shire, in the county of Stirling, and feudally vested therein.

In April 1873, under the Burial Grounds (Scotland) Act 1873 (18 and 19 Vict. c. 68), the Sheriff-Substitute of Stirlingshire designated and set apart, on the petition of the Parochial Board of Denny a portion of the estate of Herbertshire. The price was fixed by valuation under the Lands Clauses Act at £480, 6s. 9d., and that sum was consigned in bank, a disposition being executed by Mr Forbes in favour of the chairman of the Parochial Board of Denny.

Mr Forbes was also heir of entail in possession of, and feudally vested in, the lands and barony of Callendar in the same county, and the destination in the entail of that property was the same as in the entail of Herbertshire.

Under the Caledonian Railway Act 1876, and the Lands Clauses Consolidation Act 1845, the Caledonian Railway Company acquired certain portions of the estate of Callendar for their undertaking, the price of which, £906, 3s. 9d., was consigned in bank on May 12, 1883. The two sums thus consigned amounted to £1386, 10s. 6d.

In this petition Mr Forbes craved, under the Lands Clauses Act 1845, secs. 67 and 68, authority to invest the sum of £1335 in a certain investment in superiorities of lands, and to obtain payment of the balance of £51, 10s. 6d.

The petition craved the Lord Ordinary to decern against the Parochial Board of Denny and the Caledonian Railway Company for payment of the costs of the petition and proceedings therein, and uplifting and applying the consigned money, and of entailing the superiorities to be purchased as an investment on the series of heirs in the entails, "and that in the same proportions as the sums consigned by them respectively bear to each other," or to do otherwise as should seem proper.

On a motion being made for expenses against the parochial board and the railway company, the Lord Ordinary directed inquiry to be made as to whether in practice such expenses in similar cases were divided equally between the parties, or in proportion to the sums consigned by them respectively. It was stated that the practice had varied.

Argued for the parochial board—It was equitable that the expenses should be apportioned between the board and the railway company in proportion to the sums consigned by them respectively.

Argued for the railway company — The general rule in the English Courts was to make such costs divisible between the parties equally (Deas on Railways, p. 350, and cases there cited; *ex parte* Governors of St Bartholomew's Hospital, May 20, 1875, 20 L.R., Equity Cases, p. 369), and as there might have been separate petitions with reference to each of the consigned sums, the equitable course was to divide the expenses equally between the parochial board and the railway company.

The Lord Ordinary (Lord Trayner) sustained the contention of the railway company, and pronounced the following interlocutor—"Finds the Parochial Board of Denny and the Caledonian Railway Company liable equally between them in the expenses of this petition and proceedings therein, and also of and incident to the purchases referred to in the petition, and of uplifting and applying the said consigned moneys, and also of the expenses of entailing the said superiorities on the series of heirs mentioned in the petition, and remits the accounts thereof," &c.

Counsel for the Petitioner—A. J. Mitchell. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Parochial Board — Begg. Agents—Philip, Laing, & Trail, W.S.

Counsel for the Railway Company — Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Saturday, December 18.

SECOND DIVISION.

[Sheriff of Aberdeen.

LESLIE AND OTHERS *v.* WALKER AND OTHERS.

Reparation — Shipping Law — Trawler — Sea Fisheries Act 1883 (46 *and* 47 *Vict. cap.* 22), *Sched.* 1.

The Sea Fisheries Act 1883 provides that when trawl-fishermen are in sight of long-line fishermen they shall take all necessary steps to avoid doing injury to them, and that where damage is caused the responsibility shall lie on the trawlers unless they prove that the loss sustained did not result from their fault. Long-line fishermen set their lines, 6000 yards in length, during daylight in a bay on the North Sound of Orkney, and according to a local custom left them there all night. They were only marked at either end by a buoy surmounted by a short flag-staff. During the night they were injured by a trawler which they had seen a few miles off when they set their lines. *Held* that the damage was due to the leaving of the lines unwatched and unlit, and to the failure to warn the trawler of their presence, and that the trawler had proved that the loss did not result from her fault.

This was an action by William Leslie and others, owners of the fishing-boat "Ebenezer" of Stronsay, Orkney, against Thomas Walker and others, owners of the steam-trawler "St Clement" of Aberdeen, for £122 as damages. The pursuers alleged that the trawler on the night of 20th May 1885 carried away ten lines, of 6000 fathoms length in all, which they had set that afternoon, about 1½ mile from shore, in the North Sound, near Papa Westray, properly buoyed and secured, and easily observable, and that the trawler was indeed within sight when they were set. They alleged fault at common law, and also neglect of the provisions of the Sea Fisheries Act 1883, particularly article 15 of schedule 1 and article 19 of schedule 1; that they lost in consequence a fortnight's fishing worth £112, and the value of the lines, £10.

The Sea Fisheries Act 1883 (46 and 47 Vict. cap. 2), first schedule, article 15, provides—"Boats arriving on the fishing-grounds shall not either place themselves or shoot their nets in such a way as to injure each other, or as to interfere with fishermen who have already commenced their operations." Article 19—"When trawl

fishermen are in sight of drift-net or of long-line fishermen they shall take all necessary steps in order to avoid doing injury to the latter. Where damage is caused the responsibility shall lie on the trawlers, unless they can prove that they were under the stress of compulsory circumstances, or that the loss sustained did not result from their fault."

The defenders denied fault or liability, and stated that in any view the claim was excessive, since the pursuers could have supplied themselves with new lines by travelling a short distance to Kirkwall.

It appeared from the proof that the pursuers after setting their lines went on shore, according to the custom of the place, intending to return in the morning for them. Their evidence was to the effect that the trawler could, and the defenders' evidence to the effect that it could not, have observed them and their lines. The trawler was during the night in question trawling round a buoy which it had fixed in the Sound. It appeared that in the morning the pursuers had boarded the trawler and made a claim for lost lines, putting the value of their lost lines at £2, and even at £1, and offering to give up their claim for such sums, which offer was refused, those in charge of the trawler having seen no evidence on any occasion when they lifted their trawl of the presence of lines which had been torn away by it.

The Sheriff-Substitute (W. A. Brown) found that the trawler might have seen the pursuers setting their lines if a proper look-out had been kept, and that the trawler had carried them away —"That the officers and crew of the said trawler failed to keep a proper look-out while engaged in trawling operations as aforesaid, and failed otherwise to take all necessary steps in order to avoid doing injury to the pursuers' lines, in terms of article 19 of the first schedule appended to the Sea Fisheries Act 1883." His Lordship gave the pursuers £10 damages for the value of the lost lines, and £10 damages, holding that the pursuers had greatly exaggerated this item.

"*Note.*—[*After stating reasons for holding that the nets were set, and the trawler tore them away*] —(3) It seems to me that any difficulty there is in the case lies in its last branch, and is connected with the law rather than the facts. Both parties appeal to the common law and the provisions of the recent statute, the pursuers specially founding on article 19 of the schedule annexed to the Act of 1883. The defenders, on the other hand, contend that article 19 is to be read along with article 15, and that it is not applicable to the circumstances of the present case, as the trawler was first on the ground. I think it is the fair construction of the evidence that the trawler was fishing in the North Sound at the time the pursuers set their lines, but it rather seems to me that article 15 is intended to apply to the case of fishing-boats only, and that it is too narrow a reading of article 19 to limit the duty imposed on trawlers by the consideration of which party first arrives on the ground. The statute was evidently designed to give a special protection to the weaker party, and I am disposed to think that the provision in the schedule imposes an absolute obligation on trawlers when long-line fishermen are in sight, or, with proper care, may be observed. But notwithstanding the rules laid down by the Sea Fisheries Act, it seems to me that the main issue in the case must still primarily be controlled by the provisions of the common law. In this view the defenders contend that there is a duty laid on long-line fishermen, after they have set their lines, to remain by them in their boats during the night, in which case the situation of the lines would be marked by the lights which the boats are bound to carry. It is not said that there is any provision in an Act of Parliament or any statutory regulation that a boat shall remain beside its lines during the night, but it is argued that that is a principle of the common law, and in corroboration of that the defenders appeal to the regulations for preventing collisions at sea, annexed to the Order in Council, dated at Balmoral on 17th September 1885, and particularly to section 10 thereof, subsection C. The rule may be quoted for convenience of reference, and is in the following terms—'A vessel employed in line-fishing with her lines out shall carry the same lights as a vessel when engaged in fishing with drift-nets'—that is, two white lights on any part of the vessel where they may be seen. Now, certainly that is a very distinct provision as to what lights are to be exhibited, assuming fishing-boats and vessels to be in the same category, when they remain beside their lines; but considering what the primary object of the regulations is—viz., to prevent collisions at sea—it strikes me as a somewhat strained principle of construction to extract from them a law to regulate the conduct of fishermen in prosecuting their rights as such. It is proved in this case that the lines were set in the usual way, and that it is quite a common practice to leave them out all night without a watch, and I have judged in several cases in this Court where damages have been claimed and awarded under the same conditions. I quite appreciate the strength of the argument that if fishermen are to be permitted to occupy such a large portion of the highway of the sea as is implied in setting their lines in a continuous line, and are not to be held bound to mark their situation by a light, and trawlers are to be found responsible for destroying them, that practically means the proscription of trawlers from certain localities in the exercise of an admittedly common right. It would, however, be as manifest a hardship to poor fishermen following their calling in remote districts of the country, and knowing little of modes of fishing beyond their own primitive experience, to have their property destroyed when pursuing their vocation as they have been accustomed to do, and in a way that the law, so far as I can see, has never declared illegal. Both trawlers and fishermen are engaged in exercise of their common right to take white fish from the sea, but it is notorious that in pursuance of these rights a conflict of interests may arise, and therefore it is necessary that each party should inform himself as to the conditions under which the other practises his vocation. I think it is proved that there is a practice not only in the North Sound, but in other places, such as the Bay of Aberdeen, of fishermen leaving out their lines all night, and it seems to me that if a trawler betakes himself to such a limited area for fishing as the North Sound, with that knowledge, a special duty of inquiry and vigilance is laid

upon him both by common and statute law to see that no damage is done. But that is precisely, I think, what the defenders' trawler did not do, for I believe the master of the trawler strikes the true keynote of the case, notwithstanding his protestations as to the instructions to keep a good look-out, by his admission that it never occurred to him to look out for fishermen's lines; and if that was the frame of mind of the captain, that of his crew may readily be inferred."

On appeal the Sheriff (GUTHRIE SMITH) found that the lines were damaged by the trawler, but that the defenders had proved that the loss did not result from their fault.

"*Note.*—I think that the Sheriff-Substitute has rightly held that the damage in this case was done by the trawler. The master admits that she was the only trawler in the North Sound of Orkney on the night of the 20th May, and two perfectly neutral witnesses saw her crossing and recrossing about 10 o'clock at night over the part of the bay where the nets were set. It follows that under article 19 of the Convention, which by the Sea Fisheries Act of 1883 has the force of statute, the responsibility lies on the trawler 'unless she can prove that the loss sustained did not result from her fault.'

"The pursuers commenced to set their lines about three in the afternoon, and about four o'clock left them for the night, their custom being to return next morning and lift them. During the night they admit that they were wholly unattended and unprotected, and were only marked at either end by a skin and cork buoy, surmounted by a flagstaff, rising perhaps 7 feet above the water. The lines were 6000 yards, or nearly 3½ miles in length. It is admitted that the weather was hazy, not so much so in the afternoon, but towards evening the haze became very dense, and after dark the two terminal buoys were of no use in indicating the lines.

"It appears that it has always been the custom for the people of the islands to fish in this way, and until they were invaded by trawlers the traffic in these seas was too insignificant to occasion any considerable risk. It is otherwise, however, now, and I have no scruple or hesitation in holding that the local custom must conform to the requirements of the general law. The sea is a public highway open to all, and if a fishermen leaves his lines all night to take care of themselves, it is at his own risk. Had the pursuers remained by their nets they would have been bound to exhibit the lights prescribed for vessels engaged in fishing, and any failure to do so would have disentitled them to recover. Much more when there was neither boats nor light nor anything visible to warn off passing vessels, and if in the darkness another boat chanced to run through their lines she cannot be said to be to blame unless she knew that they were there.

"The question in the case thus comes to be, Did the defenders know? On this point the burden of proof shifts to the pursuers as soon as the defenders have proved negligence in leaving the lines unguarded. I do not think that on the evidence this burden has been discharged. When the pursuers began to set their lines the trawler was observed away to the south, about half-way between them and the island of Sanday, which according to the chart would be about 3 miles. It is inferred that at that distance they might have seen both the boat and what they were doing if a proper look-out had been kept. But the master states that he was on deck all the time, and he is confirmed by his crew in saying that no boat was seen, and they had no reason to suppose that a line had been stretched right across the mouth of the bay. Moreover, the argument cuts both ways. If the trawler was to blame in not taking a more active interest in the operations of the fishermen, it was no less the duty of the pursuers to have made certain that she did see them. It would have been an easy thing to have hailed her, and warned her to keep clear of the lines, especially if one of their own witnesses is right in saying, 'I expected the trawler would take away some of the "Ebenezer's" lines before morning.' Thus, in the most favourable view which can be taken of the pursuers' case, there was negligence on both sides, and I have no doubt that article 19 of the Convention, under which the case falls to be determined, must be read in accordance with the rule of the common law on the subject, namely, that to enable a fisherman to recover, the accident must be attributable entirely to the fault of the trawler, and if there was want of care on both sides he cannot maintain his action."

The pursuers appealed to the Court of Session, and argued—The trawler was liable in damages. It was found by the two Sheriffs that the lines had been destroyed by the trawler. Under the 19th article of the first schedule of the Sea Fisheries Act 1883 a trawler was bound to take all necessary steps in order to avoid doing damage to the long lines. Here it was proved by the evidence of the fishermen in the "Ebenezer," and also by independent witnesses, that the trawler and the fishing-boat were in sight of each other on the afternoon of the 20th May. It appears from all the evidence that there was no effectual look-out kept on board the trawler; they did not see the fishermen shooting their lines, and they did not see the boats that passed within 200 yards of them on the morning of the 21st. It was impossible for the fishermen to lie by their nets all night; the weather was too rough, and, besides, it was the common practice of all fishing-boats to go ashore during the night. The captain of the trawler ought to have taken the trouble to inform himself where the lines were, as he knew long-line fishing was carried on in those seas—*Combe* v. *Renton*, June 5, 1886, 13 R. (J.C.)

Argued for defenders—It was admitted that the long lines were destroyed by the trawler, but there was no necessity for the trawler keeping a constant watch for the long lines. The first question is, Did the trawler see, or ought she to have seen, the fishing-boat shooting her lines? All the evidence was against it. She was three miles off, and the difficulty of seeing a small boat at that distance was very great. (2) Even if they did not see the boat, they ought to have been warned off by the buoys at each end of the long line, but that was impossible as the buoys were more than three miles apart, and the course of the trawl did not take her near either of them. No vestiges of hooks or long lines were found in the trawl when it was drawn up. If the fishermen saw the trawler they ought to have warned her where their lines were set and she would have avoided them.

At advising—

Lord Young—The questions raised in this case are questions of fact. There are two questions raised, whether the fishing lines of the pursuers were destroyed by the defenders, and if they were so destroyed, whether the defenders have proved that the destruction was attributable to no fault of theirs? Both the Sheriffs are of opinion that the pursuers' fishing lines were destroyed by the defenders, but they differ in regard to the other question. The Sheriff-Substitute is of opinion that the defenders did not take due care to avoid the pursuers' lines, and therefore finds them liable in damages. The Sheriff finds no fault proved on the part of the defenders, and reverses the Sheriff-Substitute's decision. For my own part I think it doubtful whether the pursuers' lines were destroyed by the defenders at all. I think it doubtful if it is proved that the defenders' lines were ever set as alleged; the evidence is not quite convincing on that point. It is curious that not a trace of the lines said to have been destroyed were ever recovered. The fishermen who first examined the place where the lines were said to have been set say there was not a trace of the lines. They then went to the trawler, and I think all on board her concur as to the complaint that was then made, and as to what the fisherman said; they first claimed £2 of damages, and then they came down to £1. I am disposed to believe that evidence; I see no reason for discrediting these witnesses. It is remarkable that in an action in which £120 is sought as damages the pursuers should have started with asking such small sums, and that as compensation for their lines torn away. I think that it is enough to render their case doubtful. Then they bring an action for £120 and get £20 in all as damages, I do not think these facts are favourable to them. But although I think it doubtful if the lines were even set, I am content to put my judgment as the Sheriff-Principal has put it, and find that the import of the evidence is that the men on board used all due care, and were not in fault. I think that the judgment of the Sheriff should be affirmed, and the defenders assoilzied from the conclusions of the summons. I think the proper findings would be, that it is not proved that the pursuers' lines were destroyed, and that it is proved that the defenders used all due care and caution and were not in fault.

Lord Craighill—I concur in the opinion which Lord Young has just pronounced. In my opinion the interlocutor of the Sheriff-Principal is in accordance with the evidence, and in accordance with the law applicable to this case. I think that the result he has come to is that at which we should arrive. There was no carelessness on the part of the trawler. Her crew did not wish to destroy the lines of the fishermen if they were really set, and I think such an allegation totally unfounded. I think that the proof has not substantiated the charge against the trawler, but the contrary. With reference to the question whether the lines were set, and if set were destroyed by the trawler, I do not express an opinion. The case was presented to us on the assumption that the lines had been set, and had been destroyed by the trawler, and taking the case on that assumption I concur with Lord Young in his opinion.

Lord Rutherfurd Clark—I am rather inclined to take the opposite view. I think it proved that the lines were set in the sight of the trawler, and that the trawler did not use due care to avoid going over the ground where they were laid, and that she destroyed them. That is my impression and my view of the evidence.

Lord Justice-Clerk—I confess I have participated in the doubts expressed by Lord Rutherfurd Clark. But the finding we are asked by the appellants to make is that the defenders have not proved that the loss sustained did not arise from their fault. I cannot make that finding, though there is a conflict of evidence on the point. I think that the fishermen might have taken the precaution, which they did not take, of informing the trawler that their lines were set there. Then again, they left the lines when they had set them, and went on shore, no doubt they say for a very good reason, on account of the weather, but they did leave their lines, and the signs that they left to show that their lines were set there were not sufficient to prevent the trawler going over that ground.

The Court found that "on 20th May 1885 the pursuers' fishing-lines were damaged as alleged by the trawler 'St Clement,' but that the defenders have proved that the loss did not result from their fault; therefore dismiss the appeal and affirm the judgment of the Sheriff."

Counsel for Pursuers (Appellants)—H. Smith—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Defenders (Respondents)—Sol.-Gen. Robertson, Q.C.—Dundas. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 18.

SECOND DIVISION.

ANDERSON AND OTHERS (BUCHANAN'S TRUSTEES) *v.* MINISTERS OF KILMARNOCK, ETC.

Trust — Administration of Trust — Whether "Minister of Town" includes Minister of quoad sacra *Parish therein.*

A truster directed her trustees to convey a certain portion of the funds which she left for charitable purposes to the Provost and Town Council of Kilmarnock, the "clergymen of the Established Church of Kilmarnock, and the clergyman of the parish of Riccarton," as trustees. In Kilmarnock there were various Established Churches situated in the old parish and in the burgh which had been erected as *quoad sacra* churches out of the original parish. *Held* that the ministers being ministers of Established Churches within the town of Kilmarnock were trustees along with the collegiate ministers of the original parish and the minister of Riccarton, but that the minister of a *quoad sacra* church situated some distance out of the town, part of whose parish had been disjoined