

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 assoilzied 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 assoilzied 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

his objections to the Judge's refusal to admit certain evidence, but did not present a bill of exceptions. A rule was granted. The hearing on the rule took place upon 20th June 1893 before three of the Judges of the First Division—the Lord President, Lord Adam, and Lord M'Laren, Lord Kinneir being absent—with Lord Kincairney as the Judge who presided at the trial. The Lord President and Lord Adam thought a new trial should be granted on the ground that the evidence tendered and refused should have been admitted. Lord M'Laren and Lord Kincairney thought otherwise.

The Court being equally divided in opinion the rule was discharged and the verdict upheld.

The following day counsel for the pursuer submitted to the First Division that as this was a motion for a new trial, not a bill of exceptions, with a majority "of the judges of the Division" who heard the case in favour of setting aside the verdict, the opinion of Lord Kincairney, who was not a Judge of the Division, should be disregarded and a new trial granted under section 61 read as a whole, and looking to the views expressed in Mackay's Practice, ii. p. 75. To hold otherwise would deprive the first part of section 61 and its concluding words of all meaning.

The defender's counsel waived the objection that this argument should have been stated at the hearing on the rule, but submitted that under sec. 58 Lord Kincairney's vote fell to be counted, and that under the second part of sec. 61 in case of an equal division of opinion the verdict was to be sustained.

At advising—

LORD PRESIDENT—In the first place, it is only by the concession of Mr Comrie Thomson that this matter can be well reconsidered, because judgment has been given and no objection was taken at the time to the announcement. At the same time, as the point is one of practice, it may be well to consider it on the merits.

We are concerned with a motion for a new trial, and not with a bill of exceptions, and as I understand section 34 gives an option to a party who has taken exception to a ruling of the judge to proceed either by way of a bill of exceptions, in which case there may be an appeal to the House of Lords, or by way of a motion for a new trial, in which case the objection to the ruling is raised incidentally, and there is no right of appeal. In the present case, which, as I have said, was a motion for a new trial, objection was taken to the rejection of certain evidence by Lord Kincairney. We considered that objection, and as Lord Kincairney is not one of the Judges of this Division of the Court, the Court was constituted under section 58, which directs that "if the judge who tried the cause is not one of the judges in 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." It so happened that there was an equal division, and that takes us to the second branch of section 61, which provides that "in case of equal division judgment shall be given in conformity with the verdict." Now, I take that to mean, in the case of a court constituted under section 58, that the equal division referred to is equality of division among the whole judges sitting in the Court as constituted under section 58. It is quite true that the first branch of section 61 says 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 it may be that that means a majority of the permanent judges of the Division. But I think that we are not concerned to consider whether that is the sound construction or not, because I do not think that those words apply to or govern the second branch. The language of that branch, directing that judgment shall be given "in conformity with the verdict," perhaps primarily and more naturally refers to cases in which the objection is that the verdict is against the weight of the evidence. At the same time it appears to me that it may quite reasonably be understood to include also cases in which the objection is to a ruling of the judge, the words "in conformity with the verdict" being thus regarded as equivalent to "so as to uphold the verdict." That seems to me to be the case which here occurred. The first branch of section 61 not being in point, and Lord Kincairney being a member of the Court, I think that his Lordship's vote must count, and that the verdict of the jury must, in consequence, be upheld.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused a new trial.

Counsel for Pursuer—Wilson—W. Thomson. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender—Comrie Thomson—Wilton. Agent—John Rhind, S.S.C.

Friday, June 23.

SECOND DIVISION.

[Lord Low, Ordinary.]

ALSTON'S TRUSTEES v. ROYAL BANK OF SCOTLAND.

Retention—Bank—Cash—Credit Bond—Negotiable Securities Deposited in Security.

In 1881 a bank agreed to allow a firm of merchants in Glasgow credit upon a cash account to the extent of £10,000, and a cash-credit bond for that amount was executed by the firm and the individual partners in favour of the bank.