expressed in the agreement; and I cannot doubt that the second clause of the agreement, giving the defenders the option of recovering any part of the property was, however obscurely worded, intended for that purpose. It is provided [*reads*]. If the disponees under the conveyance were entitled to renounce the purchase, that implied surrender of the benefit, and freedom from the conditions of the purchase, in any question with the pursuer, with whom alone this stipulation was made. It is said that the renunciation was to be made to the heritable creditors, and that his consent was necessary. But the creditors were not parties to this agreement. They had the personal obligation of their debtor, as well as that contained in their heritable bonds, and it was not supposed or contemplated that they should give up either. The true meaning was, that when the property turned out or seemed to be insufficient to meet the burden, the defenders should be under no obligation to retain it, but might free themselves alike from the benefit and the obligation.

It is said that this result would be hard on the pursuer. It would be no more hard on him than if his property had passed into the hands of a trustee in a sequestration, as it certainly would have done if the defenders had not interposed. It would no doubt have been easy to have expressed this very reasonable result in plain words, but such I believe to be the true import of the clause.

While I thought myself bound in justice to the parties to mention these views, it is right to add that even if I were right in my opinion of the true meaning of the memorandum of agreement, I have seldom seen a more unsatisfactory or indeed unintelligible document, and have felt the greatest difficulty in attaching an interpretation to this second clause.

The Court pronounced the following interlocutor:—

> "The Lords . . . ordain the defenders, jointly and severally, to free and relieve the pursuer of his liability for the sums specified in the first and second conclusions of the summons, by making payment thereof either to the creditors mentioned in the said conclusions or to the pursuer, that he may operate his own relief, and to this extent and effect vary the said interlocutor: *Quoad ultra* adhere thereto: Find the pursuer entitled to expenses from the date of the said interlocutor: Remit the cause to the Lord Ordinary to proceed therein as accords, with power to decern for the expenses now found due, and decern."

Counsel for Pursuer (Respondent)—Mackay—Patten. Agent—Adam Shiell, S.S.C.

Counsel for Defenders (Reclaimers)—Robertson—Graham Murray. Agents—Smith & Mason, S.S.C.

Friday, November 7.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

HERSKIND AND WOODS (OWNERS OF "HILDA") *v.* HENDERSON AND OTHERS (OWNERS OF "AUSTRALIA"), *et e contra.*

Ship—Shipping Law—Liability for Collision—Article 20 of the Regulations for Preventing Collisions at Sea—Overtaking Vessel.

The steamers "Hilda" and the "Australia" were proceeding in the same direction through the Great Bitter Lake, when the "Australia," which was the faster vessel and had been astern of the "Hilda," made up to and attempted to pass her. A collision occurred, the bow of the "Hilda" coming in contact with the starboard side of the "Australia." The Court *awarded damages* to the owners of the "Hilda," on the ground that the "Australia" was the overtaking vessel, and therefore bound under article 20 of the Regulations for Preventing Collisions at Sea, to keep out of the way of the "Hilda."

Where a faster vessel overtakes a slower one and attempts to pass her, and a collision results, there is a *prima facie* case against the former, which can only be removed by shewing that the accident was attributable to some fault on the part of the latter.

These were two conjoined actions raised at the instance of owners of the steamships "Hilda" and "Australia" respectively for damages caused by a collision between the two vessels on the 1st January 1883. The "Hilda" was steaming from Suez to Port Said through the Suez Canal, and was steering for the entrance to the canal at the northern end of the Great Bitter Lake. The weather was fine. Shortly after she had entered the Lake, the "Australia" also entered the Lake, and being the quicker vessel she gradually overtook the "Hilda" and (about 5 p.m.) passed to her port side; the two vessels thereafter collided, the bluff of the portbow of the 'Hilda' coming in contact with the starboard side of the "Australia." The account of the collision set forth by the owners of the "Hilda" was—"(Cond. 3) The said collision was caused by the fault and negligence of the master and crew of the 'Australia.' The 'Australia' was negligently steered too close to the 'Hilda,' and her course was wrongly altered so as to throw her across the bow of the "Hilda." The 'Australia' was navigated in contravention of article 16 of the regulations for preventing collisions at sea, which provides that 'if two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other;' and also in contravention of article 18 of said regulations, which provides that 'every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary;' and also in contravention of article 20 of said regulations, which provides that 'notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, overtaking

any other, shall keep out of the way of the overtaken ship. The 'Australia' did not keep out of the way of the 'Hilda,' and did not, when approaching the 'Hilda' so as to involve risk of collision, slacken her speed, or stop and reverse."

To this the owners of the "Australia" replied as follows—"Denied, and explained that the collision occurred solely through the fault of the 'Hilda,' which was an overtaking ship at the time of the collision, and was navigated contrary to said regulations. The 'Australia' was neither a crossing ship nor an approaching ship nor an overtaking ship at the time of the collision."

In the action at their own instance they further stated—"The 'Australia' gained upon the 'Hilda.' While both vessels were still in the lake the 'Australia' overtook the 'Hilda.' She proceeded to pass the 'Hilda' on the latter's port-side, the two ships being then about two ship's lengths from each other. The 'Australia' kept her course, and continued to steam full speed, the same speed as she had maintained from the time she entered the Bitter Lake. The 'Hilda' then made a sudden spurt forward so as to overhaul the 'Australia,' which had passed her, and gaining upon the 'Australia,' sheered in upon her, and (notwithstanding repeated warnings from the latter vessel) struck her on the starboard quarter."

A proof was taken, the import of which fully appears in the note of the Lord Ordinary and the opinions of the Judges in the Inner House. The captain of the "Australia" being examined for the owners of that vessel, deponed as follows—"Did you intend to reach the same spot as the 'Hilda?'—(A) She was perhaps going close to the light-house. (Q) What was your purpose in passing the 'Hilda?'—(A) Because I had a faster ship; I intended if possible to get into the canal before the 'Hilda;' the faster ship always goes first; when behind the 'Hilda' in the narrow of the canal we could not get ahead of her. We kept on full speed after passing the 'Hilda.' We never reduced the speed. I do not understand how the 'Hilda' overtook us. The only way in which I can account for it is that they might have got up more steam. (Q) Is that the explanation that occurred to you at the time?—(A) It was my explanation, and I discussed the matter with my engineer afterwards. As far as my judgment goes, we were about 20 feet ahead of the 'Hilda' when all at once I saw her coming upon us. (Q) Then if steam was put on, I suppose that must have been for the purpose of her overtaking you?—(A) Yes, to show what he could do I suppose."

The Lord Ordinary (KINNEAR) in the action at the instance of the owners of the "Hilda," decerned against the owners of the "Australia" for £828, and in the other action assoilzied the defenders (owners of the "Hilda") with expenses.

"*Opinion.*—There is a good deal of contradictory evidence in this case, as is usual in cases of this kind. But I do not think there can be much doubt as to the manner in which the collision took place between the two ships in question. The 'Hilda' was the first to enter the Great Bitter Lake. She was overtaken by the 'Australia,' a larger and faster vessel, which attempted to pass her, and before she had succeeded in doing so the two ships came into collision. Now, in these circumstances there is *prima facie* a strong case against the 'Australia,' because she was the overtaking vessel; and by the regulations for avoiding collision she was bound to keep out of the way of the vessel she had overtaken. If she did not perform that duty she must be deemed to have been in fault, and the mere fact of the collision is conclusive evidence that she failed to perform it, unless she can relieve herself of responsibility by proving some specific fault on the part of the 'Hilda' to which the accident may be ascribed.

"The fault alleged is, that after the 'Australia had passed, or all but passed, the 'Hilda,' the latter increased her speed, made up with the 'Australia,' and ran into her. I do not know that this would be a sufficient answer unless the 'Australia' had actually passed the 'Hilda,' and got ahead of her, so as to convert the latter in her turn into the overtaking vessel. But I think it clear upon the evidence that nothing of the kind took place. The 'Hilda' was already at full speed when she was overtaken, and it is proved that there was no possible means by which her speed could be increased in the slightest degree. If that be so, the fact of the collision taking place is evidence that the 'Australia' did not perform her duty of keeping out of the 'Hilda's' way. It is said that the distance at which she attempted to pass made that operation a perfectly safe one. But the result proves the contrary. I do not think it at all material whether her mistake consisted in misjudging the distance at which she should pass or in returning too soon into the course which she had left in order to pass her. It is suggested that in passing the 'Hilda' she had to go out of the straight course for the mouth of the canal, and had therefore to return to the course she had left as soon as she got ahead of the 'Hilda.' I think this is a very probable way of accounting for the accident, for there is a good deal of evidence to show that the master of the 'Australia' must have supposed that he had got ahead of the 'Hilda' when in fact he had not done so. But I do not think it incumbent upon the pursuers to prove this or any other specific fault on the part of the master of the 'Australia.' It is enough that he was bound to keep clear of the 'Hilda' in passing her, and that from no fault of hers he failed to do so."

The owners of the "Australia" reclaimed. In the argument their counsel abandoned the theory which had been advanced by the captain of their vessel, and which had been put forward in their averments and pleading before the Lord Ordinary, and maintained that the collision was due to the "Hilda" slowing, and thus loosing steering power, and then sheering into the "Australia."

The owners of the "Hilda" replied—The Lord Ordinary was right in holding on the evidence that the "Hilda" was at no time an overtaking vessel. She was already at full speed when she was overtaken, and could not possibly have increased her speed. That being so, the quicker and overtaking vessel was to blame. Further, the evidence did not support the theory advanced now in lieu of that advanced at the proof by the captain of the "Australia."

At advising—

LORD YOUNG—This is certainly a long case, upon the evidence and upon the speeches which we have heard. Certainly length is not a characteristic of the last, although clearness and dis-

tinctness are characteristics of it. But I must marvel that so many pages of evidence should have been taken upon the issue which this record presents, and which the Lord Ordinary has decided.

The issue which the record presents is contained in the third condescendence for the pursuer, and the answer thereto for the defender, and before reading it—for it is there very distinctly presented I think—I just notice this, that the collision undoubtedly occurred between two vessels which were pursuing, generally speaking, the same course through the Great Bitter Lake as a part of the Suez Canal. The vessel in advance during the whole passage to about the time of the collision—I say "about" for a reason that will appear hereafter—was the "Hilda," the slower vessel of the two; the vessel behind was the "Australia," the quicker vessel of the two, and which ultimately overtook or overhauled the other, as Mr Mackintosh prefers to express it. When the collision occurred between them, curiously enough the bow of the "Hilda" ran into the side of the "Australia." The dispute, then, between the parties is, how this collision is to be accounted for. That it must be accounted for in the circumstances of this case by the fault of the one party or of the other is clear. It was not owing to the weather, and as the one vessel could certainly pass the other without coming into collision—as the vessels might undoubtedly have kept clear of each other, for there was nothing to hinder them, and they ought to have kept clear of each other—if they came into collision, the fault must be attributed to fault on the one side or the other. Accordingly the issue presented by the record and sent to trial is, which of them was in fault? The pursuer's averment, which is his issue as he presents it, is this—"The said collision was caused by the fault and negligence of the master and crew of the 'Australia.' The 'Australia' was negligently steered too close to the 'Hilda,' and her course was wrongly altered so as to throw her across the bow of the 'Hilda.' The 'Australia' was navigated in contravention of article 16 of the regulations for preventing collisions at sea, which provides that 'if two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard-side shall keep out of the way of the other;' and also in contravention of article 18 of said regulations, which provides that 'every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop or reverse if necessary;' and also in contravention of article 20 of said regulations, which provides that 'notwithstanding anything contained in any preceding article every ship, whether a sailing ship or a steam-ship, overtaking any other shall keep out of the way of the overtaken ship.' The 'Australia' did not keep out of the way of the 'Hilda,' and did not, when approaching the 'Hilda' so as to involve the risk of collision, slacken her speed, or stop and reverse." The answer to that is in these terms:—"Denied; and explained that the collision occurred solely through the fault of the 'Hilda,' which was an overtaking ship at the time of the collision, and was navigated contrary to said regulations. The 'Australia' was neither a crossing ship nor an overtaking ship at the time of the collision." That was the issue pretty distinctly expressed upon which the parties went to proof, and upon which the case was argued before the Lord Ordinary, and the captain of the "Australia," in the evidence which has just been referred to by Mr Robertson, supports the "Australia's" view of the case, for his account of the accident is in these terms—"Did you intend to reach the same spot as the 'Hilda?'—(A) She was perhaps going close to the lighthouse. (Q) What was your purpose in passing the 'Hilda?'—(A) Because I had a faster ship. I intended if possible to get into the canal before the 'Hilda'—the faster ship always goes first. When behind the 'Hilda' in the narrow of the canal we could not get ahead of her. We kept on full speed after passing the 'Hilda.' We never reduced the speed. I do not understand how the 'Hilda' overtook us. The only way in which I can account for it is that they might have got up more steam. (Q) Is that the explanation that occurred to you at the time?—(A) It was my explanation, and I discussed the matter with my engineer afterwards. As far as my judgment goes, we were about 20 feet ahead of the 'Hilda,' when all at once I saw her coming up on us. (Q) Then if steam was put on I suppose that must have been for the purpose of her overtaking you?—(A) Yes; to show what he could do, I suppose." Well, it appears from the Lord Ordinary's note that that case, stated on record by the owners of the "Australia," and supported by the captain of that ship, was maintained before the Lord Ordinary. He negatives that case, and he says that is not a correct account of it—that there was no spurt—no putting on of steam to make the "Hilda" go faster than she had been doing when the other passed her, for in point of fact she was going at her full speed and she could not increase it; she might decrease it, but she could not increase it and become the overtaking vessel—overtaking the "Australia" which had passed her, and she 20 feet ahead. I say the Lord Ordinary negatives that case, giving his reasons briefly but quite distinctly. And Mr Guthrie opened an exactly opposite case before us, attributing the collision not to a spurt by the "Hilda" making her an overtaking vessel and successful in overtaking the swifter vessel, which was 20 feet ahead of her when the spurt began. He gave up, I say, that contention, and maintained that she had slowed and lost her steering power. I pointed out that he was maintaining just the reverse of what was maintained to the Lord Ordinary and negatived by him. Mr Mackintosh was perfectly frank upon that point when he said he was entitled with reference to the evidence to explain the collision as he best could by the evidence consistently with his own—that is, his client's freedom from any blame in the matter. But I think upon that and upon the evidence, without going into it, whether the account given by the "Hilda" is supported or not, undoubtedly the account given by the "Australia" is negatived. The "Australia" did not pass the "Hilda" and get 20 feet ahead of her. The "Hilda" did not put on more steam and become the overtaking vessel, and so run into the swifter vessel ahead of her. That is not only negatived by the Lord Ordinary, but that view of the case was abandoned by the counsel for the "Australia."

Then what are we to say? You may suggest some other view than the record suggests or the

evidence of the defender's principal witness is adduced to prove, and say that the accident might be accounted for by the "Hilda" slowing when the "Australia" was passing her, and, by slowing, loosing steering power, and 'sheering' so as to run into the other; and you may adopt that as the explanation. I am not inclined to accept that view of it. The suggestion is intelligible in the sense that one understands it when it is made and put into language, but I am not disposed to adopt it as the explanation, or as the fair result of the evidence, and to say that the Lord Ordinary is wrong because he has not adopted it. I think his view is the right one—that there is a *prima facie* case against the overtaking vessel which may well pass in perfect safety; if she does not pass in perfect safety, and a collision takes place, there is a *prima facie* case against the overtaking swifter vessel. It may be removed either by showing that the collision is attributable to some fault on the part of the overtaken and slower vessel, or by showing that the overtaking vessel acted properly—kept at a proper distance—so that you are driven, as matter of necessity, to account for the accident by imputing blame to the other although you have not succeeded in discovering exactly what it was. But I am not satisfied upon the evidence, taking it together with the fact of the collision having taken place, that perfect propriety of conduct on the part of the "Australia" is established, and I am quite satisfied that no fault on the part of the "Hilda" is established. I so entirely agree with the Lord Ordinary upon both these points that I think if I had been deciding the case in the first instance I should have decided as he has done, although not thinking that there is any superfluity of evidence by any means, or that the case is other than a narrow one. The Lord Ordinary having arrived at that conclusion, which I think the evidence will reasonably sustain, it is sufficient for our judgment. In my opinion, if we are not satisfied that he is wrong—and I for one am certainly not satisfied that he is wrong—that is enough for our judgment, and I repeat that although the case is not in my view an extra strong one, I think I should have pronounced in the first instance the same judgment as he has done.

I am therefore of opinion that the interlocutor ought to be affirmed.

Lord Craighill—I am entirely of the same opinion. I think the Lord Ordinary has arrived at the right conclusion, and if I had been to give judgment when he gave judgment I would have pronounced the same decision. It appears to me, in the first place, that fault has not been proved against the pursuers of the first action, the owners of the "Hilda." In the next place, I think there has been fault proved on the part of the owners of the "Australia."

I do not propose to repeat that which has been already said on this subject by my brother Lord Young. But I will say this—the defenders, the owners of the "Australia," repudiate the evidence given by the master of their ship; they say he was quite wrong when he said that the "Australia" had passed the "Hilda," and taken up her old line after she had so passed, and that she was run into by the "Hilda"—which they supposed to be the slower vessel of the two—and which by putting on a spurt was thereby able to overtake and run into the "Australia." Be it that he is wrong in point of fact as to the collision having been produced in this way, it is impossible to resist the conclusion that he, the master of the ship, the person by whom the course of the ship was to be guided, did intend to pass the "Hilda," and get into the "Hilda's" old track—there was that intention long before the one passed the other, and it was in the execution of that intention that there occurred the accident of which the present litigation is a consequence.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Justice-Clerk—This is a narrow case beyond all question, and very early in the discussion I thought that no ground sufficient had been shown to alter the judgment of Lord Kinnear. I am still of that opinion. I think that on a question of this kind—on a proof where the whole facts of the case have come out—great weight ought to be given to the judgment of the Lord Ordinary, and where the evidence is conflicting, his judgment on the credit to be given to the witnesses should be, I do not say conclusive, but almost conclusive.

I must own, however, as the discussion went on I felt more difficulty about it, but on the whole matter I return to my original impression, and I am not disposed to differ from the result at which you have come. At the same time I should have thought it a grievous miscarriage of this case if the fact of a statement on the record, founded evidently on the instructions of the captain, should be held even an element in the judgment. It was an element to show that the captain's recollection of the circumstances, or observation of the circumstances, was not to be relied on; otherwise, I do not see that it could possibly have prevented the Lord Ordinary doing what he did—inquiring into the whole circumstances of the case, and deciding upon the truth as he found it to be.

On the whole matter, however, I concur in the judgment that we should adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Reclaimers—Mackintosh—Guthrie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Respondents—J. P. B. Robertson—Thorburn. Agents—Snody & Asher, S.S.C.