision. There is no technical evidence upon the matter, and no chart showing the course, the bearings, and the angles. These matters must be left to the nautical assessor, and I am bound by his opinion, which is negative of this argument.

"I am accordingly of opinion that the 'Eidsvaag' has failed to displace the evidence that the general course of events up to the collision becoming imminent was as the 'Gala's' witnesses have deponed. Accordingly I must hold that the 'Eidsvaag' was at fault in not having observed the 'Gala' as an approaching vessel showing red to green throughout.

"The red light upon the 'Eidsvaag's' starboard bow indicated a crossing vessel so near that there was danger of collision. In these circumstances, in accordance with the regulations, it was the duty of the master of the 'Eidsvaag' to keep out of the 'Gala's' way, and the proper manœuvre was to port his helm so as to pass under the stern of the approaching vessel. His explanation for not having done so is that the collision was so imminent when he first saw the red light that he had to do the best he could irrespective of rule, and that the best chance of avoiding a collision was to bear away by starboarding his helm. On the assumption that the position of matters was as the master states, I should hesitate to affirm that if the only choice was between porting and starboarding his helm the master of the 'Eidsvaag' is to blame for starboarding. But I am advised by the nautical assessor that neither course was the proper one in the circumstances, and that it was the proper course for the master of the 'Eidsvaag,' on suddenly observing a vessel showing red on his starboard bow, which he deemed he could not now avoid by porting, to have reversed his engines.

"If the 'Eidsvaag's' story of what occurred were accepted, I should regard it as a difficult question whether failure to stop and reverse could be accounted a fault although it might have been the best course to have taken. The 'Eidsvaag's story is that a vessel passing apparently safely green to green suddenly ported and made straight at her. Some allowance must be made for a master who does what seems to him best on the spur of the moment under such conditions.

"In holding the 'Eidsvaag' at fault I proceed upon the finding that the two vessels were approaching throughout green to red, that the atmosphere was not such as to render it impossible to observe this at a safe distance, and that as the 'Gala' showed red it was the duty of the 'Eidsvaag' to keep out of her way.

"I turn now to the question whether the 'Gala' was at fault. [*His Lordship here dealt with grounds of fault with which this report is not concerned.*]

"There remains, however, the question whether the 'Gala' was at fault in her second porting when she put her helm hard-a-port immediately before the collision. It is maintained that the 'Gala' was not justified in porting her helm when the danger of collision appeared, and that but for this action the collision would not have occurred. It is not necessary for the 'Eidsvaag' to establish this latter if she is right as to the impropriety of porting the helm. It is for the 'Gala' to show that maintaining her course could have made no difference. This she has not done. Having regard to the courses and speed of the vessels, to the place at and direction in which the 'Gala' struck the 'Eidsvaag,' to the facts that she struck her with her port bow and that she had answered the helm some five or six points, and to the time which elapsed between the porting and the collision, a matter I shall deal with later, it appears to me that the 'Eidsvaag' would have cleared the 'Gala's' course if the 'Gala' had not ported. But it is not necessary to affirm this, for the reason I have indicated.

"The rule as to the duty of a vessel which has to keep her course is clear, and the rigidity with which it must be adhered to has been more than once authoritatively enunciated. When a vessel finds a crossing vessel on her port bow she must keep her course and speed. She is not justified in altering her course because there appears to be a danger of collision and it is deemed more likely that it will be avoided by a deviation. An alteration of course is warranted only in the last moment when it appears that a collision is inevitable if the course be maintained. The *onus* is on the ship which has altered to justify the alteration, and the *onus* is severely interpreted.

"I am advised that the 'Gala' was not justified in porting her helm in the circumstances disclosed in the evidence. This opinion is not, however, binding upon me, as it proceeds upon a certain view of the evidence as to the distance between the ships when the 'Gala' ported. I understand that the nautical assessor takes it as approximately a quarter of a mile as spoken to by Hutton, the man at the helm of the 'Gala.'

"The direct evidence stands thus—The master and the first officer of the 'Gala' put it at about two ship's lengths; Hutton the helmsman puts it at less than a quarter of a mile, which I must interpret as just under a quarter of a mile. The master's story of what happened between the porting and the collision is as follows:—'I put my helm hard a-port and gave one short blast of the whistle. The other vessel proved to be a steamer and gave two short blasts of her whistle. I immediately gave another short blast and she gave two short blasts, and just about that instant the black loom of her hull came up. She gave two blasts, indicating that she was directing her course to port on a starboard helm. (Q) As far as you could see, did she go to port at all?—(A) I could not say what she did; I only know that she indicated that she was going that way. As the vessel came closer I then gave the order to the engine-room "Full speed astern." That order was acknowledged and the engines reversed. That was just as I saw the loom of the other vessel, just a second or so afterwards, when I saw that we

were getting dangerously close. I do not think it would have been wise for me to have reversed the engines sooner than I did, because if he had done what he ought to have done and I had reversed I would only have been hindering him instead of assisting him, as I did by putting the helm hard a-port and giving one short blast. Notwithstanding my reversing it was impossible to avoid the collision; I did all I possibly could to avoid a collision. My vessel ran on and struck the other vessel abaft the bridge.'

"Now I confess that all this—porting the helm, one blast, two in answer, one again, two in answer again, seeing the loom of a vessel, ordering reversing, order acknowledged, engines reversed—suggests to me more time than would have been available if the two vessels had been only two ship's lengths apart and approximately approaching each other at eight and a half to nine knots an hour when the helm was ported. Then again, the 'Gala' struck the 'Eidsvaag' abaft the bridge with her port bow, the stem of the 'Gala' being directed nearly at right angles but slightly forward towards the 'Eidsvaag's' bow. This shows that the 'Gala' must have paid off five or six points to port from her course immediately before the collision. This again is suggestive of more than one to one and a half ship's lengths of steaming between the porting and the collision. The master of the 'Gala' puts it thus—'I saw that I would have to do something to assist her to port her helm, so I put my helm hard a-port and gave one short blast of the whistle.' It was the duty of the 'Eidsvaag' to keep out of the 'Gala's' way, and if the 'Gala' had been timeously observed the proper manner of discharging that duty was for the 'Eidsvaag' to have ported and passed under the 'Gala's' stern. This, I understand, is what the master of the 'Gala' refers to in the above statement. He thought that the 'Eidsvaag' would attempt this manœuvre, and that by porting he would assist her. But as I read the regulations and the relative decisions the master of the ship which has to give way must assume, but the master of the ship which has to keep its course may not assume. The former must assume that the other ship will keep her course, the latter must keep his course and assume nothing as regards the action of the crossing ship.

"I have come, though not without reluctance and hesitation, to the conclusion that the master of the 'Gala' has failed to discharge the *onus* upon him to show that he was justified in departing from the regulations and failing to maintain his course and speed.

"In conformity therefore with the foregoing opinion I must hold that both vessels were at fault.

"In apportioning blame for this collision I must of course proceed upon what I have found proved, without giving any effect to conjectural doubts as to whether, as regards either vessel, the evidence fully and completely corresponds with the actual facts. In this view I must hold that the 'Gala' was placed in a position of difficulty by serious fault on the part of the 'Eidsvaag,' and that the 'Gala' committed an error in a sudden effort to extricate herself from this difficulty. Upon this footing, in accordance with a recent precedent, I might have been disposed to apportion three-fourths of the blame to the 'Eidsvaag' and one-fourth to the 'Gala.' There is, however, a consideration which leads me to a certain modification of this conclusion. The fault of the 'Gala' was not a wrong exercise of discretion in a position of sudden difficulty, but the exercise, albeit in a moment of anxiety, of discretion under circumstances, according to my findings, where the statutory rules do not allow any exercise of discretion. I apportion the blame two-thirds to the 'Eidsvaag' and one-third to the 'Gala.'"

The defenders reclaimed, and after hearing counsel and making avizandum, the Judges of the Second Division, on 2nd December 1919, appointed the cause to be argued by one counsel on each side before themselves and three Judges of the First Division, and further directed that at the hearing their Lordships should have the assistance as nautical assessors of Captain P. W. Tait of Leith, and Captain William Grieve of Aberdeen.

Argued for the reclaimers—The pursuers' case was based on the assumption that the vessels were on parallel courses, whereas the ground of fault was based on the finding that the vessels were on crossing courses, which was not averred. The first point at issue therefore between the parties was whether the pursuers could win on an alleged fault of the defenders which was not averred by the pursuers on record, and which was only established at the proof in the cross-examination of the defenders' witnesses. To hold this would be to contravene the rule that a party suing can only recover *secundum allegata et probata—The "Tasmania,"* 1890, 15 A.C. 223; *The "Ann,"* 1860, Lush, 55; *The "Memnon,"* 1889, 6 Asp. 488, *per* Lord Herschell at p. 490; *Nitrate Producers Steamship Company, Limited* v. *Short Brothers,* October 30, 1919, Lloyd's List, vol. i, No. 3, p. 74, *per* Bankes, J. Scottish practice followed English Admiralty practice in this matter—*Owners of the "Thames"* v. *Owners of the "Lutetia,"* 1884, 12 R. (H.L.) 1, *per* Lord Watson at p. 10, 9 A.C. 640, 21 S.L.R. 716. The case of *Bile Beans Manufacturing Company, Limited* v. *Davidson,* 1906, 8 F. 1181, 43 S.L.R. 827, was not in point as an authority *contra,* because that case was based on the rule that a party seeking relief could not obtain it if his case was based on fraud. 2. In any event there was no presumption of fault through failure to observe the regulations in the present circumstances. The Maritime Conventions Act 1911 (1 and 2 Geo. V, cap. 57), section 4 (1), had repealed section 419 (4) of the Merchant Shipping Act 1894 (57 and 58 Vict cap. 60), creating such a presumption of fault. The test accordingly now was what a prudent seaman, having in view article 21 of the Rules for Preventing Collisions at Sea and the relative note, would in the circumstances do when he saw that a collision could no longer be averted by the action of the giving-way vessel. The duty

of the nautical assessors was to assist the Court on this question of nautical skill. The test was not one of mathematical calculation to be worked out afterwards on the facts as ascertained, but one of reasonable prudence looking to the whole circumstances of the case. The cases decided on the repealed presumption of fault rule where the decision was adverse to the infringing vessel were of little value as authorities, but those in which infringements were excused were of *a fortiori* force, and the principles laid down in such cases were fully applicable to cases under the present law—Marsden on Collisions at Sea, 7th ed., p. 71; *The "Beryl,"* 1884, 9 P.D. 137; *The "Ceto,"* 1889, 14 A.C. 670, *per* Lord Watson, p. 685, and Lord Herschell, 694; *The "Memnon," cit. sup., per* Lord Herschell, at p. 490; *The "Tasmania," cit. sup., per* Lord Herschell, p. 225, ft.; *The "Albano,"* [1907] A.C. 193; *Beucker (Owner of "Irmgard")* v. *Aberdeen Steam Trawling and Fishing Company, Limited, (Owners of "Strathfillan"),* 1910 S.C. 655, 47 S.L.R. 513; *The "Huntsman,"* 1911, 11 Asp. 606; *The "Enterprise,"* [1912] P. 207; *The "Tempus,"* [1913] P. 166; *The "Olympic" and H.M.S. "Hawke,"* [1913] P. 214, and *per* Vaughan Williams, L.J., at p. 245, and Lord Parker of Waddington at p. 279; *The "Orduna,"* [1919] P. 381, and *per* Bankes, L.J., at p. 388, and Scrutton, L.J., at p. 393. There was, further, on the facts of the present case no failure to observe the regulations. Even if article 21 of the Rules for Preventing Collisions at Sea were to be construed as leaving nothing to discretion, but as depending on the mathematical accuracy of the captain's forecast, then even applying this test the defenders were free from blame.

Argued for the pursuers and respondents —1. It was too late at the hearing for the defenders to raise the point of procedure which they sought to raise. It should have been raised at the proof when the questions put with regard to this issue should have been objected to. As a matter of fact the point of fault of the defenders was fully argued in the Outer House without objection, and it was left open to the Lord Ordinary to decide it. The cases quoted *contra* were cases where the point was raised for the first time in the appeal court, and was not raised in the lower court at all. *Lamont, Nisbet, & Company,* 1907 S.C. 628, *per* Lord Ordinary Stormonth Darling at p. 630, 44 S.L.R. 490, was in some respects a similar case. When as here a defender sought to exculpate himself by showing that the pursuer was to blame, and in the course of the evidence it appeared that he had been guilty of negligence, it was incumbent on him to show that that negligence in no way contributed to the accident —Bevan on Negligence (3rd ed.), p. 142; *Clyde Navigation Company* v. *Barclay,* (1876) 1 A.C. 790, *per* Lord Chelmsford at p. 792, ft. 2. *On the merits*—The "Gala" should in the circumstances have maintained her course and speed, and should never have taken any action at all. Rule 21 was *ex facie* imperative and left nothing to the discretion of the captain, and it was to supersede such discretion that the rule was passed. The only exception admitted was when it was impossible for the giving-way vessel by her own action to avoid collision. In these circumstances the note to rule 21 came into operation, but in all such cases it depended on the actual facts as worked out mathematically as to whether the violation of the rule was justified. The case law fell into three periods—(1) to 1873, when there was no presumption of fault, (2) to 1911, when there was a presumption of fault, and (3) after 1911, when the presumption of fault was repealed. The early cases were very important as bearing on the question of seamanship—*The "Test,"* 1847, 5 N. of C. 276, *per* Dr Lushington at p. 279; *The "Vivid,"* 1849, 7 N. of C. 127, *per* Dr Lushington at pp. 128 and 129; *The "Immaganda Sara Clasina,"* 1850, 7 N. of C. 582; *The "Agra"* and *"Elizabeth Jenkins,"* 1867, L.R., 1 P.C. 501, *per* Sir James Colvile, p. 504, ft.; *The "Fenham,"* 1870, L.R., 3 P.C. 212. The later cases supported the argument for the imperative character of the rule—*The "William Frederick,"* 1879, 4 A.C. 669, and *per* Sir James Colvile, at p. 672, mid.; *The "Beryl,"* 1884, 9 P.D. 4 and 137; *The "Memnon,"* 1889, 6 Asp. 488; *The "Tasmania,"* 1890, 15 A.C. 223; *The "Saragossa,"* 1892, 7 Asp. 289, *per* Lopes, L.J., at p. 392, ft.; *The "Ranza,"* 1898, 79 L.J., P. 21, *per* Gorell Barnes, J., p. 22, 2nd col. top; *Windram* v. *Robertson,* 1905, 7 F. 665, 42 S.L.R. 602, *per* Lord President, at p. 672, ft.; *The "Albano,"* [1907] A.C. 193; *Beucker (Owner of "Irmgard")* v. *Aberdeen Steam Trawling and Fishing Company, Limited (Owner of "Strathfillan"),* 1910 S.C. 655, 47 S.L.R. 513; *The "Huntsman,"* 1911, 11 Asp. 606, *per* Bargrave Deane, J., at p. 608, 2nd col. ft.; *The "Olympic"* and *H.M.S. "Hawke,"* [1913] P. 214, *per* Vaughan Williams, L.J., at p. 244, ft., and Kennedy, L.J., p. 269; *The "Orduna,"* [1919] P. 381. *The "Enterprise,"* [1912] P. 207 and *The "Tempus,"* [1913] P. 166, were distinguishable on the facts. The action of the defenders in this case was one of the proximate causes of the collision in the sense of the dictum of Lord Watson in *Cayzer* v. *Carron Company,* 1884, 9 A.C. 873, at p. 886, top. Reference was also made to Marsden on Collisions at Sea, p. 70, ft., and p. 75, note f.

At advising—

LORD PRESIDENT — Shortly after midnight on the 3rd of February 1918 a collision took place off Flamborough Head between the s.s. "Eidsvaag" and the s.s. "Gala." The Lord Ordinary has held both ships to blame. I agree with him in thinking that the "Eidsvaag" was in fault, but I am unable to discover any reason for attributing blame to the "Gala." On the contrary, it appears to me that she was navigated throughout with seamanlike skill and caution. It is common ground that the account of the occurrence given on record and in evidence by the pursuers cannot be accepted. Their case is simple enough. The two vessels, so runs the condescendence, were proceeding on opposite and parallel courses, the "Gala" sailing northwards and

the "Eidsvaag" southwards. Had each maintained its course they would have passed in safety, green light to green light, but the "Gala" suddenly ported her helm, and altered her course to starboard, when she was within a couple of cable lengths off the "Eidsvaag." And the "Eidsvaag" seeing a collision to be imminent put her helm hard a-starboard as the only chance of avoiding a collision, but too late, for immediately thereafter the "Gala" crashed into her and sent her to the bottom. Such being the facts according to the pursuers' version the fault alleged on record against the "Gala" is that she ported her helm and altered her course so as to cross the bows of the "Eidsvaag" at a time when the vessels were so close to each other that it was impossible for the "Eidsvaag" to avoid the collision. Now the Lord Ordinary rejects entirely this account of the collision, and consequently this ground of fault. He holds that at the time of the collision the two vessels were on crossing courses—that it was the duty of the "Eidsvaag" in terms of Article 19 of the Rules to keep out of the way of the "Gala," and that she failed to do so. But then he further holds that the "Gala" too was in fault because she failed to maintain her course and speed—in other words, because she ported her helm and stopped and reversed too soon. And the Lord Ordinary so holds (1) in face of the pursuers' averment, supported but not controverted in evidence, that the "Gala's" helm was ported at a time when the vessels were so close that it was quite impossible to avoid a collision, and (2) in face of a cross-examination of the captain of the "Gala" directed to show that he ported too late. Now it is to be observed that this ground of fault is nowhere alleged on record, and that the pursuers' averments completely exclude it. If the collision took place as the pursuers allege then it was impossible for the "Gala" to have been on such a course as would have rendered it to be her duty to maintain her course and speed. And hence she could never have been to blame for failing to do so, and it is not averred that her captain failed to do so. In these circumstances I decline to hold the "Gala" responsible for a fault which is not alleged against her, and which consequently the captain was never called upon to excuse. The defenders were clearly entitled to have notice on record of the case which they were called upon to meet, viz, the breach of Article 21 of the Rules. And here they had no notice. On the contrary they were confronted with averments in the condescendence which are absolutely inconsistent with the ground of fault which alone is now maintained against them. My views on this subject may be stated in the words of Lord Watson in the case of "*Thames*" v. "*The Lutetia*," 12 R. (H.L.) at p. 10—"Now for my own part I cannot regard these averments as other than the deliberate statement of the parties who are responsible for the navigation of the 'Lutetia,' or as of less importance than if they had occurred in the log of the vessel, or in particulars in the Court of Admiralty. To admit the suggestion that they ought to be treated as an erroneous account given by the professional advisers of the party would in my opinion be to destroy the usefulness of a Scottish record in all cases of collision at sea." If these views be sound, as they plainly are, then it is not competent to consider the only ground of fault now maintained against the "Gala," inasmuch as it is contrary to the record and no evidence has been adduced in support of it. But the case has been sent to Seven Judges in order, as I understand, that a certain view of the law taken by the Lord Ordinary, and on which his judgment rests, may be considered and an authoritative opinion be expressed upon it. I shall accordingly proceed to consider the case as the Lord Ordinary does on the footing that the two steamers were crossing vessels; that it was the duty of the "Eidsvaag" in terms of Article 19 to keep out of the way of the "Gala"; that she committed a breach of this duty by holding on her course until collision was imminent and then starboarding her helm;¦ that it was the duty of the "Gala" to keep her course and speed until collision could not be avoided by the action of the "Eidsvaag" alone; and that the question fairly raised on record is —did the "Gala" fulfil this duty? That is in my opinion a question of fact and seamanship which on account of the view he has taken of the law the Lord Ordinary does not appear to have considered. The evidence on the point is all one way. There is not a trace in the evidence of fault or failure on the part of the captain of the "Gala" to observe Article 21 and the note which accompanies it. On the contrary, the captain of the "Eidsvaag" says more than once that at the time when the "Gala" ported there was nothing he (the master of the "Eidsvaag") could do to avoid a collision. In other words, according to his evidence the "Gala" held on her course to the very last, and it was only at the last that she took such action as would best aid to avoid collision. The evidence of the master of the "Gala" is to a like effect. The evidence of both captains supports the pursuers' averments on record that the "Gala" acted "when the approaching vessels were so close to each other that it was impossible for the 'Eidsvaag' by any manœuvre on her part to avoid the collision." In face of this evidence it appears to me to be impossible to resist the conclusion that the "Gala" obeyed Rule 21 and the note appended to it. For, of course, the rule and the note must be read together. The fundamental error, as I think, in the Lord Ordinary's judgment is that he reads the rule as if it stood alone without the note.

But it was contended on behalf of the pursuers that if it could be shown on the evidence that at the time when the "Gala" ported the second time the two vessels would in point of fact have passed clear of one another had each maintained her course, then the master of the "Gala" must be held to have violated the rule, and, even if a good and cautious seaman would have been justified in the circumstances as they then appeared to him in coming to a conclusion that a collision could not have been avoided

by the action of the giving-way vessel alone, nevertheless the standing-on vessel would be in violation of the rule. This is apparently the view of the Lord Ordinary, for he says in his opinion—"But as I read the Regulations and relative decisions the master of the ship which has to give way must assume, but the master of the ship which has to keep its course may not assume. The former must assume that the other ship will keep her course, the latter must keep his course and assume nothing as regards the action of the crossing ship." I disagree entirely with the view here expressed by the Lord Ordinary. In my opinion the master of the ship which has to keep her course and speed is bound to assume that the other vessel will keep out of her way. But he is not bound to proceed on that assumption until a collision occurs. There comes a point of time when he must assume, and act upon the assumption, that a collision cannot be avoided by the action of the giving-way vessel alone. When that time comes then he must "take such action as will best aid to avert collision."

That is the law, as I hold, laid down in Article 21 and appended note. For I repeat rule and note must be read together. There remains the question, when does the time arrive that the standing-on vessel must assume that collision cannot be avoided by the action of the giving-way vessel alone? The answer is—when her master in the exercise of good seamanship so determines having regard to the circumstances of the situation in which he finds himself. It is and must be a question of skilful and cautious seamanship. In the proved circumstances, how would a skilful and cautious seaman having the rule and note in mind act? He cannot be certain that the time to act has come. He must act according to the best of his judgment. He may act too soon or he may act too late, but if he acts as a prudent and skilful sailor would in our opinion have acted, then he is in my opinion absolved from blame. We must not expect impossibilities. We must not judge a careful seaman hardly. We must not try his conduct by mathematical calculations subsequently made. Confessedly he is placed in an extremely difficult position, especially at night and in drizzling rain as was the case here. Now in the present instance it is common ground that the "Gala" by porting her helm and reversing her engines did take "such action as would best aid to avert collision." The propriety of this manœuvre was not challenged. And the sole ground of fault that was maintained against her before us was that she acted at all. It was argued that she ought to have maintained her course and speed, and that if she had done so no collision would have occurred. Her captain acted, he says, when he judged the vessels to be about two ship's lengths apart, or about 500 feet. He is supported by other witnesses in the case, and this I hold to be proved. If this be so, then our nautical assessors advise us that her captain was justified in thinking that collision could not be avoided by the action of the "Eidsvaag" alone, and was bound therefore under the rule to act. He acted therefore as a skilful and cautious seaman would under the circumstances have acted, and hence is in my opinion free from blame, I do not doubt that it is for the master of the holding-on ship to explain why he ceased to maintain his course and speed. But for my own part I must say that if a seaman of skill and experience, proved to have been at the post of duty and carefully watching the movements of the giving-way ship, depones that in his judgment the time had come to act I would as a general rule accept his statement as conclusive. It must not be forgotten that Rule 21 and its note place the master of the holding-on ship in an extremely difficult position. He has to assume, at a point of time which no one can accurately determine, that another ship of which he probably knows nothing is deliberately about to break the rules. I ought to add that I can find no support in the evidence for the view that the ships were a quarter of a mile apart when the "Gala" ported a second time, although this view seems to have commended itself to the Lord Ordinary. The vessels may have been, as our nautical assessors consider, calculating from data more or less uncertain, 1000 feet apart when the "Gala" ported the second time. Even if this were so they advise that the master of the "Gala" was justified in acting as he did. For at that distance apart he had, so say our nautical assessors, no means of either determining the exact course of the "Eidsvaag" or the distance the vessels were apart. He had nothing to go upon save his judgment as a skilful and cautious seaman. And on that as I hold he was bound to act.

LORD JUSTICE-CLERK—In this case the accounts given on record by the two vessels are quite irreconcilable.

The pursuers were cargo owners on the "Eidsvaag" and they claim damages against the owners of the "Gala" because of a collision which took place off Flamborough Head, as a result of which the "Eidsvaag" and her cargo were sunk. Little or no damage was done to the "Gala" and there is no counter claim.

The pursuers aver that the vessels when they first sighted each other were passing ships—green to green—and that if they had both held on they would have passed each other in safety. But they say the "Gala," for some unexplained reason, when close to the "Eidsvaag" suddenly altered her helm and opened her red light to the "Eidsvaag," when the latter could do nothing effective to avoid a collision, and struck the "Eidsvaag" on the starboard side, with the result that the latter sank in about an hour.

The "Gala" met these averments with a totally different account as to the position of the vessels. Her story was so thoroughly different from that of the pursuers that according to proper pleading it should have been set out in a separate statement of facts to which the pursuers should have been ordered to lodge specific answers—a process corresponding to what used to be termed a revisal of the pleadings. Instead of adopt-

ing this, the obviously proper course, the "Gala" chose to tack on her account of what took place by way of explanations to her answer to the pursuers' case. The result was a perfunctory and entirely inadequate reply by the pursuers to the defenders' explanations instead of a detailed and circumstantial answer which would have been given had there been a separate statement of facts. Both parties concurred in this improper and insufficient method of making up the record. In the result, though I understand the point was not taken before the Lord Ordinary, and accordingly he does not deal with it in his opinion, it was argued before us that, there being no question that the pursuers' case of passing ships had not been established, the defenders were entitled on the pleadings to be assoilzied inasmuch as the pursuers had not put upon record the case which they argued not only before the Lord Ordinary but also before the Second Division and at the further hearing before the Seven Judges, videlicet—that the "Gala" had failed to justify her breach of Article 21 of the Regulations.

In my opinion this argument for the defenders proceeds on a misapprehension of the position. The proof, so far at least as the proof led after the pursuers' case was closed, was conducted on the basis of a case of crossing ships and a breach by the "Gala" of said Article 21, without any objection being taken by the defenders and without the point being argued before the Lord Ordinary. But apart from any such considerations the point is in itself I think a bad one, pressed to the extent to which the defenders seek to press it. The "Gala's" case as stated on the record is that the ships were not passing ships as the pursuers allege, but that they were from the very first crossing ships—the "Eidsvaag's" green light being open to the "Gala" and the "Gala's" red light open to the "Eidsvaag" —the latter vessel having the "Gala" on her starboard side so as to make Article 19 applicable and to put on the "Eidsvaag" the duty of keeping out of the way while the "Gala" should have kept her course and speed.

It is now admitted that on the proof the "Gala's" account is accurate so far as the position of the vessels relative to each other was concerned so as to bring into operation Articles 19 and 21, and it is not now contested that the "Eidsvaag" failed duly to observe Article 19 (and also, as it seems to me to follow, Articles 22 and 23), and we were asked to deal with the case on the footing that fault on the part of the "Eidsvaag" was no longer disputed.

But it was in my opinion a necessary part of the defenders' case, which was that the "Gala" had not kept her course and speed in terms of Rule 21, to aver and to prove that she was justified in disregarding that rule. The "Gala" accordingly stated in her answer 3—"The two vessels continued to approach each other without any appreciable alteration of bearing until the master of the s.s. 'Gala' saw that the other vessel, which turned out to be the s.s. 'Eidsvaag,' was not keeping out of the s.s. 'Gala's' way by porting her helm and passing under the 'Gala's' stern, as it was her duty to do, and that it would be necessary for him to take action if a collision was to be avoided. He accordingly put his helm hard a-port and at the same time gave one short blast on the whistle." The "Gala's" case therefore was a justified failure to observe Article 21, and the pursuers at adjustment added, *inter alia*, this sentence—"*Quoad ultra* the statements in answer in so far as they do not coincide herewith are denied." In my opinion there was thus put in issue, though not very satisfactorily, the question whether the "Gala" was justified in disregarding Rule 21, as admittedly she did, by hard a-porting just before the collision. The case was conducted on the footing that this issue was duly raised, and it is now in my opinion too late for the defenders to press the argument on the pleadings which they have now raised.

I observe (merely to show that I have not overlooked the averments) that the pursuers in the substantive and affirmative statement of their case say—"The 'Eidsvaag' continued her course, and if the 'Gala had also continued her course, as she ought to have done, both vessels would have passed clear of each other on the starboard side." They further aver in condescendence 4—"The said collision was solely due to the master of the 'Gala' porting his helm and altering his course to cross the bows of the 'Eidsvaag' when the approaching vessels were so close to each other that it was impossible for the 'Eidsvaag' by any manœuvre on her part to avoid the collision." These, however, I regard as subsidiary, though not unimportant averments, embarrassed no doubt by their being embodied in a passing-ship case which has now been abandoned.

In the argument as to the state and effect of the pleadings therefore, while unqualifiedly accepting what Lord Watson said in the "*Thames*" and "*Lutetia*" and the force of the phrase *secundum allegatum et probatum*, I am against the defenders, and think the case must be decided on the merits, viz.—Has the "Gala" succeeded in establishing that she was justified in disregarding Article 21?

As to the duty of the holding-on ship, the law is in my opinion rightly stated in Marsden (p. 392), when he says—"The rule requiring a ship to keep her course and speed must be observed strictly. So long as there is a possibility of the other ship clearing her she must stand on." He points out in a later passage (p. 394)—"This rule is perhaps the most difficult of all the regulations for seamen to adhere to," owing to the difficulty in determining when the time has arrived to take action, for if he acts too soon he may cause mischief, and yet the time may come when he must take action—some latitude is allowed in determining whether he has waited too long or acted too soon. But apart from this question of time I think the *onus* on a ship which deliberately departs from the rule is a heavy one. In the "*Agra*" (L.R. 1 P.C. 501) the judgment of the Court, which was a very strong one, contains this

passage — "That the vessel which was the holding-on vessel departed from the 18th Rule is clear, for she did not keep her course; and that this departure had not the effect of avoiding danger is also clear, for a collision of a most disastrous character occurred. Now their Lordships are clearly of opinion that if a ship bound to keep her course under the 18th Rule justifies her departure from that rule under the words of the 19th Rule she takes upon herself the obligation of showing both that her departure was at the time it took place necessary in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid the danger." The rules there considered were those of 1863, but the observations by the Court are as applicable in my opinion to the rules of 1910 with which we are now dealing.

In the case of *Windram* v. *Robertson*, (7 F. 665, 42 S.L.R. 602) Lord President Dunedin, dealing with the application of the rules of collision at sea, referred to Lord Blackburn's judgment in the "*Khedive*," and he said Lord Blackburn felt it necessary to lay down as the law that the real meaning of these rules of collision at sea was not that they were hints to people as to what they had best do in a certain condition of circumstances, but that they were absolute rules to be disregarded at the peril of those disregarding them, and the breach of which was only to be excused if a case of absolute necessity was made out. Later on he adds—"These rules are things which cannot be broken except at your own peril."

Still later he says—"If you do not follow the rule you neglect it at your own peril. You may be able as a matter of proof, the *onus* being upon you, to show that following the rule you would have increased the risk of collision. . . . The *onus* is upon you, and if you do not discharge it then you cannot be excused if you have not followed the rule." He then refers to action taken in the agony of collision and adds, "Even there I think he would need to show not only that he did what he thought was best, but what other seamen would think was best, for the purpose of avoiding a collision. But if a person through no fault of his own is in a state, from the circumstances of the case, in which he cannot tell what is the right and proper manœuvre, then more than ever it seems he is absolutely bound to stick to the rules and to leave them at his own peril."

In my opinion these observations are as pertinent to a consideration of the rules and circumstances we are now dealing with as to those concerned in the case of *Windram*.

The necessity of strictly adhering to Rule 21 was again emphasised in the "*Orduna*" ([1919] P. 381).

The Regulations are regulations for preventing collisions at sea, and the test for determining whether there is risk of collision is put thus—If the bearing of an approaching vessel does not appreciately change, risk of collision should be deemed to exist.

Now in this case the "Gala" when the "Eidsvaag's" light was first seen mistook it for the Smithic Buoy Light. How she came to make this mistake is not satisfactorily explained. Captain Hannah says of the buoy light—"It is a white light. . . . It has a slight distinctive something but I cannot tell what sort of flash it is. . . . I know it perfectly well." It is marked on the chart which was before us at the debate as an occulting light. I think this mistake was not one which the master of the "Gala" should have made—one result of it was that he ported the "Gala" a couple of points, and so, unconsciously it may be but carelessly and by faulty navigation, broke the rule, and it may be aggravated the effect of the later porting. Having ported these two points the "Gala" was steadied on a course N. by E. ½ E. and half a minute afterwards the light was recognised as the green light of a crossing steamer. At this time the green light was thought to be about a mile away. For about four minutes there was no alteration in the bearing of the green light, and those on the "Gala" were expecting a collision. Then it is said that when the ships came within two ships' lengths (under 500 feet), the captain of the "Gala" put his helm hard aport, and after a short but appreciable time the loom of the hull of the "Eidsvaag" began to be seen just before the vessel struck. The "Gala's" engines were ordered astern, but I think this order had not taken effect before the collision occurred. The "Gala" struck the "Eidsvaag" "with the port side of our stem and quite at right angles abaft the bridge and the blow was from aft forward."

There are two points especially in controversy—(1) How far apart were the vessels when the "Gala" hard aported? (2) How many points did the "Gala" come round on her hard aport helm?

(*a*) The master and first officer of the "Gala" say two ships' lengths. I think this under-estimates the distance. Hutton, the man at the wheel, says when he got the order hard aport the "Eidsvaag" was a quarter of a mile away or less, and he adds that when he got the order he "thought there was going to be a collision." The look-out man, Nicholson, says that when the green light of the "Eidsvaag" was recognised it was about a quarter of a mile away and that was before the order to the "Gala" to hard aport was given. The Lord Ordinary's assessor agreed with Hutton that when the "Gala" ported the distance between the ships was about a quarter of a mile, basing this view, as I understand, mainly on the number of points the "Gala" had come round on her port helm and on the direction of impact at the collision, and the assessors who advised us accepted this distance as about 1000 feet. I do not think the "Gala" has proved that when she hard a-ported the vessels were only 500 feet apart. On the contrary, I think the fair import of the evidence is that they were from 1000 feet to a quarter of a mile apart.

We are advised that at 1000 feet apart the "Eidsvaag" could have avoided the collision by her own action, and I think on the advice we have received, if the vessels were 1000 feet apart when the "Gala" hard a-ported, a collision would have been

avoided if the "Gala" had held on her course and speed, *i.e.*, had not broken the rule.

(*b*) I think the fair result of the evidence is that after the "Gala" hard a-ported she came round five or six points. The master of the "Gala," asked as to the number of the points she swung through, says—"I could not do it accurately, but I would say perhaps three points we might have gone in the time." The first officer says—"She would pay off a good bit. . . . I agree that she must have paid off at least five or six points in order to get into the position which I have described."

Our advisers added a note to the answers they gave to the questions put to them as follows:—"We wish to point out that when the master of the 'Gala' put his helm hard a-port at the point when the vessels were about 1000 feet apart, he had no means of either determining the exact course of the 'Eidsvaag' or the distance the vessels were apart." If that advice is sound, any helm action on the part of the "Gala" was in my opinion wrong, and especially when it was in breach of Regulation 21. But further, I think on the evidence hard a-port was a wrong manœuvre under the circumstances on the part of the "Gala." I think the "Gala" would have cleared if she had held on, and still more would she have cleared if she had starboarded instead of porting. Her master says if we had starboarded "we might have gone clear." The first officer when asked, "If you had instead of porting put any starboard helm on you would have cleared?" gave as his reply, "Oh, yes." He says if we had been a second or two later we would have cleared, and when asked "If at any time, the other boat holding her course, you had starboarded your helm that would have avoided the collision?" his answer was "Yes."

I note also that the "Gala" on record says that the "Eidsvaag" did not starboard her helm as she had signalled she was about to do." The "Eidsvaag" was admittedly in fault. The "Gala" admittedly broke Rule 21; it lay upon her—and with a heavy *onus* upon her in this respect—to justify her so doing. In my opinion she has failed to discharge this *onus*.

No question was raised as to the Lord Ordinary's apportionment. I think the result he arrived at was right as expressed in the findings in his interlocutor.

LORD DUNDAS—It is not disputed that in this collision the "Eidsvaag" was to blame, but I have come to the conclusion, differing from the Lord Ordinary, that the "Gala" was not in fault, and ought to be assoilzied.

The pursuers' case on record is that the "Eidsvaag" travelling southward and the "Gala" travelling northward were on parallel courses, and would have passed one another safely, but that the "Gala," when the vessels were about two cable lengths distant from one another, ported her helm, went to starboard, and crashing into the "Eidsvaag," sank her. This case has gone by the board. The Lord Ordinary's judgment proceeds, as the debate before us proceeded, upon the view that the ships were on crossing courses; the "Eidsvaag" being, under Article 19 of the Regulations, in the position of the giving-way, and the "Gala" of the standing-on, vessel. The Lord Ordinary has held the "Gala" to be in fault because she took action by directing her course to starboard too soon. There seems to be no record for this view—if indeed the pursuers' record is not inconsistent with it, but in any case it is not, in my judgment, supported by the evidence. The Lord Ordinary holds that when the "Gala" took action the vessels were about a quarter of a mile apart. I think that upon the evidence his lordship is mistaken, and that the distance between the vessels was much less—probably not more than two ship's length, or about 500 feet. If this be so, it seems to me that the "Gala" has justified her action. Her master was in a very difficult position—one of the most difficult I suppose in which an officer could find himself. His duty no doubt was, in terms of Article 21, to keep his course and speed, not, however, as I think—differing from what seems to be the view of the Lord Ordinary—to do so until collision occurred, but only to a point when a skilled navigator would be justified in believing that collision could not be avoided by any action on the part of the other vessel. This duty it is, in my judgment, proved that he fulfilled. Not only is Captain Hannah's own evidence to this effect, but it seems to be completely supported by that of the "Eidsvaag's" captain. And we are advised by our nautical assessors that, assuming the distance between the vessels to have been 500 feet, or even a somewhat greater distance, when the "Gala" took action, a skilful and cautious seaman would have been justified in thinking the collision could not be avoided by action on the part of the "Eidsvaag" alone. In my judgment, therefore, the Lord Ordinary was wrong in finding the "Gala" to be in fault, and she ought to be assoilzied.

If this view be correct it is not necessary to decide whether or not upon a contrary hypothesis the "Eidsvaag" would have been entitled, looking to the state of her pleadings—which her counsel deliberately declined to amend—to claim judgment in her favour. It seems to me to be at least doubtful whether she could have done so, though I am not sure that the pursuers alone are responsible for the utter mess in which we find this record. I recognise that in cases of this sort it is often difficult for agents and counsel to set forth their pleadings with accuracy owing to the imperfect information at their command. But it does not follow that a party should be entitled to judgment after proof upon a record which does not give fair notice of—still less upon one which may be inconsistent with—the case disclosed in evidence.

LORD SALVESEN—Two entirely irreconcilable accounts of the collision out of which this action arises are given by the master of the "Eidsvaag," corroborated so far by a single member of his crew on the one hand

and by the master and crew of the "Gala" on the other. According to the former account the "Eidsvaag" was proceeding on a course S.S.E. ½E., when she sighted the green light of another steamer about three points on her starboard bow. The vessels being thus starboard to starboard would have passed each other in perfect safety if they had kept on their respective courses, but it is said that the "Gala" suddenly altered her course to starboard and went across the bows of the "Eidsvaag" when not more than two cable-lengths off, with the result that although the "Eidsvaag" at once put her helm hard to starboard the vessels came into collision and the "Eidsvaag" was sunk. In his examination-in-chief this, which is the story told upon record, is so far supported by the master of the "Eidsvaag," but he broke down on cross-examination, and the Lord Ordinary, as I think rightly, entirely rejected his account of the collision.

The story of the master and mate of the "Gala," on the other hand, is that when they first sighted a light, which afterwards proved to be the green light of the "Eidsvaag," from a mile to a mile and a half distant and bearing three-quarters of a point on the port bow, they were unable to ascertain its colour in the somewhat hazy weather which prevailed and took it for the light, of the North Smithic Buoy which they were expecting to see on the course which they were steering although they were surprised at finding it bearing so narrowly upon their port bow. As this light has been placed to warn shipping from a shallow area which it dominates the master ordered his helm to be ported so as to give the light a wider berth. He proceeded for some little distance on his original course on which the helm had been steadied and which was N. by E. ½E. when he noticed that the light assumed a green colour. He and his chief officer continued to watch the light which was very low down and did not appear to be a strong light, and they formed the conclusion that it belonged to a steamer which was not carrying its masthead light but was travelling fast. They arrived at this conclusion from the fact that the light was not appreciably changing its bearing on their port bow. As the approaching steamer had the "Gala" on her starboard bow it was the duty of the "Gala" according to the sailing rules to maintain her course and speed and this she did until the vessels were very close. He then formed the opinion that as the "Eidsvaag" was not altering her course in any way there was a very serious risk of collision unless he took helm action, and he accordingly ordered the helm to be put hard aport, at the same time signalling that he was doing so by giving the customary short blast. He heard the "Eidsvaag" answer with two short blasts and noticed that her head commenced to pay off to port. He again blew a single short blast on his whistle, and as the loom of the "Eidsvaag" became visible he ordered his engines to be put hard astern. By that time the vessels were so close that the order had not taken effect and the vessels came into collision, the "Gala" striking the starboard side of the "Eidsvaag" with the port side of her stem which was pointing sightly forward. He attributes the collision entirely to the fault of the "Eidsvaag" because it was her duty as the giving-way vessel to have ported her helm when the two ships were at a considerable distance apart, in which case he would have maintained his course and speed and no collision could have occurred. He defends his action in ordering the helm to be put hard a-port on the ground that when he did so there was imminent risk of collision unless he had taken action, and he blames the "Eidsvaag" for having rendered this manœuvre hopeless of good results by porting her helm so as to bring her length across the vessel's bows.

I ought to have explained that according to the evidence of the captain of the "Eidsvaag" she was making some 7 or 7½ knots an hour, while the master of the "Gala" puts his own speed at about 8½ or 9 knots. The master of the "Eidsvaag" admits, however, that his vessel is capable of going 9 or even 9½ knots in fine weather and that he was going at full speed on the occasion in question although he states that the engines were at reduced pressure. The conclusion of the Lord Ordinary is that the two vessels were approaching each other at approximately equal speeds, the combined speeds being from 17 to 18 knots per hour.

Counsel for the "Eidsvaag" admitted that he could not successfully attack the judgment of the Lord Ordinary, which was to the effect that the "Eidsvaag" was to blame for not keeping out of the way of the "Gala" by timeously porting her helm as she ought to have done, and at a subsequent stage by her not having reversed her engines, nor did he attack the apportionment of the blame under which the responsibility of the "Eidsvaag" for the collision was held to be twice as great as that of the "Gala." He maintained, however, that the Lord Ordinary had reached a sound result when he held that the "Gala" was in fault in failing to maintain her course and speed, and that he had rightly held that she had failed to prove that if she had maintained her course and speed the collision would nevertheless have occurred. He also maintained that the first porting of the helm of the "Gala" was a negligent act, and that but for this first porting when the "Eidsvaag's" light was mistaken for that of the North Smithic Buoy, no collision would have occurred.

As regards this latter point I am in substantial agreement with the Lord Ordinary. It must be kept in view that the "Eidsvaag" was not exhibiting a mast-head light (no doubt quite legitimately looking to the fact of the danger from submarines), and that her side lights were burning with a subdued light. These two circumstances, especially in view of the weather not being clear, although sufficiently so for the vessels to be navigated at full speed, added greatly to the difficulties of the master of the "Gala" in forming a correct judgment as to what the light which he saw actually was. Looking at it as both he and his

chief officer did, through their glasses, they formed the conclusion that it was a white light, and as they expected to be in the neighbourhood of the North Smithic Buoy, they not unnaturally concluded that it was the light on that buoy which they saw. As events proved they were mistaken, but I cannot hold that the master of the "Gala" was to blame for an error in fact which he could not ascertain to be so until his vessel had come much closer to the light, and he was able to make out what its true colour was. On the assumption that the light was what he judged it to be, he acted quite properly in giving the light a somewhat wider berth.

But even if I had taken a different view, this original porting of the helm of the "Gala" had in my opinion absolutely nothing to do with the collision which followed, for the "Eidsvaag" was not misled by it as she had not seen the lights of the approaching steamer, and according to her own master's evidence did not pick up the light of the "Gala" until she was only half a mile distant. It is difficult to understand how this evidence is consistent with a good lookout having been kept on board the "Eidsvaag." The masthead light of the "Gala," which was burning brightly, ought to have been seen at a considerably greater distance than that at which the green light of the "Eidsvaag" was observed by those on board the "Gala," and indeed ought to have been seen about two miles off. The red light of the "Gala" was also burning brightly and ought to have been seen at a much greater distance off than half-a-mile. I reach the conclusion that there was a very defective lookout on board the "Eidsvaag" and probably this was the initial fault which led to the disaster.

As the evidence of the captain of the "Eidsvaag" cannot safely be appealed to the case against the "Gala" must stand on the evidence led on her behalf. The story of her master and chief officer is that the "Gala" maintained her course and speed until the vessels were about two ship's lengths, or say 500 feet, apart; that the "Eidsvaag" was then bearing from 2½ to 3 points on the "Gala's" port bow, and that a collision was inevitable unless immediate action were taken by those on board the "Gala." We are advised by the nautical assessors that on this assumption the vessels were so close that the "Eidsvaag" could not by her own action alone have avoided a collision. If so it cannot be held, as the Lord Ordinary has done, that the "Gala" acted too soon.

The Lord Ordinary, however, has held that the "Gala" ported her helm while the two vessels were still a quarter of a mile apart, and that at that distance he is not satisfied that the "Eidsvaag" could not, if she had taken action in accordance with the duty incumbent upon her, have avoided the collision. I am not at all satisfied that he is entitled to hold that the distance was a quarter of a mile on the grounds which he states. He relies upon the evidence of the man at the helm of the "Gala," who puts the distance at a quarter of a mile or less, but in cross-examination he says—"I did not see the loom of the vessel until she was very close, when we hard ported. I should say the vessel was then less than a quarter of a mile away." Now it is common ground that the loom of the "Eidsvaag" would not be observed at a quarter of a mile away, or at much more than a ship's length. The night was very dark and there was a slight haze and some rain. It was not Hutton's duty to be attending to the navigation. His primary duty was to steer, and I think his estimate of distance accordingly is likely to be far less accurate than that of the two officers who had been observing the light of the "Eidsvaag" continuously from the time that that light first became visible. It is also to be noted that the only member of the "Eidsvaag's" crew examined puts the distance between the ships immediately before he got the order "hard a-starboard" at only a cable's length or 600 feet, which is less than half the distance which the Lord Ordinary assumes when he estimates it at a quarter of a mile. His other ground for preferring his own view of the distance is that too much happened between the time when the first order to port was given and the collision to be consistent with the vessels having been only two ships' lengths apart when that order was given. There is no evidence on this subject nor is the point mooted in the cross-examination of any of the witnesses, and his conclusion does not appear to me to be well founded. A short blast need not occupy more than a second, and it may quite well have been repeated a few seconds later. At the speed at which the two vessels were approaching each other they would cover a quarter of a mile in 40 or 50 seconds, and half that distance in half the time. In 20 seconds I see no reason why the signals that are spoken to by the master of the "Gala" might not all have been given. The great weight of the evidence in my opinion is to the effect that the vessels were not more than 500 or 600 feet apart when the master of the "Gala" ordered the helm to be put hard aport. It is also, perhaps, worth noting that the reason given by the master of the "Eidsvaag" for giving the order to hard a-starboard his helm, which followed immediately on the order to port from the "Gala," was that the vessels were then too close for him to have ported with safety.

Assuming my view of the evidence to be well founded as to the distance between the vessels and the bearing of the "Eidsvaag" on the "Gala's" port bow, then I do not think it can for a moment be maintained that the "Gala" acted too soon. According to the advice we have received from the nautical assessors a collision was at that time imminent unless both vessels took appropriate action. Whether it could have been averted even if the "Eidsvaag" had simultaneously ported, which was the proper manœuvre, or had in addition reversed her engines full speed astern, may be doubtful, but it is perfectly certain that if neither vessel had changed her course and speed a collision was inevitable.

But even if I had reached the same conclusion in fact as the Lord Ordinary that the two vessels were a quarter of a mile apart at the time that the "Gala" acted by porting her helm, I cannot hold that the "Gala" would have been to blame. It must always be kept in view that the master of the "Gala" did not know the precise course on which the approaching steamer was proceeding. All he could see was a green light, and as the bearings of that green light to his own ship were not appreciably changing, he was entitled to conclude that there was risk of collision of a very grave kind unless he took action. The question does not appear to me to be whether in fact the two vessels might have cleared each other, in view of the courses which we now know they were respectively steering, but whether the master of the "Gala" had reason to conclude that the "Eidsvaag" was not going to give way, and that if the two vessels proceeded on their courses they would probably come into collision. The rule that a vessel is to maintain her course and speed when she is in the position of the "holding-on" vessel is not an absolute one—indeed she will be held to blame if she does so to the end and makes no effort to avoid a collision of which she sees there is immediate danger. It has been often said that there is no position so difficult as that of the master of the "holding-on" vessel when he finds that the vessel which ought to give way is taking no steps towards avoiding a collision. If he acts too soon he may be held to blame; if he acts too late he may also be held to blame. Here at the time when he did take action he was within 40 seconds of the point at which a collision actually occurred. Is he to be condemned because he did not wait 10 or 20 seconds longer before acting? In my opinion it is impossible to judge people by so strict a standard, and I think the master of the "Gala," even if he took helm action at a distance of a quarter of a mile was doing just what any prudent and careful navigator would have done in the circumstances.

I am confirmed in this view by the judgment of Sir Samuel Evans in the case of the "*Tempus*," 1913 P.D. 166. The facts disclosed in that case are almost identical with those which the Lord Ordinary has assumed, for the "Tempus" took action when she was within a quarter of a mile of the other vessel, which was then bearing about 1½ points on her port bow. Exactly the same manœuvre was executed by the "giving-way" vessel, for she hard a-starboarded about the same time. The vessels were approaching each other at substantially the same speed as the two vessels in the present case. Sir Samuel Evans says (p. 170)—"A quarter of a mile sounds a considerable distance, but when we remember the speeds of these vessels and picture them approaching each other, they were at pretty close quarters. Apart from any lengthening of the distance by reason of the swinging, as the vessels were approaching at these speeds that quarter of a mile means that one vessel and the other had roughly two of their own lengths to travel, and they would cover the distance in something like 40 seconds." Now these remarks apply in terms to the present case, and the "Tempus" was found not to blame although when she hard a-ported she failed to give the signal that was given in the present case by the "Gala" of her change of course. I take it that it was on this latter point alone that the President of the Probate Division found some difficulty. He was advised, however, by the Elder Brethren "that under article 21 the 'Tempus' could not be expected to take action earlier than she did, that she did not act too late, and that in the agony she did not act improperly," and with this view the learned Judge coincided.

The case of the "*Irmgard*" (1910 S.C. 655, 47 S.L.R. 513), decided in this Court, where my judgment holding the "Irmgard" partly to blame for the collision was reversed, appears to me also to be in point. Indeed the present case is very much *a fortiori*, for the collision between the "Irmgard" and the "Strathfillan" occurred in broad daylight, so that each vessel had the opportunity of seeing precisely the course on which the other was going. Now there the master of the "Irmgard" waited until the vessels were only 1½ ships' lengths away before he took action, this being less than half the distance at which the master of the "Gala" acted. I held that he ought to have acted earlier, but the Second Division took a different view and held that he was not in any way to blame. The Lord-Justice Clerk says (p. 666)—"He (the master of the 'Irmgard') was necessarily forced at the last moment to form an opinion whether he should act according to Article 21 or the note to Article 21, or Article 27 or Article 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 Articles 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 at all until it may be too late to do anything with effect, and almost certain to do harm if he acts a moment too soon." All these remarks apply in the most pointed way to the position of the master of the "Gala," with the additional force that is derived from the fact that unlike the master of the "Irmgard" he could not form any accurate judgment as to the precise course which the approaching vessel was steering.

The two cases which I have quoted are, I think, most apposite, for we are not dealing here with a rule such as that which was applied in the well-known case of the "*Khedive*," where the rule as to stopping and reversing was held to be absolute and inflexible. The rule as to keeping course and speed is only absolute up to a point which must be left to the discretion of a competent navigator as to when the time has come for him to act. The "Eidsvaag" was in my opinion entirely to blame for the collision. She was to blame for not having earlier seen the lights of the "Gala," which were of normal brilliancy. She was to blame for not having timeously ported her helm so as to pass under the "Gala's" stern, and she was further to blame when the "Gala"

paid off to starboard in hard a-starboarding so as to cross the "Gala's" bows. Had the "Gala" taken any other action than she did I think she would have been to blame, for it would have been unseamanlike to starboard when the approaching vessel was on her port bow, or to have stopped and reversed when in that position. The only chance of averting a collision at the time she did act was to port as she did, expecting, as she was entitled to do, that the other vessel would port at the same time, or port and in addition reverse her engines.

LORD MACKENZIE—It is proved in my opinion that the master of the "Gala," the stand-on ship, was justified in taking action when he did. If so the correctness of his manœuvre—putting his helm hard aport—was not challenged by the pursuers in the argument of their counsel to us. No suggestion was made in the case that he ought to have stopped and reversed, and the Court are therefore relieved from the necessity of considering that question.

The case argued to us by counsel for the pursuers was that the master of the "Gala" should have held on and that he acted too soon. This is a charge of breach of Rule 21. The evidence negatives this in my opinion, because when the master of the "Gala" went hard aport the moment had arrived when he found himself so close to the "Eidsvaag," the giving-way vessel, that collision could not be avoided by the action of the "Eidsvaag" alone. This, under the note to Rule 21 and Rule 27, justified the master of the "Gala" in taking action. Three views are possible of the distance the "Gala" was from the "Eidsvaag" when the helm of the "Gala" was put hard aport. (1) That the "Gala" was quarter of a mile from the "Eidsvaag." This view depends upon the evidence of Hutton, and his evidence does not appear to me to be supported by the weight of the evidence, and I reject it. (2) That the "Gala" was about two ship's lengths or about 500 feet from the "Eidsvaag." This is what the master of the "Gala" says, and he is sufficiently corroborated. It is the view of the facts which, upon the evidence led in the case, I take. (3) That the "Gala" was 1000 feet from the "Eidsvaag" at the time when the master of the "Gala" hard aported. This I understand is the view taken by the nautical assessors. Their conclusion is based on calculations working back from the angle of impact and based upon the number of points the "Eidsvaag" and "Gala" swung, as well as the speed and courses of the respective vessels. Though I feel bound on the question of fact to take the distance as being 500 feet, the conclusion I arrive at is the same if the distance be taken to have been 1000 feet.

Whether it is held that the distance at which the "Gala" took action was 500 feet or 1000 feet, in either case the master was not to blame. If the distance was 500 feet, we are advised by the assessors that the "Gala" would have struck the "Eidsvaag" about 50 feet from her stern had Rule 21 been rigidly adhered to. If the distance was 1000 feet, we are advised that it was the duty of a skilful seaman to take action, *i.e.*, that he was not to blame if he did not then rigidly adhere to Rule 21 and keep his own course and speed. The master of the "Gala," when the vessels were 1000 feet apart had no means of determining the exact course of the "Eidsvaag" or the distance the vessels were apart.

If the view be taken that the distance was 1000 feet, it is said this raises a question of law upon the construction of the regulations. The contention on behalf of the "Eidsvaag" was that if it can be mathematically demonstrated that by standing-on the "Gala" would have cleared the "Eidsvaag," then the master of the "Gala" was in fault in not standing-on. According to this view there is no room for discretion on the part of the master of the stand-on ship. As the Lord Ordinary puts it—"But as I read the regulations and the relative decisions the master of the ship which has to give way must assume, but the master of the ship which has to keep its course may not assume. The former must assume that the other ship will keep her course, the latter must keep his course and assume nothing as regards the action of the crossing ship." I am unable to agree with this view. There comes a moment when the master of the stand-on vessel is bound to assume, and to assume that there is something wrong, calling for action on his part. When that moment arrived is the point at issue in this as in the other cases. There are numerous judgments which lay down that Rule 21 must be rigidly adhered to, and that a seaman who departs from it does so at his peril. This means that if he does not follow the rule he will "need to show, not only that he did what he thought best, but what other seamen would think was best, for the purpose of avoiding a collision." This is the language of the Lord President (Dunedin) in *Windram* v. *Robertson*, (7 F. at p. 673), a case in which the previous authorities were reviewed. It applies to the present case, and means that Captain Hannah was not the final judge. His conduct in departing from the stand-on rule at the time he did may be referred to the nautical assessors. A good deal was said in argument about the *onus* being upon the master of the "Gala." No doubt this is so, but when the whole facts in the case have been ascertained this way of putting the matter becomes of little assistance. It is of the highest importance that the stringent application of Rule 21 should not be unduly relaxed, because that way lies the path of greatest safety. This view is reflected in many judgments from the days of Dr Lushington down to the recent time of Sir Samuel Evans. As Lord Low points out in the "*Irmgard*" case (*Beucker* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1910 S.C. 655, at p. 668, 47 S.L.R. 513) the master of a ship is not bound slavishly to adhere to a rule . . . "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." This appears to me to apply in terms to the present case, and judged by this standard the master of the "Gala" must be acquitted. The provisions of the Act of 1911 repealing the previous enactment raising a presumption of fault when there is breach of the regulations do not appear to make much difference to the law.

It only remains to say that the case presented on record by the pursuers is not the case upon which the Lord Ordinary has given judgment against the "Gala." We were asked to hold there was no record for the Lord Ordinary's judgment, and that it was incompetent to proceed on the ground disclosed in the Lord Ordinary's opinion. I am unable to take this view. No doubt the setting of the pursuers' case on record is different from that presented in evidence. The pursuers' case was that the vessels were on parallel not on crossing courses. I should have had great difficulty had my view of the evidence been different to what it is, in holding the master of the "Gala" in fault when he had not had proper notice to enable him to meet the specific charge now brought against him. I am of opinion that the case for the pursuers fails on the merits and that there was no fault on the part of the "Gala."

LORD GUTHRIE—I agree with the Lord Ordinary in thinking the "Eidsvaag" to blame for the collision in question, and I am of opinion, contrary to the view of the Lord Ordinary, that no fault has been established against the "Gala."

On the question of the record, as I read it the case found against the "Gala" by the Lord Ordinary is not only absent from but is contradictory of the record. On record the pursuers gave notice that they meant to prove first that the "Gala" before she began to manœuvre was on a parallel course with the "Eidsvaag," and that instead of manœuvring at the time she did she should have held on her course indefinitely. This seems to me notice to the "Gala" that no case was to be made against the vessel on crossing courses, and that she was not to be blamed for manœuvring too soon. It would not, however, necessarily follow that even without amendment of the record the case found proved by the Lord Ordinary against the "Gala" must be rejected. If it appeared that notwithstanding the absence of notice, and the fact that the case ultimately made and ultimately sustained was contradictory of the case made on record, that case had been in fact anticipated by the opposite party, and the whole facts relating to it had been fully gone into in chief and in cross, I am not prepared to say that in such very exceptional circumstances the Court would not be bound to deal with a case even in so unsatisfactory and irregular a position. In the present position of the proof in this case I am not satisfied that it falls within the exception above indicated. On the contrary, the pursuers admitted that their present case against the defenders is not to be found in the pursuers' evidence, but must be built up out of stray passages in evidence, particularly in the cross-examination of the defenders' witnesses. I should, accordingly, have been disposed to hold that the case now made against the "Gala" cannot be entertained on the pleadings and proof. I could not have decided against the defenders without feeling that they had been seriously prejudiced by the pursuer's pleadings, and by the method in which the pursuers conducted the case at the proof, with the result that they were thereby prevented from doing full justice to their case.

But it is not necessary to proceed on that ground, because I think that no fault has been established against the "Gala." At one time it appeared as if a sharp question of law was going to arise between the parties under Article 21 and relative note, taken along with Articles 27 and 29 of the Regulations for Preventing Collisions at Sea, namely, whether, supposing that when the "Gala," the holding-on ship, began to manœuvre, the "Eidsvaag," acting alone, could have manœuvred so as to avoid a collision by however small a distance, it did not follow that the "Gala" manœuvred too soon, and therefore broke the Regulations. I hold on the evidence that the "Gala" began to manœuvre at 500 feet from the "Eidsvaag." At that distance the nautical assessors tell us that, on the assumption of the facts as now ascertained, had the "Eidsvaag" made the proper manœuvre and the "Gala" held on her course, if the vessels had cleared, which they would probably have done, it would have been by a small margin such as no prudent seaman would have risked, looking to the impossibility in the circumstances for the "Gala" to form a reliable estimate of the course and speed of the "Eidsvaag" or the distance the vessels were apart. But no such question in the end arose. It was not maintained that the issue could be determined on a mere extent of clearance as subsequently ascertained without reference to what seamen might consider a safe margin to allow in the whole circumstances. As I understood, it was admitted that if the "Gala" first began to manœuvre at 500 feet, or any distance substantially under a quarter of a mile, she did not disobey the regulations. The question in the end came therefore to be one of fact, namely, whether instead of 500 feet or thereby the "Gala's" manœuvring did not begin at a quarter of a mile, a question on which, disagreeing with the Lord Ordinary, I hold it established that the proved distance was approximately two ships' lengths or 500 feet.

LORD CULLEN concurred with the opinion of the LORD PRESIDENT.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Find that the pursuers have failed to prove that the s.s. 'Gala,' the defenders' vessel, was to blame for the collision referred to on record: Assoilzie the defenders from the conclusions of the summons, and decern."

Counsel for the Pursuers (Respondents) — Hon. Wm. Watson, K.C. — Normand. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Reclaimers) — Sandeman, K.C. — Carmont. Agents — Beveridge, Sutherland, & Smith, W.S.

Friday, February 20.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

MITCHELL & MUIL LIMITED *v.* FENISCLIFFE PRODUCTS COMPANY, LIMITED, AND ANOTHER.

Process — Jurisdiction — Arrestment — Arrestable Subject—Claim and Counter Claim.

Arrestments to found jurisdiction were used in an action in the Sheriff Court. The defenders pleaded no jurisdiction, and as the result of a proof it was established that at the date of the arrestment the arrestee was due to the defenders, as appeared from his books, £286 odds; on the other hand the arrestee had prior thereto given a cheque for a larger sum to the defender to prepay a consignment of beef which was not delivered at the date of the arrestment, but against which the arrestee had obtained a delivery order. The arrestee never got delivery of the beef, and his claim against the defenders was ultimately adjusted at £525. *Held* that jurisdiction had not been validly founded, in respect that at the date of arrestment the payment by the cheque had the effect of extinguishing the indebtedness of £286, and that consequently nothing had been arrested. *Napier, Shanks, & Bell* v. *Halvorsen*, 1892, 19 R. 412, 29 S.L.R. 343, *followed, per* Lord Mackenzie. Graham Stewart, Diligence, at p. 256—"Although the defender has a claim of accounting against the arrestee, if the Court have allowed proof whether anything is due, and it appears that there is nothing due, jurisdiction will not be constituted"—*approved per* Lord Mackenzie.

Mitchell & Muil Limited, bakers, Aberdeen, *pursuers*, brought an action in the Sheriff Court at Aberdeen against The Feniscliffe Products Company, Limited, Blackburn, England, and another, *defenders*, concluding for decree for £194, 10s. Arrestments to found jurisdiction had been used.

The parties *averred, inter alia*—"(Cond. 5) The defenders have been rendered subject to the jurisdiction of this Court by arrestment *ad fundandam jurisdictionem*. (*Ans.* 5) Not known and not admitted."

The defenders *pleaded, inter alia*—"1. No jurisdiction."

The Sheriff-Substitute (LAING) having allowed and taken a proof on the question of jurisdiction pronounced the following interlocutor:—"Finds in fact (1) that on 4th February 1919, the date on which the pursuers used arrestments in the hands of William Watt Hepburn, produce merchant, Aberdeen, for the purpose of founding jurisdiction against the defenders, the said William Watt Hepburn was not due and indebted to them in any sum whatever; and (2) that said arrestment *ad fundandam jurisdictionem* did not attach any sum belonging to the defenders in the hands of the arrestee the said William Watt Hepburn; Therefore sustains the first plea-in-law for the defenders and dismisses the action."

Note—"The evidence given by Mr Hepburn, the arrestee, shows (1) that on 4th February 1919 he was due to the defenders a sum of £286, 16s.; and (2) that at the same date the defenders were due to him a much larger sum, which was finally adjusted at £525. That being the state of the accounts between them it is plain, as Mr Hepburn stated, that he was as at 4th February not due to the defenders a single penny. It was, however, maintained for the pursuers that it was sufficient to found jurisdiction if at the date when the arrestment was used Mr Hepburn as the arrestee was under an obligation to account to the defenders, even although as a result of an accounting between them it should be found that they were really debtors to him. On the authority of *Napier, Shanks, & Bell* v. *Halvorsen* (1892, 19 R. 412), it seems to me clear that the mere fact that at the date when the arrestment was used there existed an obligation on the part of the arrestee to account to the defenders, is not sufficient to found jurisdiction when it is in point of fact proved that at that date there was no sum whatever due by the arrestee to the defenders. The parties here have joined issue upon the question whether at 4th February 1919 Mr Hepburn had in his hands any sum of money belonging to the defenders, and as result of the proof it is clear that that question must be answered in the negative. The legal result therefore is that jurisdiction cannot be found to have been constituted. As Lord Adam in *Napier's* case, *supra*, said—'I know of no case in which jurisdiction has been sustained where it is ascertained in point of fact as here that nothing is covered by arrestment'; and referring to the argument founded on a claim to an accounting, Lord President (Robertson) said—'There is nothing in the cases to countenance the argument that the arrestments will be good wherever there is a claim of accounting between the parties, no matter on which side the balance may be, and even admitting (or it being proved) that the balance is against the party asserting such claim. The argument is repugnant to common sense, and I cannot assent to it.' In short, in view of the result of the proof