My inclination was to allow the case to go to the jury, because in our practice it is unusual, though it is competent, for the Judge to stop a case before the conclusion of the evidence for both parties, and the addresses of counsel to the jury. But on consideration of the grounds stated by the defenders, I did not think it would serve any good purpose to allow the case to proceed, and being of that opinion I adopted what, so far as I know, is the only mode of withdrawing a case, viz., directing the jury to find for the defenders. If it was not competent to do so at that stage it would have been equally incompetent to do so at the close of the case. If, again, that course would have been competent at the close of the case, the addresses of counsel to the jury would have been useless. But as I do not understand that the majority of your Lordships hold that the course which I adopted was incompetent, I need add no more.

Counsel for the defenders then moved that expenses should be reserved in accordance with the usual practice.

Counsel for the pursuer admitted that the general rule was to reserve the question of expenses, but argued that this was an exceptional case, in respect that the first trial had been rendered nugatory by the action of the defenders in moving that the jury should be directed to return a verdict for them.

The Court pronounced the following interlocutor:—

"Having heard counsel on the bill of exceptions, allow the exceptions, set aside the verdict in the cause, and grant a new trial: Find the pursuer entitled to the expenses of the first trial in so far as not available for the second, and *quoad ultra* all his expenses from date of said first trial till this date."

Counsel for the Pursuer — Strachan — Anderson. Agents — Gray & Kinnison, S.S.C.

Counsel for the Defenders — Sol.-Gen. Shaw—Ure—Salvesen. Agents—Macpherson & Mackay, W.S.

Tuesday, March 12.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

CARSE *v.* NORTH BRITISH STEAM PACKET COMPANY.

Reparation—Ship—Collision at Sea—Open Boat—Duty to Exhibit Light—Regulations for Prevention of Collisions at Sea, 1884, *Article* 10 *(f).—Contributory Negligence.*

Sub-section (f) of article 10 of the Regulations for preventing Collisions at Sea, 1884, provides that "every fishing vessel, and every open boat, when at anchor between sunset and sunrise, shall exhibit a white light visible all round the horizon at a distance of at least one mile."

This regulation does not apply to boats propelled solely by oars.

A small rowing boat while lying at anchor one night after sunset in the Firth of Clyde was run down by a steamer. There were several men on board engaged in fishing, of whom one was drowned. His widow brought an action against the owners of the steamer. The case was sent to trial by jury. It was admitted that the boat carried no light, but there was evidence that the night was sufficiently clear to have enabled the steamer to avoid the collision had a good look-out been kept on board. There was also evidence that the boat had anchored in the fair-way between two piers. The judge directed the jury that the Regulations above quoted did not apply to the boat in question. The jury found for the pursuer.

The defenders excepted to the direction of the judge, and also moved for a new trial on the ground that the verdict was contrary to the evidence.

Held (1) that the direction given by the judge was right; and (2) that the verdict was not contrary to the evidence, in respect that, although the boat was in fault in anchoring where it did without showing a light, the direct cause of the accident was the failure of those on board the steamer to keep a good look-out.

On 15th July 1893 William Carse, china merchant, Greenock, accompanied by two friends, hired a small rowing boat without masts, and about nine o'clock in the evening proceeded to the fishing ground east of the pier at Dunoon. They anchored their boat and proceeded to fish. While they were engaged in fishing at about twenty-five minutes to eleven the s.s. "Guy Mannering," belonging to the North British Steam Packet Company, on its way from Kirn to Dunoon Pier, ran down and sank the boat. William Carse was struck by the paddle float and killed. His widow raised this action on her own behalf, and as guardian of her four children, against the North British Steam Packet Company, for payment of £2000 as damages for his death.

The pursuer averred that the accident had been caused by the failure to keep a sufficiently good look-out on board the "Guy Mannering," and that there had been gross carelessness on the part of the captain and those in charge. She admitted that the boat had carried no light, but averred that it was not usual or necessary for a boat of the kind in question to do so.

The defenders denied that a good look-out had not been kept, and averred "that the boat was anchored in the usual track of steamers," and that "the accident was solely due to the culpable and reckless conduct of the deceased and his companions in anchoring in the fairway, and negligently failing to show the light required by the Regulations for Preventing Collisions at Sea. Apart from the Regula-

tions a light was required as a reasonable and proper precaution to avoid danger."

They pleaded, *inter alia*—"(3) The accident having been caused, or at least materially contributed to, by the negligence of the deceased William Carse, the defenders should be assoilzied."

Sub-section (f) of article 10 of the Regulations for Preventing Collisions at Sea, 1884, provides that "Every fishing vessel and every open boat when at anchor between sunset and sunrise shall exhibit a white light visible all round the horizon at a distance of at least one mile."

The case was sent to trial by jury on the following issue—"Whether on or about the 15th July 1893, at or about 10·30 p.m., the pursuer's husband the late William Carse, china merchant in Greenock, while engaged in fishing in a small boat anchored near Dunoon Pier, was killed through the fault of the defenders, to the loss, injury, and damage of the pursuer."

The pursuer led evidence to show that, if a good look-out had been kept on board the steamer, the boat could have been seen in time to avoid a collision. Two witnesses, who had been passengers on board the steamer at the time of the accident, gave evidence to this effect, and said that they themselves had seen the boat for some time before the steamer came near it.

The defenders led evidence showing that the boat had anchored in the usual track for steamers plying between Kirn and Dunoon piers.

Counsel for the defenders moved the Judge to give the following directions to the jury:—"1. That the boat in which the deceased was, and which came into collision with the defenders' steamer was an 'open boat' within the meaning of the Regulations for the Prevention of Collisions at Sea, 1884, Art. 10 (*f*), and ought when at anchor, at the time of the said collision, being between sunset and sunrise, to have exhibited a white light in terms of said Regulations. 2. That, it being admitted that the said boat was not exhibiting a white light at the time of the collision with the defenders' steamer, the jury are bound to find for the defenders, unless the jury are satisfied upon the evidence that the absence of such light could by no possibility have contributed to the collision. 3. That, even if the jury are of opinion that there was fault on the part of the defenders, the pursuers are not entitled to a verdict, in respect that, in breach of said Regulations, the said boat, which was in charge of the deceased William Carse, failed to exhibit a white light, unless the jury are satisfied on the evidence that the absence of said light did not contribute to the said collision."

Lord Wellwood refused to give the directions asked, and directed the jury that the said regulation did not apply to the boat in question, but that they were entitled, apart from the regulation, to consider whether the deceased should not, in the circumstances, as a reasonable precaution, have exhibited a light on board the boat, and whether his failure to do so caused, or materially contributed to, the collision which caused his death; that in the event of their so finding they were bound to find for the defenders, although they might think that the defenders were also in fault; but that, if they were satisfied that, notwithstanding negligence on the part of the deceased, the defenders, by keeping a proper look-out, and by the exercise of reasonable care, could have avoided the collision, they should find for the pursuer.

Counsel for the defenders excepted to the foresaid refusal, and also to the above directions, in so far as inconsistent with the directions which, on behalf of the defenders, he had asked the Judge to give.

The jury, with consent of the Lord Ordinary, read the following questions which they had put to themselves, with their answers, which sufficiently indicate the view taken by them of the evidence. "(1) Was the small boat moored in the track of the steamers?—Yes. (2) Were Mr Carse and his friends at fault in mooring in such a position?—The jury are of opinion that Mr Carse and his friends acted rashly in mooring where they did. (3) Was there enough light to enable those in charge of the steamer to detect the small boat if a sufficient look-out had been kept?—Yes, but the jury consider that the man selected as outlook was inefficient."

The jury returned a verdict for the pursuer, and fixed the damages at £300 for the widow, and £50 for each of the children.

The defenders presented a bill of exceptions. They also applied for and obtained a rule on the ground that the verdict was contrary to the evidence.

Argued for the defenders—(1) The verdict was against the weight of the evidence. (2) There had been sufficient contributory negligence proved, even according to the finding of the jury, to prevent the defenders from being liable in damages. This was an ordinary case of contributory negligence, where the conduct of both parties was the continuing cause of the accident. Accordingly it could not be brought under the principle of *Davies* v. *Mann*, November 4, 1842, 10 M. and W. 546. It was impossible to say that the want of lights did not contribute to the accident, and therefore this case was ruled by that of *The Khedive*, L.R., 5 App. Cases, p. 876; *Spaight* v. *Tedcastle*, March 7, 1881, L.R., 6 App. Cases, 217; approved in *Cayzer, Irvine, & Company* v. *Carron Company*, August 1, 1884, L.R., 9 App. Cases, 873, at p. 886. (3) *On the bill of exceptions*—The boat was an "open boat" within the meaning of the Regulations for the Prevention of Collisions at Sea, 1884, Art. 10 (*f*)." It was not reasonable that the Interpretation Clause defining "ship" in the Act of 1854 (17 and 18 Vict. c. 104), sec. 2, should be held to limit the operation of subsequent Acts, the regulations in which clearly applied to open boats. Sec. 17, being the penal clause of the Act of 1873 (36 and 37 Vict. cap. 85), spoke of "ships," but the term as used there applied to all vessels specified in the Regulations, of which vessels this was one. So, too, sec. 25 of the 1862 Act (25 and 26 Vict. cap. 63), applied to boats of

this class. The objection that these boats were not examined by Board of Trade surveyors, and were therefore not included in the Regulations, would apply equally to yachts, which it was not customary to examine, but which were indisputably bound to carry lights. The case of the "*C. S. Butler*" was distinguishable from this, because there the boat in question was a lighter which had never left the Thames, while this was a boat which might, and as a matter of fact did go to sea. Accordingly the Lord Ordinary had been wrong in saying that the regulation did not apply to this boat.

Argued for the pursuer—(1) The verdict was not contrary to the weight of evidence. It would have to be grossly so in order to be set aside—*Metropolitan Railway Company* v. *Wright*, April 6, 1886, L.R., 11 App. Cas. 152. (2) This case fell within the principle of *Davies* v. *Mann*. It was clearly the duty of the steamer to steer clear of the boat, which at worst was only in the same position as a man walking along the middle of a road. Even if there had been contributory negligence on the part of those in the boat, the defenders might by reasonable care have avoided the accident, and were therefore liable. The absence of the light had not contributed to the accident, and the defenders accordingly could not escape on that ground—*Morrison* v. *General Steam Navigation Company*, April 23, 1853, 8 Ex. 733. (3) The Regulations did not apply to small boats such as this, and the direction of the Lord Ordinary to that effect was quite right. The Definition Clause of the 1854 Act, sec. 2, expressly excluded them, speaking of ships as "every description of vessel used in navigation, not propelled by oars." In the Act of 1862 and its regulations as to lights, the language of the 1854 Act was maintained. Thus sec. 27 spoke of the duty of "masters of ships" to take notice of the Regulations, and the word "ship" in that Act had special reference to the definition clause in the 1854 Act. Thus also sec. 17, the penal clause of the 1873 Act, spoke of "ships" infringing the Regulations. Accordingly, if the Merchant Shipping Acts were read along with these regulations, this boat was evidently excluded from their scope. There was no authority for including boats like this, and much authority against it—"*C. S. Butler*," August 6, 1874, L.R., 4 Ad. and Ecc. 238, where a lighter of 60 tons was held not to be bound to carry lights—"*Owen Wallis*," January 23, 1874, L.R., 4 Ad. and Ecc. 175; *Ex parte Fergusson*, L.R., 6 Q.B. 280, at p. 291; *European and Australian Royal Mail Company* v. *Peninsular and Oriental Steamship Company*, January 4, 1866, 14 L.T. (N.S.) 704.

At advising—

LORD PRESIDENT—We have here a bill of exceptions as well as a motion to make the rule previously granted absolute on the ground that the verdict is contrary to evidence; and it may therefore be convenient, as a member of the Court who did not try the case, that I should state first my opinion upon the bill of exceptions. The case made by the defenders here is that the open boat, in which the man who came by his death was at the time of the accident, was an open boat which was subject to the obligations imposed by Article 10 of the Regulations for Preventing Collisions at Sea which are now in force, and sub-section *f* of that article. That sub-section says—"Every fishing vessel and every open boat when at anchor between sunset and sunrise shall exhibit a white light visible all round the horizon at a distance of at least one mile." It is quite certain that this was in ordinary language an open boat, that it was at anchor, that the occurrence took place between sunset and sunrise, and that it was not exhibiting any light at all.

But while, therefore, *prima facie* this rule might be applicable, the question whether it is applicable to an open boat, which admittedly has oars as its only means of propulsion, is a question depending upon a consideration of the statute which authorises these Regulations and of the Regulations themselves. It has been contended to us by the pursuer that the word "open boat" must be construed with reference to a certain limitation which runs through the two statutes which are now to be read as one, viz., the Merchant Shipping Act of 1854, and the Merchant Shipping Act of 1862, and the subsidiary rules which derive their force from the latter. After hearing the argument I have come to be satisfied that the pursuer is right. In the first place it is section 25 of the Merchant Shipping Act of 1862 which authorises these Regulations; and the Regulations, when we turn to them, most plainly import a certain relation between one another, and particularly between article 10 and article 6 which precedes it, because article 10 in the initial part or first half—which must have the same extension as the second half—imports an exemption from the obligation which is contained in article 6—an exemption which implies that but for the exemption the rule would have effect.

Now, we have a rule which in terms is applicable to a sailing ship, and accordingly it must be plain that, for the purposes of this section, the open boats which are exempted are open boats which would have been hit by article 6, and hit because they are described by ships. Well, then, when we turn to the interpretation clause, which is made common to the Act of 1854 and the Act of 1862, we find that it limits the operation of the Act to such vessels as are not propelled by oars. It seems to me, therefore, that so far as the first part of article 10 is concerned, it is made plain that the word "open boats" is to be used in the sense in which the Act brings them under the word "ship;" and that is, that they must have the common characteristic of those ships which alone are dealt with by the Act, viz., that they are not propelled by oars.

Then when we turn to the second part of article 10, which is that under which the present question primarily arises, I find that the phraseology is just the same as in the first part; and accordingly I cannot resist the argument that the same limita-

tion which has been proved to apply to the word "open boats" in the first part applies to the word "open boats" in the second.

And that view is greatly confirmed by two considerations. I have referred to section 25 of the Act of 1862 as that which points out the regulations which are to be observed; but the relative section which compels obedience to these regulations under a penalty is not section 25 but section 27, and there the persons who are put under obligation, and under penalty in the case of default are "all owners and masters of ships." Now, it is quite plain that there the statutory word "ship" is used in the statutory sense, and it cannot, I think, be maintained that the Legislature passed, as a *brutum fulmen*, the code which is found in the Regulations, but compelled obedience only from a certain class of the persons who were directed to fulfil them. That is the result of the argument on the side of the defenders, because section 27 unquestionably does not cover the master of an open boat which is propelled by oars; and the result would be that the enactment would be nugatory so far as this class is concerned. It seems to me that the reconciliation of the two is to be found by recognising the limitation which is common to both, and which is derived from the word "ship" having a standard meaning—the original definition in the Act of 1854. The other consideration to which I referred is to be found in the 17th section of the Act of 1873. That is a penal clause which makes it extremely difficult for anyone in default in the matter of these Regulations to escape civil consequences. Now, it has not been suggested that, if the rule applies to open boats which are propelled by oars, there is any reason, or any evidence of an intention, to treat them more lightly than other defaulters; and yet again, apparently of set purpose, the phraseology used is "ship." The word "ship" under the Act amending the Merchant Shipping Act suffers the limitation common to the two preceding Acts of 1854 and 1862; and that is, that it applies to ships which are not propelled by oars.

Therefore I have come to be satisfied that the bill of exceptions is wrong, that the Judge's direction was right, and that we must act accordingly. If the Regulations do not apply, then the first, second, and third questions all fall to the ground.

But then we are also moved to make an absolute rule to set aside this verdict as contrary to evidence. In this matter, we are aided in ascertaining the views of the jury by certain statements which they made to the learned Judge who presided, as to their opinion upon certain questions which they had put to themselves. It appears from these that the jury were of opinion that the outlook on board the steamer was inefficient; and we have to read that in connection with what after all is the verdict which we are concerned with, to see whether it is right or not. They affirmed the proposition that the accident was caused by the fault of the defenders, and that the fault is an inefficient outlook.

Now, considering, first of all, the conduct of the steamer, I think that the evidence as it stands is such as fairly supports that conclusion. There are two witnesses among the passengers on board the steamer who give evidence, which if it were believed by the jury, led directly to the conclusion that the outlook was inefficient. Two men, whose testimony is really, I think, not substantially shaken on cross-examination, asserted that they, looking in front of them on the night in question, saw this boat when the steamer was at a considerable distance from it, that they saw it from that time up to the moment of the collision, that the time which elapsed was such that the boat might have been saved; and they had a strong opinion as to the conduct of the persons on board who did not secure the safety of the boat. Now, it seems to me that the *prima facie* cause of the accident was the want of an efficient look-out. But then the man who professed to keep a look-out was put into the witness-box, and it is enough to say that his evidence, as reported in the notes taken at the trial, very well justified the jury in coming to the conclusion, from his conduct, by the way he answered the questions, and, very possibly also, from the look of him, that he was not an efficient look-out. Putting these two things together it seems to me to be a sufficient conclusion that the view of the jury was that there was no sufficient look-out—practically no look-out; and that if there had been a look-out, as testified by those two witnesses, this boat might have been saved. Again, I think it is quite clear, from other evidence in the case, that the diversion of the steamer so as to save the boat would not have been an extraordinary manœuvre at all, but, on the contrary, would have been the simplest and most plain-sailing manœuvre. Therefore, when I look at the matter, without examining with any minuteness the various pieces of evidence which the Court have had put before them, I think there was enough to justify the jury in saying that this boat was run down, and this man lost his life, because the steamer was not keeping a look-out, and that, if it had kept a look-out, with ordinary care and prudence the accident would have been avoided. Now, apart from the position of the boat itself, that would completely sustain the finding of the jury. But let us see what there is in the action of the party in the boat to avert the consequences of the steamboat's carelessness. The facts are these, that, in the course of the evening and sometime before this accident took place, these gentlemen had gone out in their boat for the purpose of fishing, had moored it at a particular place, and were engaged in fishing. They had moored it with the anchor. As I have said, that was some time before the steamer came down upon them. It is shown that the boat was at anchor, and that it could not at the first sight of danger move out of its place; it was a matter of more or less time to extricate it from that position. Now, it seems to me that these facts show that the direct cause of the accident was not the boat being in

the way at the moment of the collision, because the accusation made against the boat refers back to a period of time and sequence too remote to make it the cause of the accident. I do not affirm that dogmatically, but I say there is adequate evidence in support of that view; and, if that be the view come to by them, I think there is no law which compels to the conclusion that the jury were wrong in thinking that the accident was caused by the fault of the steamer. It seems to me that the mere fact that at an antecedent period the boat had put itself in a position which the jury say was a wrong position, because in the track of the steamer, does not by any means necessarily abate the consequences of fault on the part of the steamboat. That the boat had been placed there is a matter of history; and, at the time, it was not moveable because it could not be taken out of the way within such a time as would have enabled the steamer to clear it. Therefore, it seems to me that, while that is an important fact in the case, it is not one which has that vital force which would deprive the pursuer of the right to the verdict which the jury has given her.

I am for refusing the bill of exceptions and discharging the rule previously granted.

LORD ADAM—Whether the exceptions were right or wrong depends upon this question, whether the Regulations for the Preventing of Collisions at Sea apply to the boat in question. The Lord Ordinary who tried the case thought they did not, and the question for us is whether or not his Lordship was right in giving that direction. Now, as I understand, it is said that the Regulations do not apply to the boat in question because, as we know, that boat was propelled by oars exclusively, and it is said that the Regulations apply to ships, and that by the definition clause contained in the Act "ships" applies to all kinds of vessels not exclusively propelled by oars, and therefore does not apply to vessels exclusively propelled by oars. Your Lordship has stated the grounds fully upon which your Lordship has arrived at that conclusion, and Mr Salvesen quite satisfied me that that view was right. In particular, with reference to the 27th section of the Act of 1862, which was before us for our consideration, that shows I think conclusively against whom and in what circumstances these Regulations apply, because it specifies the parties who are to obey them, and to be liable if they do not obey. What that section says is that "owners and masters of ships" shall obey these Regulations. Now, if the owners and masters of ships are to obey these Regulations, I suppose the owner and master of anything else that is not a ship is not bound to obey them. That takes us back to what is it? Well, there are two ways of it I think, and that is to take the original matter where the definition of "ship" applies to ships or any other kind of vessel exclusive of boats propelled by oars only. If we are to go back to that definition, then it humbly appears to me that these Regulations cannot apply to this case. The only other way of interpreting the word ship is to ask whether it is a ship in the ordinary acceptation of the term. It would require a great deal more than I have heard to satisfy me that, in the ordinary acceptation of the word, this open boat, 14 feet long, was a ship. Therefore it appears to me, in agreement with your Lordship, that the Lord Ordinary rightly refused to give to the jury those charges which he was asked to give them, and therefore I think that the bill of exceptions must be refused.

Upon the other question I agree with your Lordship and have very little to say. The question put to the jury was whether the accident happened through the fault of the defenders. Now, on this particular question, in this boat Mr Carse and his friends had gone out on this summer night and they had anchored the boat in the fairway of the river so to say. They had gone without any lights; and the jury, the question having arisen, very properly came to the conclusion that in doing so Mr Carse and his friends had acted rashly. Now, Mr Carse and his friends preferred to anchor there, but I am far from thinking that because a person may anchor rashly—it may be in the fairway of a channel—any other boat has a right to run them down with impunity. I do not think that is so; I would be very slow to affirm such a proposition as that. On the other hand, I think that people who had put themselves in such a position are bound to take ordinary care of themselves, and if, through the fault of another, they suffer injury, that does not dispense with their duty of taking ordinary care of themselves. That was the sort of case, it seems to me, that was raised in this case. Now, looking at it in that light it humbly appears to me that the true view which the jury came to was this—there was this boat, anchored no doubt in this place, which was attended with some danger; we think it should not have been there; but on the other hand, here was a steamer coming down on a night which, on the evidence, the jury evidently took to be a very clear night, on which they could see perfectly well, and with the observance of ordinary care and the most ordinary outlook could have avoided and should have avoided this collision. Now, if that be so I should think they were bound to avoid it. On the other hand, there was a duty laid upon those people who had put themselves in this position to get out of that dangerous place if they could. It is obvious upon the evidence that they were in a position from which they could not extricate themselves, because they were anchored there. Now, I think it would have been contributory negligence if these people had been there, being free to remove, and had deliberately remained in that place, and had been deliberately run down without the least exertion on their part. But the jury were apparently satisfied upon the facts proved that the act complained of was in their view, as I think, solely attributable to the steamer. I therefore think we should not disturb the verdict.

LORD M'LAREN—The chief question raised by the bill of exceptions is whether the regulations relative to lights, so far as we are asked to apply them to this case, are really applicable to the case of such small craft as boats hired for pleasure-rowing, and which do not carry sails. If our attention were confined to that part of the 10th article of the Regulations which relates to boats at anchor, it might be difficult to say that the Regulations were not applicable. But, in order to determine the question, we must take the whole article into view, and its relation to previous articles, particularly the 3rd and the 6th. Now, when we compare the introductory part of the first enactment of article 10, with the previous enactments in articles 3 and 6, we see that the crafts which are described in article 10 are "open boats and fishing vessels of less than 20 tons," and they are described as vessels of the kind forming an exception to these general rules relating to lights which are the subject of the 3rd and 6th articles. I agree with your Lordships that as the boats there referred to are boats which are treated exceptionally, and which, but for that exceptional provision, would have fallen under this regulation, it follows that no boats fall within article 10 except such as could, according to the definition of the statute, be considered to be ships of small size, and as to which it is necessary to have the regulations as to lights modified.

Now, that being the result of my consideration of the first part of the 10th article, it follows that the same words are used in the subsequent part of the article in the same sense to describe the class of boats that are to exhibit a white light at anchor, and that no boat can be held to fall within that provision except those that are enumerated in the commencement of the article, and which are boats of such a size and so fitted with sails as to be able to proceed to sea. I have no doubt from the contents of article 10, that fishing vessels—I mean vessels that carry on the trade of fishing—were those primarily in view of the Legislature in giving statutory effect to those Regulations.

On the question of the motion for a new trial on which we have called for argument I shall say very little. The chief interest of the case is that an argument is raised as to the extension of the limits of application of that rule of liability which is illustrated by the cases of *Davis* v. *Mann* and *Radley* v. *London and North-Western Railway Company*. Of course it would be easy to state that principle with such generality as to cover all cases of injury to life and property consequent upon collision, and if we should accept the rule in the general terms contended for, I am afraid it would go very near to abrogating altogether the rule of law which disentitles a pursuer to damages when he is shown to have been guilty of contributory negligence. But we must consider that rule with reference to the class of cases in which it has been applied; and they seem all to contain this element in common, that the negligence which is alleged to be contributory—the negligence of the plaintiff or pursuer—is something which has been done by him in advance, and which makes him less able to avoid the collision. Either it is the case of the ass which has only power to move within the length of its tether; or again the case of the railway trucks which are put in a siding, and which even though in charge of a man cannot be got out of the way in sufficient time to avert a collision; or again, as in the present case, where a boat is at anchor, and when a collision is imminent, the persons who are navigating the boat are unable to get the anchor up in time to move out of the way. Now, in this class of cases there is certainly a moral duty incumbent upon the other party to do what he can by going out of the way to avoid a collision; that moral duty seems to be the foundation of the legal rule, and the Judges have acted upon it.

I may refer in this connection to the bill of exceptions. The presiding Judge gave a direction on this subject which is not excepted to (except in so far as bearing on the other exception), in which his Lordship—as I think quite rightly—lays down that in the state of circumstances, which apparently the jury has held to be proved, the antecedent negligence of the pursuer is not contributory negligence, because the Judge puts the facts and says that is not contributory negligence on a state of the facts which might otherwise entitle the pursuer to claim a verdict. But I should desire to reserve my opinion as to the possible extension of this principle to every case, other than those of the class to which it has hitherto been applied. In the present case I think the jury were entitled to hold that although there had been originally fault on the part of the persons navigating the boat—and no one can dispute that it was a rash and dangerous thing for a boat to anchor in the fairway without a light—yet as it was not in the power of the people in the boat to retrieve their error when collision became imminent, the responsibility for the accident lay upon the steamship. Of course the jury must have held that there had been an omission to keep a proper look-out, because if, in point of fact, the boat was not seen then there would be no negligence. But it appears to me after reading the evidence that there was sufficient material in the evidence to enable the jury to hold (1) that a proper look-out was not kept; and (2) that if their look-out had been good, there was sufficient light at eleven o'clock on that night in July to enable the look-out man, or the master of the steamer, to see the boat, and by deviating its course to avoid a collision. I am therefore of opinion with your Lordships that the rule should be discharged.

LORD KINNEAR—I am of the same opinion. I agree, for the reasons which your Lordship has given, that the regulation of the Order in Council requiring certain open boats to carry lights, must be intended to apply to those boats only which answer

the definition of the Merchant Shipping Act—the statute creating the authority under which the Order in Council was issued. Now, the definition of the Merchant Shipping Act is, "vessels used in navigation, and not propelled by oars;" therefore the question is, whether a pleasure boat 16 feet long, having no mast, and no place for a mast, and entirely propelled by oars, answers that definition or not? With your Lordship I am very clearly of opinion that it does not, and that the Judge was quite right in refusing to give the direction which the defenders asked for.

On the question of fact as to whether the verdict is justified by the evidence I also agree with all your Lordships. It appears to me that the evidence raised a very proper question for the consideration of the jury. In considering the discussion of the rule for a new trial we have the advantage not only of their verdict, but of the specific answers which the jury have given to certain questions which they put to themselves, and which were read when they returned their verdict. These answers did not exhaust the issues, and did not even exhaust the opinion of the jury upon the questions of fact which were committed to them; and accordingly the Judge did not accept them as a special verdict, but required the jury to give a general verdict on the issues. They found in the first place, that the gentleman who lost his life acted rashly in mooring the open boat in the track of the steamer; and, in the second place, they found that the steamer did not keep an efficient look-out. But they did not find whether one or other of those two faults—for both of these acts are in one sense faults—was the cause of the accident, or whether they both contributed to the accident. Therefore, in order to find their opinion upon that vital question we must go to their general verdict in which they find for the pursuer. Now, the question is whether the evidence which justified them in giving those two specific answers to the questions they themselves had stated is or is not consistent with the verdict which they ultimately gave. I agree with all your Lordships that it is quite consistent with their verdict, because, although an open boat may be anchored in the way of a steamer, and although the boat may have acted very rashly indeed in putting itself in that position, still the steamer is not entitled to run down the boat. Therefore, if it appear that the loss of the boat is to be attributed either to reckless navigation on the part of the steamer, which, although it observed the boat, took no pains to avoid running it down, or to such negligence in keeping a look-out as a jury is entitled to say is blameable on the part of those in charge of a steamer navigating such waters as the Clyde, where they are perfectly well aware that there are numbers of open boats constantly either crossing their bows or lying in their way—then the jury find that the cause of the accident—the direct cause of the accident—is the negligence of the steamer rather than the antecedent rashness of those on board the boat. I therefore agree with your Lordships that the jury have been properly directed upon that question, because no exception whatever is taken to the law laid down by the Judge, and that their verdict is one with which we are not entitled to interfere.

LORD WELLWOOD—I am of the same opinion. Your Lordships have so fully expressed the views that I hold on both points that I have really scarcely anything to add. Upon the first point with regard to the bill of exceptions, the view which I had when I refused to give the directions asked by the defenders was that the definition of the word "ship" in the Act of 1854 over-rode the Regulations; that the Regulations applied to all ships falling under that definition, and to no other. No doubt in the Regulations a number of different kinds of ships are described by name, and amongst other descriptions given there are certain regulations applicable to open boats and fishing vessels. But the reason why these crafts are so described is for the purpose of introducing certain exemptions or modifications absolving vessels of that sort and class from carrying lights which other ships are compelled to carry. But for all that, all the different vessels and boats and ships mentioned in the Regulations are "ships," within the meaning of the Merchant Shipping Act of 1854. And in that view I am confirmed by the consideration which your Lordship in the chair has mentioned, viz., that when we come to deal with the provisions of the Act of 1862, which deals with the enforcing of the Regulations passed under that Act, which were substantially the same as those we are now considering, we find the word "ships" and the word "ships" alone used. And, what is perhaps of still greater importance, when we come to the Act of 1873 we find that in the 17th section of it, which was specially invoked by the defenders on account of the penal consequences which it enacts, the only word used is "ship" again. Therefore I conclude that these Regulations were intended to apply only to ships in the sense of the definition in the Act of 1854.

In regard to the other point there was a very great conflict of evidence, but I left that matter entirely to the jury, subject to the directions which I gave them. I think that there was a body of evidence which, if they believed it, entitled the jury to hold that the persons in charge of the defenders' vessel, the "Guy Mannering," could have seen and should have seen this little boat at the distance of two or three hundred yards, and in ample time to have avoided running it down. By their verdict they evidently took that view. Then, in regard to the fault or negligence on the part of the persons in charge of the boat, I explained to the jury that they must be satisfied, in order to enable the pursuer to get the benefit of the last direction which I gave them, that any fault on the part of those

in charge of that little boat was antecedent, and not truly in any proper sense the cause of the accident, or contributory to it. That was explained to the jury, and I have not the slightest doubt that they fully understood it. They put certain questions to themselves, but these questions were certainly not exhaustive. The answers were not given in answer to any question put by me or put by the pursuer's counsel. Now, the jury having that in view, I think there was evidence if they believed it to entitle them to hold that the fault on the part of those in charge of the boat was antecedent to and remote from the true cause of the accident. There was evidence that this boat had been moored in that place for some time—a considerable time before the accident occurred; and that in the interval between the mooring of the boat and the running down of the boat by the "Guy Mannering" two other vessels had passed the boat in safety.

No doubt the captains of these vessels say that they did not see the boat although they were close upon it and very nearly ran it down. But I do not think the jury can have taken that view; because, if they believed the evidence of the captains of those two vessels, the "Mercury" and the "Marchioness of Breadalbane," they would not have formed the opinion that those in charge of the "Guy Mannering" should have seen the boat at a distance of two or three hundred yards. In the view of these facts I think there was evidence, if the jury believed it, to entitle them to hold that this boat had been moored there, unable to get away in a hurry, for some time before, and that other vessels had been able to pass it in perfect safety, thus inducing the belief in the minds of those in the boat that they were in safety in remaining where they were in the state of the light. I therefore agree that the exceptions should be disallowed and the rule discharged.

The Court disallowed the bill of exceptions for the defenders, and discharged the rule.

Counsel for the Pursuer—Salvesen—Blair. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders—A. Jameson—Grierson. Agents—J. & J. Ross, W.S.

VALUATION APPEAL COURT.

Wednesday, February 20.

(Before Lord Wellwood and Lord Kyllachy.)

THE UNION TUBE COMPANY *v.* ASSESSOR FOR COATBRIDGE.

Valuation Cases — Statement of Case — Findings of Fact—Valuation of Lands (Scotland) Amendment Act 1879 (42 *and* 43 *Vict. cap.* 42), *sec.* 7.

Held that a case stated for the opinion of the Valuation Appeal Court which contained no findings in fact could not be entertained, in respect that it was not stated in terms of section 7 of the Valuation of Lands Act 1879.

The Union Tube Company, Coatbridge, appealed against the valuation of their works being entered at £700, and craved to have it reduced to £500. The Magistrates of the Burgh of Coatbridge "without going into details" fixed the valuation at £625, whereupon the appellants and the Assessor both craved a case. This case as stated by the Magistrates contained no findings in fact, but consisted simply of an enumeration of various statements made on behalf of the parties.

The Valuation of Lands (Scotland) Amendment Act 1879 (42 and 43 Vict. cap. 42), section 7, provides that the appellant may require the Commissioners or magistrates to state and sign the case "setting forth the facts proved."

On the case being called in the Valuation Appeal Court, counsel for the appellants, the Union Tube Company, said that he could not offer any argument in this case as stated, and asked that it should be sent back to be stated properly.

At advising—

LORD WELLWOOD — In this case both parties appeal. It seems to me that the case is not properly stated, and that this is a matter for which the appellants, as well as the magistrates, are responsible. We have in the case a statement of the arguments on both sides, and statements of fact by both parties, but there are no findings that these facts were proved or admitted to be correct. In these circumstances this case has not been properly stated in terms of the Act. That is the fault of both parties. Therefore we should dismiss both appeals and allow the valuation to stand.

LORD KYLLACHY—The magistrates are bound under the Act to state in the case, not only the contentions of parties, but the facts which they find proved. It is not always necessary that evidence should be led. The magistrates may ascertain the facts by the admission of parties. It is enough to say—"So and so was stated and not disputed;" or, "from the evidence led the magistrates came to the conclusion that such and such was the fact." It may