

very soon after the voter left, and had been intimated before the counting to the returning-officer, who had counted the vote.

THOMSON for Mr Williamson objected to the proposed evidence as irrelevant. The direction of the Act was absolute, and must be obeyed, no matter how innocent a mistake had occurred—*Woodward v. Sarsons*, 9th July 1875, L.R. 10 C. P. 733.

LORD RUTHERFURD CLARK intimated that the Judges were not agreed whether the evidence ought to be admitted, and that it would be taken under reservation.

Proof was then led, which bore out all the facts above stated by Sir R. Anstruther.

It was then argued for Sir R. Anstruther—It must be “a paper” that was delivered to the voter. The unity or duality was a question of what was given to him, not of the papers in the poll book, and it had been proved that the voter got two papers sticking together as one paper.

The Court reserved the question, and it was ultimately found unnecessary to decide it.

V. The vote of a person named Jamieson was also objected to by Sir R. Anstruther on the ground that he had been guilty of a corrupt practice in the sense of the Corrupt Practice Prevention Act 1883, and his vote was therefore void. Evidence was led to show that he had threatened a voter whom he wished to go out to vote, but who refused on the score of sickness, with loss of money from a benefit society unless he obtained a medical certificate. Jamieson was not examined as a witness by either party. The Act provides (section 11) that upon the trial of an election petition respecting an election for a county or burgh the Election Court shall report in writing the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice, and that (section 38) “before a person, not being a party to an election petition, nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an Election Court . . . to have been guilty at an election of any corrupt or illegal practice, the Court . . . shall cause notice to be given to such person, and if he appears in pursuance of the notice shall give him an opportunity of being heard by himself and of calling evidence in his defence to show why he should not be so reported.” The Court appointed intimation to be given to Jamieson that he had been charged with a corrupt practice, and appointed him to appear and give evidence if so advised.

In consequence of the decisions of the Court on other disputed votes it became unnecessary to the result of the inquiry that the question whether Jamieson's vote should be struck off should be determined, it having appeared that in any view a majority had voted for Sir R. Anstruther.

LORD RUTHERFURD CLARK—The result of this inquiry has been that we find that a majority of the electors voting voted for Sir R. Anstruther, the petitioner, and it is our duty to declare that after hearing and considering the case, and the objections for the parties, we find that Sir R. Anstruther has been duly elected for the St Andrews Burghs, and it is further our duty to report that finding to the Speaker of the House of Commons. But we have felt some difficulty as to

an incident which has occurred in the course of the inquiry—the matter of the alleged intimidation by Jamieson. The course the case has taken does not make it incumbent on us to consider the effect to the parties of the evidence on that matter, for it is not necessary for the petitioner's case—he having a majority otherwise—that it be struck off. But it is impossible to disguise that a charge of corrupt practices within the Corrupt Practices Act has been preferred. We could not have disposed of that without giving Mr Jamieson notice thereof, and in the expectation that it would be necessary to decide on the validity of his vote we appointed notice to be given him that he might appear and be heard in his defence. That course was necessary to enable us to decide on the charge. Now, we find it is not necessary to decide on the question one way or the other, and I have no opinion on it, and can have none without having heard the person accused. It is therefore impossible for us to report that anything has been proved against Jamieson, and we are not called on to consider the case against him. It is a slender case at best, and I think it unnecessary to delay our judgment in order to settle a question which is not of importance in this case, I think, either to the parties or to the public.

I propose that we give the ordinary certificate that the petitioner has been duly elected.

LORD LEE—I have had—and still have—difficulty as to the case against Jamieson, but I am not sorry that your Lordship has seen your way to arrive at the conclusion now stated. My difficulty was whether we are not bound to form and report our opinion on the matter. No doubt it is not necessary for this case to do so, but my difficulty has been whether the statute did not require us to do so. But your Lordship thinks not, and I will only say that I do not dissent.

The Court reported that the petitioner Sir R. Anstruther had been duly elected.

Expenses were not moved for.

Counsel for Sir R. Anstruther—Mackintosh—Anstruther. Agents—J. C. & A. Stewart, W.S.

Counsel for Williamson—Comrie Thomson—Jamieson. Agents—J. & J. Galletly, S.S.C.

Counsel for Lord Advocate—Mackay.

Wednesday, February 17.

FIRST DIVISION.

GUNN AND OTHERS (OWNERS AND CREW OF “SEA KING”) v. HUNTER AND OTHERS (OWNERS OF “LORA”).

Process—Expenses—Extra-judicial Offer Repeated on Record.

Before an action (for salvage) was raised the defenders had without prejudice offered £50 to settle the claim. This had been refused, and the action brought. The defenders renewed on record their offer of £50, but without offering expenses. After a proff had been fixed the pursuers put in a minute accepting the offer of £50. *Held (diss. Lord*

Shand, *alt.* judgment of Lord Trayner, who found no expenses due) that the pursuers, by reason of their refusal to accept before going into Court the sum which they ultimately accepted as sufficient, were responsible for the litigation, and were therefore liable in expenses to the defenders.

This was an action arising out of salvage services rendered by the steam trawler "Sea King" to the s.s. "Lora." The pursuers were William Gunn, the owner, and others, the crew who were on board the "Sea King" at the time the services were rendered, and they concluded against William Hunter and others, the owners of the "Lora," for £150.

Before the action was raised the defenders on 1st December 1885 wrote to the pursuers offering £50 in full of all claims, "but this offer is not to be founded on if rejected." This was refused on 7th December by the pursuers, who intimated that they would not take less than £90, with £3, 3s. of expenses, and on 12th December the summons was served.

The defenders in their defences offered £50 (under reservation of their whole pleas) in settlement of the pursuers' claims. There was no offer of expenses.

On 19th January 1885 the record in the action was closed, and a proof fixed for 17th February. On 30th January the pursuers lodged a minute accepting the judicial offer, and *eo die* the Lord Ordinary (TRAYNER) in respect of this minute discharged the order for proof and decerned against the defenders for £50. He found no expenses due to or by either party.

The defenders reclaimed on the question of expenses, and were heard in the Single Bills. They argued that as before any expense had been incurred they had offered just what the pursuers ultimately accepted, and as they had repeated this offer on record, they should be found entitled to expenses—*Owners of the "Vulcan" v. Owners of the "Berlin,"* July 6, 1882, 9 R. 1057; *Critchley v. Campbell*, Feb. 1, 1884, 11 R. 475; *Bilsborough v. Bosomworth*, Dec. 5, 1861, 24 D. 109.

The pursuers replied—The Court was here asked to interfere with what the Lord Ordinary had done in the exercise of his discretion. This would not be done without showing reason. The Lord Ordinary considered that the right of the pursuers to get expenses incurred prior to the judicial offer would be balanced by the defenders' right to get expenses subsequently, and therefore had found no expenses due. The defender here had not made any proper tender—*Little v. Burns*, Nov. 16, 1881, 9 R. 118. In the "*Vulcan's*" case (*supra*) the point had not been argued.

At advising—

LORD PRESIDENT—There are two rules applicable to questions connected with tender which I think are quite established—the *first* being that a judicial tender is of no avail upon the question of expenses as they come to be disposed of after the cause has been decided, unless the tender was accompanied by a tender of expenses down to the date when the tender was made; the *second* being, that an extra-judicial offer, if it is not repeated when the case comes into Court (if not below the sum ultimately recovered by the pursuers), only entitles the defender to such a finding as has been here pronounced.

But the present case does not fall under either of these rules, for there are these peculiarities, (first) that there was here an extra-judicial offer of £50, which was rejected by the pursuers, and then the action was raised. If that offer had not been repeated on record, then that extra-judicial offer would have flown off altogether—that is to say, there would no longer have been an existing tender—and the defender would have come in pleading on the merits of the case that he was entitled to absolvitor, and taking up the position that he was not liable to pay anything. In that case the defenders would have taken the full benefit of all his pleas and might have been assolized, but then the question of expenses would have been determined as it has been here.

But when the extra-judicial offer is repeated on record, that shows that the defenders were throughout, from the time the claim was made, or rather from the commencement of the extra-judicial negotiations, down to the termination of the case, and have always been, willing to pay the sum of £50 in settlement of the pursuers' claim.

That is a totally different case from either of those two which I have adverted to. It appears to me that the conduct of the defenders has been so reasonable that, considering the pursuers have only got the sum tendered, the defenders are entitled to expenses.

LORD MUIR—I am of the same opinion. It is settled that a judicial tender must be accompanied by an offer of expenses, and in the case of an extra-judicial offer it has been held that when such an offer is not followed up it will not entitle the defender to get expenses, but will entitle him to be free from expenses as regards the pursuer. The reason for this is, that by not repeating the offer on record the defender takes his chance of defending himself from the claim in the action.

But here I think the principle of judicial tender is applicable. If the defender, when the case comes into Court, makes an offer without expenses, that cannot be held to put him in the position of claiming expenses. But, on the other hand, if an extra-judicial offer previously made has been refused, and expense thereby occasioned, and if the defender in his defences repeat the offer originally made, and this is ultimately accepted by the pursuer, then as the expense has been caused by the pursuer the defender is entitled to get expenses.

In the cases to which we were referred the question was considered, whether an extra-judicial offer should be taken into account at all in dealing with expenses. In *Ramsay's Trustees v. Souter*, March 19, 1864, 2 Macph. 891, it was thought competent. And the same view was taken by Lord Deas in the case of *Little v. Burns, supra*.

LORD SHAND—I am sorry to be unable to agree with your Lordships, and think that the judgment of the Lord Ordinary should be affirmed.

I think that for a very long time the effects of judicial and extra-judicial tenders have been well known and recognised by the profession, and that the effect of altering the judgment of the Lord Ordinary would be to unsettle the rules which have been so recognised. In the case of extra-judicial offers the Court has reached this result,

that they will look at such an offer with reference to the conduct of the party, in considering whether his conduct has been reasonable or not. And I think that the utmost length the Court can go in a case where the extra-judicial offer has been repeated on record is to find no expenses due to or by either party. In no case has an extra-judicial offer received further effect.

On the other hand, a judicial tender, in order to be looked at, must be accompanied by an offer of expenses. There was no such tender here. The offer though repeated, was not accompanied by an offer of expenses, and if the defenders are well founded in saying that that repeated offer was sufficient to entitle them to expenses, I do not see why the argument should stop there. I think that the same legal consequence would follow if the defenders offered the same sum, less the expenses which they have incurred owing to the pursuers' conduct. The argument for the defenders would be as strong in this case as in the other.

That, I think, would introduce extreme looseness in practice, and in my opinion it would be better to adhere to the established rule. Therefore, though the Court may look at an extra-judicial offer as bearing on the conduct of the parties, I think that a tender must be irrespective of what has been done before, and must be accompanied by an offer of expenses.

I think that we should follow the course taken in *Critchley v. Campbell*, and that we should adhere to the interlocutor of the Lord Ordinary.

LORD ADAM—As I understand this matter, the sum of £50 was offered by the defenders to the pursuers before the case came into Court, and this tender, which was renewed in the defences to the action, was eventually accepted by the pursuers, and the case thus brought to a close.

One thing is quite clear, that the pursuers by bringing and insisting in this action have gained nothing; they have got just what they would have got if there had been no proceedings at all, and so the pursuers are the parties who have caused all the expense. I should have thought it unfortunate if in such circumstances there had been a rigid rule of practice to prevent our taking that fact into consideration.

This case is certainly to be distinguished from one in which an extra-judicial offer has not been renewed, and for this obvious reason, that if the defender does not renew his offer, he then goes into Court and takes his chance of getting off altogether, or of being found liable for a less sum than that which he offered. But here the offer which was made was renewed on record, and was before the pursuer for acceptance throughout. That I think is quite distinguishable from a case where there has been an extra-judicial offer not renewed.

LORD PRESIDENT—I omitted to notice one peculiarity in this case, viz., that the offer of £50 was ultimately accepted by the pursuers, and that decree was pronounced upon the minute lodged by them accepting the offer. The ground of judgment which I think is applicable to that *species facti* is, that the pursuers should, instead of accepting the £50 at that late date, have accepted the offer before.

LORD SHAND—I cannot see that it makes any

difference that the £50 was accepted by minute. I think it would just have been the same if it had been decerned for.

The Court recalled the interlocutor of the Lord Ordinary in so far as it found no expenses due to or by other party, and found the defenders entitled to expenses.

Counsel for Pursuers—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defenders—Dickson. Agents—Macrae, Flett, & Rennie, W.S.

Thursday, February 18.

SECOND DIVISION.

ROWAT v. BROWN.

Process—Proof—Remit to the Lord Ordinary—Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112)—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 62.

A Lord Ordinary having sustained a preliminary plea of no title to sue, and dismissed an action, the Inner House on a reclaiming-note recalled that interlocutor, repelled the plea, and before further answer allowed the parties a proof of their respective averments, and remitted to the Lord Ordinary to proceed. *Held* that section 62 of the Court of Session Act 1868, providing that when proof shall be ordered by one of the Divisions of the Court it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before one of the Judges of the said Division, did not apply to such a case, and that the proof could competently proceed before the Lord Ordinary.

The Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112) provides by section 3—“Where proof shall be ordered by one of the Divisions of the Court, such proof shall be taken before any one of the Judges of the said Division or of the Lords Ordinary to whom the Court may think fit to remit, in one or other of the modes above provided in section 1 hereof, and his rulings upon the admissibility of evidence in the course of taking proof shall be subject to review by the Division of the Court in the discussion of the report of the proof.”

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 62, provided—“The 3d section of the Act 29 and 30 Vict. cap. 112, is hereby amended to the effect of providing that, notwithstanding the terms of said section, ‘where proof shall be ordered by one of the Divisions of the Court,’ it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before any one of the Judges of the said Division, whose place may for the time be supplied by one of the Lords Ordinary called in for that occasion.”

This case was reported by Lord Fraser to the Second Division under the following circumstances:—The action was brought before Lord Fraser (Ordinary) in the Outer House. The defender pleaded—“The pursuers have no title