

Friday, June 23.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

CURRIE AND OTHERS (OWNERS OF ss. "THORSA") v. WILSON, SONS, & COMPANY, LIMITED (OWNERS OF ss. "OTTO"), *et e contra*.

Ship — Steamships Approaching so as to Involve Risk of Collision—Collision—Whether Risk Determined—Admiralty Rules 15, 18, 19, and 21.

The steamships "Thorsa" and "Otto" were approaching each other end-on or nearly end-on in daylight, in a narrow channel. When a mile apart the "Thorsa" signalled that she was going to starboard, and at the same time put her helm to port which brought her head a point or nearly a point to starboard. The "Otto" heard but disregarded the "Thorsa's" signal, and kept her course. Two minutes afterwards, when the ships were within half-a-mile, the "Thorsa" repeated the signal and again ported her helm. The "Otto" immediately afterwards starboarded her helm, bringing her head to port, and went across the bows of the "Thorsa." The "Thorsa" immediately stopped and reversed, but she ran into the "Otto" and sank her. From the time the ships were distant at least a mile from each other, the "Otto" did not alter her course until just before the collision, nor were her engines ever stopped or reversed. The Court held it was clear that the "Otto" was in fault, but it was argued for her owners that the "Thorsa" was also in fault, and accordingly liable in one-half of the aggregate damage, because (1) she did not port sufficiently to determine the risk of collision, and (2) because she did not stop and reverse in time.

Held (1) that although it was not clear whether the extent to which the "Thorsa" ported at first was sufficient to determine the risk of collision, if the "Otto's" course had not been altered, it was sufficient if the "Otto" had ported her helm. But it was clear that the second time the "Thorsa" ported her helm she had done enough to determine the risk of collision, provided the "Otto" held on her course; (2) that the necessity to stop and reverse the "Thorsa's" engines did not arise until the "Otto" changed her course, and that the "Thorsa" had accordingly stopped and reversed in time.

The Regulations for preventing collisions at sea under Order of Council, 11th August 1884, provided as follows—Art. 15. "If two ships under steam are meeting end-on or nearly end-on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other." Art. 18. "Every steam-

ship when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary." Art. 19. "In taking any course authorised or required by these regulations a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz., one short blast to mean 'I am directing my course to starboard.'" Art. 21. "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of each ship."

These were cross actions between James Currie and others, Leith, owners of ss. "Thorsa," and Thomas Wilson, Sons, & Company, Hull, owners of ss. "Otto," arising out of a collision between the two ships on 7th August 1892.

On that day the "Thorsa" was proceeding from Christiansand and southwards towards Copenhagen. When near Lappegrund Lightship in the Sound the "Thurso" sighted two vessels, one the "James Malam," and another the "Otto." When a mile from the "James Malam" both vessels put their helms to starboard, and passed starboard to starboard about fifty feet apart. The "Otto" was then a mile away. The "Thorsa" then gave one blast on her whistle, to indicate that she was changing her course to starboard, and ported her helm so as to alter her course a point or nearly a point to starboard. The "Otto" heard but disregarded the signal. The ships then ran for about two minutes at full speed, for the distance of about half a mile each. The "Thorsa" signalled again that she was going to starboard, and again ported her helm and kept it so. At that moment or immediately afterwards the "Otto" starboarded her helm, bringing her head to port, and making a course at full speed across the bows of the "Thorsa." The latter immediately stopped and reversed her engines, but before her way was entirely off she struck the "Otto" heavily on her after gangway, so that she filled and went down. No lives were lost. The "Thorsa" was 833 tons register, the "Otto" 798. The accident occurred about half-past five in the morning, with the sea smooth and no wind.

Currie and others averred—"The collision in question was due to the unskilfulness or want of care of those in charge of the 'Otto,' for whom the defenders are responsible. In particular, it was the duty of the 'Otto,' in the circumstances in which the vessels were approaching each other, to have ported her helm, so as to have passed on the port side of the 'Thorsa.' Instead of this the 'Otto' suddenly starboarded her helm, and so altered her course to port, and that notwithstanding that the 'Thorsa' had signalled to her that she was keeping to starboard. The result was that the 'Otto' was brought right across the bows of the 'Thorsa,' so as to make the collision inevitable. Further, the 'Otto' failed to stop and reverse her engines when

it became evident that a collision was imminent, or at least did not do so until too late."

Wilson, Sons, & Company averred—"The collision was due solely to the fault of those in charge of the 'Thorsa.' (1) Having regard to the relative positions and respective courses of the two ships for some time prior to the collision, the 'Thorsa' ought to have passed the 'Otto' starboard to starboard. By porting his helm the captain of the 'Thorsa' executed a wrong manoeuvre, which was the direct and immediate cause of the collision. (2) The captain of the 'Thorsa' was further at fault in not stopping and reversing in time to avoid the collision."

The Lord Ordinary allowed a proof, and upon 3rd March 1893 pronounced this interlocutor—"Finds that on 7th August 1892 the ss. 'Otto,' belonging to Thomas Wilson, Sons, & Company, Limited, and the ss. 'Thorsa,' belonging to Messrs James Currie and others, came in collision near the Lappegrund Lightship, at the entrance to the Sound; that in consequence thereof the 'Otto' in a few minutes sank and became a total loss, and the 'Thorsa' received certain injuries to her stem: Finds that the collision was caused through the fault of the 'Otto' and the 'Thorsa,' and that the total damage sustained must be borne equally by the owners of the two vessels: Finds that it is admitted that the damage sustained by the 'Thorsa' amounts to £1055, and that that caused by the loss of the 'Otto' amounts to £5238, 13s. 3d., in all £6293, 13s. 3d.: Therefore decerns against Messrs James Currie and others, owners of the 'Thorsa,' for payment to Thomas Wilson, Sons, & Company, Limited, of the sum of £2091, 16s. 7d. sterling: Finds no expenses due to or by either party."

"*Opinion.*— . . . Parties are agreed as to the amount of damage. The damage sustained by the owners of the 'Otto' through her total loss amounts to £5238, and that sustained by the 'Thorsa' to £1055. What I have to decide in these cross actions is, whether the collision was due to the fault of the 'Thorsa' or the 'Otto,' or of both of these vessels.

"My verdict is that both vessels were in fault; but as regards the 'Thorsa,' I have come to this conclusion with reluctance. A simple and sufficient ground of judgment would be to hold that both vessels infringed article 18 of the regulations—the 'Otto' by not slackening or reversing at all, and the 'Thorsa' by not doing so in time. But it is right that I should explain my views on some other aspects of the case. . . . [*His Lordship then examined the evidence in detail, and proceeded*].— If, then, I am right in holding that the 'Thorsa' and the 'Otto' were end on or nearly end on, they were within article 15 of the regulations. The 'Otto' was bound to alter her course to starboard, and by failing to do so she infringed that regulation. Further, by continuing at full speed to the last, she contributed to the collision and infringed article 18 of the regulations. I therefore hold that fault on the part of the

'Otto' has been sufficiently proved.

"It remains to consider whether fault has been proved on the part of the 'Thorsa.' It is said that she infringed the 18th article of the regulations, which is to the following effect:—"Every steamship, when approaching another steamship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary."

"When the 'Thorsa' and the 'Otto' were a mile apart, and, as I hold, end-on or nearly end-on, the proper manoeuvre to avoid risk of collision was for each to alter her course to starboard. It was not necessary at that point to slacken speed or stop and reverse. In altering her course to starboard, and signalling that she was going to do so, the 'Thorsa' acted quite properly. But when she saw that the 'Otto' disregarded the signal and did not alter her course to starboard, she was bound to determine the risk of collision either by going more to starboard or by stopping and reversing. Instead of doing so she proceeded at full speed for two or two and a half minutes, during which time the vessels must have covered three quarters of a mile. At the end of that time they were about a quarter of a mile apart, and if they had proceeded at the same rates of speed would have met or passed each other within one minute.

"If I could have held that when the 'Thorsa' gave the second signal to port there was no risk of collision if the vessels continued their courses, or even if I could have held that after the 'Thorsa' ported the second time there would have been no risk of collision if the 'Otto' had continued her course, I should have been prepared to absolve the 'Thorsa' from blame; but after repeated consideration of the evidence, I am unable to adopt either of these views. It appears from the evidence of the witnesses for Messrs Currie that when the 'Thorsa' ported the second time risk of collision was at an end. Urquhart, the master of the 'Thorsa,' says—"After I ported the first time the 'Otto' was about half a point to a point on my port bow, so that if she had kept on that course she would have gone clear, though very close." And in cross "I did not see any alteration in the 'Otto's' course, and that is the reason I ported the second time."

"Henderson, the second mate, says, 'If the 'Otto' had kept her course at the time we blew the second whistle the vessels would have gone clear.' But in cross he says—" (Q) When the second order to port was given, was it quite clear that there was going to be a collision?— (A) Yes, if the two ships held their courses."

"At that point I think it was the duty of the 'Thorsa' to stop and reverse immediately, but instead of doing so she proceeded at full speed for an appreciable time. Henderson, the second mate, says—"The order to stop and reverse was given a few seconds after the second order to port was given. We went full speed ahead for a few seconds after the second order to port was given, and then the order to stop and reverse was given." Fraser, who was at

the wheel, says, 'I heard the order given to reverse the engines maybe a minute or so after I got the order to hard-a-port. During that minute or so we were going full speed.' Andrew Lamb, the second engineer, says, 'I heard the whistle give a blast. . . . A minute after I heard the whistle I heard the telegraph from the bridge signal "stop," and immediately after that, "easy astern," and immediately after that "full speed astern." Captain Natt-ochdag, passenger on board the 'Thorsa,' says that just as he came on deck he heard the second whistle, and that at that time the 'Otto' was bearing down on the 'Thorsa' on her port side. He says, 'I heard the engines of the "Thorsa" reversed. I heard the telegraph going. That might be half-a-minute, or something like that, after the second blast. It was a very short time.' And in cross, 'After I came on deck it was too late for anything to be done by either ship to prevent collision.' If we take it that even half-a-minute elapsed between the second order to port and the order to stop and reverse, the vessels must have come within a cable's length or so of each other when the latter signal was given. It is true that shortly after the second order was given, the position was complicated by the 'Otto' suddenly starboarding and coming across the 'Thorsa's' bows. But I think that when the second order to port was given by the master of the 'Thorsa' he should have seen that, even if the 'Otto' kept on her course, there was a serious risk of collision, which, as he was well aware by that time that the 'Otto' would not give way, could not with certainty be obviated simply by porting. In my opinion the time had then come, if not sooner, when under the 18th article he was bound to stop and reverse. I am confirmed in this view by the fact that at the time when the 'Otto' starboarded and adopted the desperate remedy of crossing the 'Thorsa's' bows, those in charge of her must have been satisfied that if she continued on her former course collision was inevitable notwithstanding the 'Thorsa's' porting.

"It is said that that article is not infringed if on a sudden emergency those in charge of a vessel do not immediately act upon it; that a master is entitled at least to a short time to consider his position. With every desire to give weight to this consideration, I do not think that it applies in the present case. I should have held it to apply if I could have held that risk of collision was not apparent till the 'Otto's' helm was put hard to starboard. But I think that risk of collision existed, and should have been seen before that, and that the master of the 'Thorsa' was sufficiently warned by the 'Otto's' conduct up to that time that she was not going to act upon article 15, and alter her course to starboard. Indeed there is some reason to think that between the first and second whistles the 'Otto' was slightly on a starboard helm, which would counteract the 'Thorsa's' porting, and increase the risk of a collision. There was thus, in my

opinion, no such emergency or necessity as to justify the 'Thorsa,' when she gave the second whistle, in neglecting to stop and reverse at once; and having regard to the decisions of the House of Lords on the meaning and scope of the 18th article, I feel that I have no alternative, in the view which I take of the evidence, but to hold that the 'Thorsa' infringed it; and therefore that under section 17 of 36 and 37 Vict. c. 85, she must be deemed to have been in fault.

"In the leading case of the '*Khedive*,' L.R., 5 App. Cases 876, the facts were thus:—The two vessels, the '*Voorwaarts*' and the '*Khedive*,' were approaching each other green light to green light, and would have passed starboard to starboard if they had continued their respective courses. But when they came within somewhat less than a mile of each other the '*Voorwaarts*' suddenly put her helm hard-a-port, and, disclosing her red light, came towards the '*Khedive*.' Lord-Justice Brett, whose opinion in the Court of Appeal is quoted by Lord Blackburn, thus describes the action of the captain of the '*Khedive*'—"*The captain of the 'Khedive,' on seeing this manœuvre, gave orders to put his own helm hard-a-starboard, and at the same moment he gave the order to stand by the engines. He did not at that moment give the order to stop the engines or to reverse them at full speed. The helm was put hard-a-starboard, the engineer did stand by the engines; it was not for the space of a minute, or perhaps somewhat more than a minute, that the captain of the 'Khedive' ordered the engines to be stopped and reversed at full speed. Directly that order was given they were stopped and reversed full speed, and they were reversing at full speed at the moment of the collision. The engines of the 'Voorwaarts' had not been stopped even, but were going at full speed ahead until the two ships were in collision. That the 'Voorwaarts' therefore was to blame, and greatly to blame, cannot be doubted. The question must remain whether those on board the 'Khedive' were guilty within the rule that I have endeavoured to enunciate from a want of ordinary care and skill in what they did.' Now, both the Court of Admiralty and the Court of Appeal held that the manœuvre of the '*Voorwaarts*' was entirely wrong; but while the Court of Admiralty held that the '*Khedive*' was also in fault, the Court of Appeal, while holding that the captain of the '*Khedive*' did the wrong thing in not sooner reversing his engines, held, and were advised by their nautical assessors, 'that the captain of the '*Khedive*' might be as a seaman fairly excused for that hesitation of a minute, and if so, we are of opinion that although he broke the rule, and although he did not do that which was the best thing to do, yet in respect of that hesitation of the moment (I will not say for a moment—for a minute) to do the best thing, he is not to be found guilty of a want of ordinary care and skill and nerve under those difficult circumstances in which he was placed' (p. 888).*

“The House of Lords reversed the judgment of the Court of Appeal as regarded the ‘Khedive,’ and held that the latter was in fault in not sooner stopping and reversing. They fully recognised the difficulty of the position in which the captain of the ‘Khedive’ was placed and the nerve which he had shown. They considered his error venial. But the view which they took of the regulations was that they were framed and given statutory force for the purpose of providing fixed directions for the prevention of collisions at sea, which should not be qualified or controlled by equitable considerations which at common law affect the defence of contributory negligence and replies thereto, and that no excuses for infringement should be accepted except those recognised by the regulations themselves. That accordingly it is not a relevant excuse for infringement of a regulation that the captain of a vessel acted to the best of his judgment, and in a way not inconsistent with his being a seaman of average skill, or that the other vessel was more in fault. It must, however, be shown that the particular regulation has actually been infringed, and this depends on circumstances. Lord Blackburn in the case of the ‘Khedive,’ says (p.894), ‘I think, further, that where a sudden change of circumstances takes place which brings a regulation into operation, though the thing prescribed by the regulations is not done by the person in charge, yet the regulation can hardly be said to be infringed by him till he knows, or ought to have known, and but for his negligence would have known, of the change of circumstances. But it would be doing Captain Steward great injustice to say that such was his condition. He at once took in the situation and was aware that there was risk of a collision, and that it was imminent if not inevitable, and he acted with great promptitude and skill so as greatly to alleviate the violence of that inevitable collision. But he did not stop and reverse, nor even slacken his speed, and there he departed from the course prescribed by regulation 16; nor was there anything in the circumstances rendering a departure from this rule necessary in order to avoid immediate danger.’ And Lord Watson says (p. 901)—‘Had it been possible to hold upon the evidence that the period in question was so brief and the “Voorwaarts” sudden change of course so startling that the captain could not be fairly expected to suppose, and did not believe the fact that a collision was imminent before he gave the order to stop and reverse, I should in that case have acquitted the “Khedive” of fault on the ground that the 16th article could not reasonably be held to apply before the moment at which it was actually obeyed. But the captain’s own testimony excluded the inference, because he distinctly avows that he at once saw the risk of the collision, but instead of giving obedience to the rule, he steered so as to diminish the violence of the concussion which he anticipated.’ Again, the words ‘risk of collision,’ when

used in this regulation as to stopping and reversing probably mean a risk more imminent than that spoken of in the regulation as to vessels meeting end-on. But, subject to such explanations, the directions must be rigidly obeyed. Holding on the evidence that the captain of the ‘Khedive’ was bound to stop and reverse sooner than he did, the House of Lords decided that the ‘Khedive’ as well as the ‘Voorwaarts’ was in fault. Accordingly the judgment of the Court of Admiralty was restored.

“It will be observed how very closely that case resembles the present. The only material difference is that while in the case of the ‘Khedive’ the time when the risk of collision became apparent was when the ‘Voorwaarts’ suddenly ported, the time in the present case when in my opinion the master of the ‘Thorsa’ should have seen that there was a risk of collision which required him to stop and reverse was at or before the time when the second whistle was given, by which time the ‘Otto’ had not yet put her helm hard-a-starboard. Had he done so, the collision in all probability would not have occurred.

“I may also refer to the case of the ‘Beryl,’ 9 L.R., P.D. 137; the ‘Ceto,’ L.R., 14 App. Ca. 670; and the ‘Lutetia,’ L.R., 9 App. Ca. 640.

“In the view which I have taken of this case I have found it unnecessary to decide the question whether the narrow channel rule, article 21 of the regulations, applies to the Sound at the point where the collision occurred. That is a question of great difficulty, and would require careful consideration.

“I find that both vessels were in fault, and that according to the usual rule they must bear the loss equally between them. The result, a very hard one for the owners of the ‘Thorsa,’ is that she must pay £2091, 16s. 7d. to the owners of the ‘Otto.’ There will be no expenses to either party.”

Currie and others reclaimed, and argued—The Lord Ordinary had found the “Thorsa” liable because in his opinion she was in fault for not stopping and reversing when her captain saw that the ships were end-on or nearly end-on, about a mile from each other. That was a misapprehension. When the vessels saw each other a mile off there was a risk of collision if the vessels had continued on the courses they were then holding, but they did not so continue. The “Thorsa” put her helm to port so as to go to starboard, at the same time giving the proper signal to the “Otto” what course she was going to take. By that movement the risk of collision was avoided, and all necessity for stopping and reversing was at an end. The ships then ran for some time, when the captain of the “Thorsa,” in order to give more room to the vessels to pass, although there was room to pass even then, put her helm hard to port and went to starboard still farther. All would have been quite safe but for the action of the “Otto” in coming right across the “Thorsa’s” bows. This manœuvre, it was admitted, laid a duty upon the “Thorsa,”

but even if her captain made a mistake in the sudden and unforeseen danger put before him, the owners would not be liable. But the captain did not make any mistake; he at once stopped and reversed in terms of article 18 of the Admiralty rules. That was the first time in which that rule became applicable since the ships had seen each other, and the necessity had arisen from the "Otto's" misconduct. The case of the "*Khedive*" quoted by the Lord Ordinary did not apply—"Stoomvaart Maatschappij, *Nederland*" v. *Directors, &c., of the P. and O. Steam Navigation Company*, July 23, 1880, L.R., 5 App. Cas. 876—because there the captain was in fault in not stopping and reversing at the first moment of danger. Here the first moment of danger was when the "Otto" crossed the "Thorsa's" bows, and the captain at once stopped and reversed. This case was more like "*The Jesmond*" v. "*The Earl of Elgin*," November 13, 1871, L.R., 4 P. Coun. App. 1. The captain of the "Thorsa" had taken the proper course by sounding his whistle and going to starboard, so that he was entitled to wait and see if the other vessel was going to do her part before stopping and reversing—"The *Emmy Haase*," March 10, 1884, L.R., 9 P.D. 81. The "Otto" had also disobeyed another of the Admiralty rules, as the Sound was certainly a narrow channel—"The *Rhondda*," June 5, 1883, L.R., 8 App. Cas. 549.

The respondent argued—It was admitted that (1) the "Otto" was grossly in fault both in continuing her course after she heard the "Thorsa's" first whistle, and also in going across her bows after the second whistle; (2) that the Lord Ordinary was right in his finding that when the ships were a mile apart they were end-on or nearly end-on, nevertheless the "Thorsa" was also to blame (1st) because when she followed the proper course and went to starboard at the same time sounding her whistle, she did not go enough to starboard to "determine the risk" as she was bound to do. She ought to have gone so far to starboard that there could have been no risk whatever although the "Otto" continued on her course. Even taking the position of the ships as held by the Lord Ordinary, the changing of the course by a half point or a whole point would not take the vessels so clear that the risk of collision was determined. The captain of the "Thorsa" knew that, because when he got near the "Otto" he ordered the helm to be put further to port so as to clear the "Otto." But he had been guilty of reckless conduct in continuing on his course for two minutes after the first sounding of the whistle. As he had not determined the risk, the captain of the "Otto" ought to have stopped and reversed whenever he saw the ships were end-on or nearly end-on with risk of collision—"The *Beryl*," June 18, 1884, L.R., 9 P.D. 137; "*Lebanon*" v. "*Ceto*," July 1, 1889, L.R., 14 App. Cas. 670; "*The Lanca-shire*," December 9, 1892, L.R., Prob. 1893, 47. By running at full speed while there was risk of collision, the captain of the

"Thorsa" left himself too short a time to stop and reverse when the "Otto" crossed the "Thorsa's" bows, so that the accident occurred from his own fault.

At advising—

LORD JUSTICE-CLERK—In this case the sole question before us now is, whether or not the owners of the vessel "Thorsa" are to be held to have committed any fault through their navigating officers on the occasion of the collision between the "Thorsa" and the "Otto," because at the debate it was admitted upon the part of the owners of the "Otto" that the "Otto" had been in fault in the course pursued by the officers in charge of her, and serious fault which could not be defended. The question therefore is, whether the owners of the "Thorsa" are to be held liable in one half of the damage, that damage being chiefly to the "Otto"—in fact she was lost—in respect of fault committed by the captain of the "Thorsa."

The facts of the case, as they are very clearly brought out, indicate that the "Thorsa," which was coming from a northerly direction between Elsinore and Helsingborg, starboarded her helm in order to pass another vessel, the "James Malam," being at that time about a mile and-a-half from the "Otto." The "James Malam" and the "Thorsa" seem to have passed starboard to starboard, the captains of both vessels having starboarded their helm and gone off to port a sufficient distance to pass, and that was quite according to good navigation. Immediately on passing the "James Malam" the captain of the "Thorsa," observing the "Otto" very nearly end-on, but still at a considerable distance, made up his mind that he would port his helm and pass her, and he not only took the step of porting his helm, but he also gave the signal which is recognised now by the regulations as the signal of information to the other vessel—such a blast upon his foghorn as meant, and as in this case it was admitted was understood to mean, that he was putting his vessel upon a port helm, and therefore intended to let the other vessel pass him on the port side.

Now, up to that time I cannot say that I see that any fault can be attributed to the master of the "Thorsa" at all. It was very stoutly contended at the debate on behalf of the owners of the "Otto" that at that distance, and the two vessels being end-on or nearly end-on, the captain of the "Thorsa" ought to have stopped and reversed. I do not think so; there was plenty of room to navigate the vessels so that they could pass one another, and although, the vessels being then upwards of a mile apart, if each of them kept absolutely on the course they were then on, there would probably have been considerable risk of collision, still the distance was so great that they had plenty of time to manœuvre, and stopping and reversing would have been quite uncalled for at that time. It would be a curious thing if two vessels end-on at a distance of upwards of

a mile should both stop and reverse before making any ordinary manœuvre by which they might pass.

Well, at the stage I have been speaking of the "Otto" is informed that the "Thorsa" is going upon a port helm. The "Otto" does nothing but keeps straight upon her course, and it may be a question whether or not, if matters had been left exactly as they were after the "Thorsa's" helm was steadied after she ported the first time, and the "Otto" had done nothing but kept straight on her course, the vessels would have cleared one another. It is to some extent speculative, but the captain of the "Thorsa" thinks he would have gone clear even if he had not ported any more, and I must say, reading the whole evidence, as I have done with some care, the evidence of those on board the "Thorsa" seems to me very much more reliable both as regards the facts which happened, and also as regards good seamanship than the evidence of those on board the "Otto." But the captain of the "Thorsa," although he thinks he would have gone clear if he had kept on his helm as he had ported it at first, did not confine himself to that—he did not take that risk—but proceeded a second time to port, and a second time gave the signal that he was porting, which necessarily meant that he was going more to starboard than he had done already. In my opinion when he had given that signal and performed that manœuvre, he had determined the risk of collision unless there was fault on the part of the "Otto." Up to this time I assume there was no fault on the part of the "Otto," although I am inclined to think there was. I think when she got the first signal that the "Thorsa" was porting she should have held that was the determined course of the "Thorsa," and herself have ported. But I hold up to this time the "Otto" was not in fault. Now, if she had, on receiving the second signal from the "Thorsa" that she was porting again, kept on her course, I think it is quite plain from the evidence which we have before us that no collision could have taken place. But when the vessels were approaching a little nearer the captain of the "Thorsa" suddenly observed the "Otto" paying off to port, showing that she had gone on a starboard helm, and of course that necessarily would bring her across the "Thorsa's" bows, and the captain the instant that he saw that stopped and reversed his engines.

Now, the sole question to which this case is narrowed down, so far as the reclaiming-note before us is concerned, is the question, whether the time at which the "Thorsa's" engines were stopped and reversed was later than it should have been according to the regulations. I do not think that it was. The captain of the "Thorsa" had the right to assume that having given the signal which determined the course he was going to take, the "Otto" would conform to that manœuvre which he was performing and would not get across his bows, and having observed that the "Otto" kept straight on her course, he, for

greater caution, repeated his signal and increased the amount of his paying off to starboard. Up to that time, I can see no fault on the part of the captain of the "Thorsa." He had no reason to anticipate that the "Otto" would starboard. It is admitted now that the "Otto" was entirely wrong in starboarding, and of course one captain in approaching another vessel must to some extent be allowed to suppose that the proper rules will be attended to, because if he did not assume that the other vessel would attend to the rules at first, he would have nothing to guide him at all. But the captain of the "Thorsa," suddenly seeing the "Otto" starboarding instead of porting, and thereby necessarily performing a wrong manœuvre and endeavouring to cross his bows, he then instantly did what was required by the regulations, namely, he stopped and reversed his engines. Unfortunately the distance was by that time too short—as captain Natt-och-dag who was on board and came on deck at the time said, by that time the collision was unavoidable, and the result was that the "Otto" was sunk.

The Lord Ordinary in holding that the "Thorsa" was to blame has gone upon the case of the "*Khedive*," and if the case of the "*Khedive*" had in my opinion ruled this case, of course I would have been bound to give effect to it. It is the case which goes strongest against a vessel which has been mainly in the right in such a case of collision as this, and it certainly lays down as a distinct principle that whenever the master is satisfied that there is immediate risk of collision, he is not entitled to allow his vessel to go on at full speed, merely giving the order to "stand by," but is bound at once to take the necessary steps to diminish the risk of injury which would be caused by the collision. I think the "*Khedive*" case and this case would be very much on all fours if in the case of the "*Khedive*" the captain, instead of giving the order "stand by," had stopped and reversed at that time. If he had done that, I do not think in that case any possible fault could have been attributed to him, and in my humble judgment the captain of the "Thorsa," at the time he gave the order to stop and reverse, was practically, as regards the risk of collision, in the same position in which the captain of the "*Khedive*" was at the time when he gave the word "stand by," and failed to give the order "stop and reverse." Therefore, upon the whole matter I have come to be of opinion that the Lord Ordinary's interlocutor should be altered in so far as the first finding that there should be blame attachable to those in charge of the "Thorsa," and that the "Thorsa" ought to be assolvied from the conclusions of the action at the instance of the owners of the "Otto."

LORD YOUNG—The only question in this case is one of fact; there is no question of law presented whatever. The Lord Ordinary has upon the evidence dealt with that question of fact by finding that the colli-

sion was caused through the fault of the "Otto" and the "Thorsa." Your Lordship has pointed out that we are now limited to the question whether there is fault on the part of the "Thorsa," it being admitted by the owners of the "Otto" that their vessel was in fault. The Lord Ordinary has found that there was fault on the part of the "Thorsa." Whether there is evidence to warrant that conclusion is the question, and the only question before us, and I am of opinion with your Lordship that there is not. I think the "Thorsa" was not in fault, and it does not occur to me that I could usefully say anything upon the details of the evidence upon which I have arrived at that conclusion. I think the "Thorsa" was not in fault, and therefore the collision was caused by the fault of the "Otto" alone. That is sufficient for the decision of the case, and I concur, therefore, that the judgment of the Lord Ordinary must be altered.

LORD RUTHERFURD CLARK—I am of opinion that the "Thorsa" was not in fault.

LORD TRAYNER—There are here counteractions arising out of a collision which took place at sea on the 7th August 1892 between the steamships "Thorsa" and "Otto." Each ship attributes the collision to the fault of the other, but on the proof the Lord Ordinary has come to the conclusion that both ships were in fault, and has, according to the rule in maritime cases, found each of the vessels liable in one-half of the aggregate damage.

I agree with the Lord Ordinary in thinking that there is not much real conflict in the evidence as to the circumstances attending the collision. The facts appear to me to be shortly these. The collision took place in broad daylight off the coast of Denmark. The vessels sighted each other when at the distance of about three miles. Their then relative positions are to some extent in dispute, but I do not regard it as material to go into this. When they had approached each other to within the distance of a mile they were end on, or nearly end on, and going in opposite directions. At that point the "Thorsa" gave the signal that she was directing her course to starboard, and at the same time put her helm apart which brought the "Thorsa's" head a point or nearly a point to starboard. The "Otto" heard but disregarded the "Thorsa's" signal and kept her course. When the ships had neared each other to the distance of half-a-mile the "Thorsa" repeated her signal formerly given and again put her helm apart and kept it so. Immediately after giving the second signal and putting her helm apart the "Thorsa's" engines were stopped and reversed because just at that point of time the "Otto" starboarded her helm bringing her head to port and consequently making a course directly across the "Thorsa's" bows. She passed about two-thirds of her own length before she was struck by the "Thorsa." From the time the ships were distant at least a mile from each other the "Otto" did not alter her course until just before

the collision when she went to port as above mentioned, and her engines were neither stopped nor reversed at any time. She was going full speed ahead when the collision occurred.

In these circumstances it is not doubtful that the "Otto" was in fault, and very much fault. On hearing the first signal from the "Thorsa" she should plainly have gone to starboard; she should have done so when the second signal was given; she was altogether wrong in going to port as she did just before the collision; and she should have stopped and reversed her engines when it became apparent that a collision was imminent. I have never seen a case in which the rules prescribed for preventing collisions at sea have been so utterly disregarded. The faults on the part of the "Otto" which I have just detailed are not now disputed by the counsel for her owners, and the pursuers Currie & Company will be entitled to decree as concluded for by them unless it can be shown that there was also fault on the part of the "Thorsa." The faults which it is alleged the "Thorsa" committed are two. First, that at her first porting (when the ships were a mile apart) she did not port sufficiently to determine the risk of a collision, and second that she did not stop and reverse in time.

With regard to the first point, it is not quite clear on the evidence whether the extent to which the "Thorsa" ported when distant a mile from the "Otto" was sufficient to determine the risk of a collision provided the course of the "Otto" was not changed. It is however quite certain that it was enough to determine the risk, if the "Otto" had then also ported, as it was her duty to do, and as the "Thorsa" had then the right to believe she would do. But I think it is proved that when the "Thorsa" ported the second time at the distance of half-a-mile from the "Otto," she did port sufficiently to determine the risk of collision provided the "Otto" kept her course. This is sworn to by the master and second mate of the "Thorsa," and I find no evidence to contradict them. It is quite true that the master says that the two vessels would have passed close to each other, but it is enough to absolve the "Thorsa" from the charge of fault if her helm was ported sufficiently to enable the vessels to go clear (the "*Jesmond*" L.R., 5 P.C. App. 1). And it has to be remembered that the obstinacy with which the "Otto" held her course notwithstanding the signals from the "Thorsa" was drawing the "Thorsa" very near the coast, and the master of the "Thorsa" cannot be held in fault if he gave enough helm to enable the vessels to pass and little more, seeing that a little more would or might have led to the grounding of his vessel or collision with the lightship. As I have said, I think it proved that when the second porting took place, there was helm enough given to determine the risk of collision provided the "Otto" kept her course, and there was therefore at that moment, and certainly not before, no necessity for stopping or reversing the engines of the "Thorsa."

But just then the "Otto" changed her course and went to port instead of to starboard, making it then apparent that a collision was imminent. The evidence is clear that instantly this change of course on the part of the "Otto" took place the engines of the "Thorsa" were stopped and reversed. I think therefore that the "Thorsa" complied with the 18th regulation. The moment it appeared necessary she stopped and reversed.

The Lord Ordinary has been chiefly influenced in pronouncing the judgment now under review by a consideration of what was determined in the case of the "*Khedive*." I think that case distinguishable from the present although in many of the circumstances they are similar. In the case of the "*Khedive*" the captain saw that another vessel (the "Voorwaarts") was crossing his bows, and knew "that within five minutes from which time, if he did nothing, he must come stem on her and probably send her to the bottom." The captain of the "*Khedive*" in the circumstances put his helm round so as to bring his vessel into parallel course with the "Voorwaarts" in order to lessen the force of the collision, and did not stop or reverse until within one minute of the collision. The Court held the "*Khedive*" in fault because it had not sooner stopped and reversed, and had thus violated the 16th (now the 18th) regulation, being of opinion that seeing a vessel so near as the "Voorwaarts" was, crossing his bows, the "*Khedive*" should have stopped and reversed at once, instead of waiting for three or four minutes to do so. There was, in the opinion of the Court, a necessity for stopping and reversing in order to avoid collision. It is only where necessary that the 18th regulation requires to be observed. Now, in this case, if I am right in the view I have already expressed, the necessity for stopping and reversing did not arise until the "Otto" changed her course so as to cross the bows of the "Thorsa." If she had not done so, the vessels would have gone clear, and the necessity for stopping and reversing would not have arisen. But the moment her change of course was observed the necessity arose, and at that moment the "Thorsa" stopped and reversed. There was therefore no neglect on the part of the "Thorsa" to observe the 18th regulation.

The result I have reached is that no fault has been proved on the part of the "Thorsa;" that the collision is attributable solely to the fault of the "Otto," and that the pursuers (Currie & Company) should have decree for the damages done to their vessel (admitted to be £1055), and be assolized from the action against them at the instance of the Messrs Wilson.

The Court recalled the Lord Ordinary's judgment, sustained the pursuers' plea-in-law in the action of Currie & Company against Wilson, Son, & Company, Limited, and found the defenders liable to the pursuers in the sum of £1055, and assolized the defenders in the action by Wilson, Son,

& Company, Limited, against Currie & Company, &c.

Counsel for the Reclaimer—C. S. Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondent—Jameson—Ure. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, June 23.

FIRST DIVISION.

BICKET v. WOOD.

Motion for New Trial—Judges Present Equally Divided—Court of Session Act 1868, secs. 58 and 61.

A motion for a new trial was heard by three Judges of the First Division and the Lord Ordinary who tried the case. Two of the Judges of the Division thought a new trial should be allowed, the other two Judges present thought not.

Held that the Court was constituted under sec. 58 of the Court of Session Act 1868, and that the words in the second part of sec. 61, "in case of equal division judgment shall be given in conformity with the verdict," applied. New trial consequently *refused*.

Section 34 of the Court of Session Act 1868 (31 and 32 Vic. c. 100) provides that "When an exception is taken in the course of a jury trial a note thereof shall be taken by the judge . . . and such exception may be made the ground of an application to set aside the verdict either by motion for a new trial or by bill of exceptions." Sec. 58 provides—"When a motion for a new trial or a bill of exceptions comes before one of the Divisions of the Court, if the judge who tried the cause is not one of the judges of the Division, such judge shall be called in to hear the motion or bill, as the case may be; and when the cause is advised, such judge shall give his judgment with the other judges, and the decision shall be in conformity with the opinion of the majority of the judges present." And sec. 61 provides that "No verdict of a jury shall be discharged or set aside upon a motion for a new trial unless in conformity with the opinion of a majority of the judges of the Division and in case of equal division judgment shall be given in conformity with the verdict; but this provision shall not apply to hearings upon bills of exceptions."

An action of reparation for slander at the instance of John Bicket, dairyman, Glasgow, against William Wood, dairyman there, was tried upon 1st and 2nd March 1893 before Lord Kincairney and a jury, and resulted in a unanimous verdict for the defender. In the course of the trial counsel for the pursuer took exception to the Judge's refusal to admit certain evidence. In June 1893 the pursuer moved for a new trial on the ground that the verdict was contrary to evidence and also repeated