instrument of the 21st of March 1890 is an Ordinance and nothing but an Ordinance, and finding that the requirements of section 20 have not been complied with, and not finding anything in the Act to lead one to think that those requirements were to be dispensed with in the case contemplated by the 16th section, I can only come to the conclusion that the judgment under appeal is erroneous.

For these reasons I concur in the motion which has been proposed.

LORD CHANCELLOR—My noble and learned friend, Lord Morris, who is unable to be present to-day, has asked me to say that he entirely concurs in the judgment your Lordships are about to pronounce.

Decided that the interlocutors appealed from be reversed: Declared that the appellants were entitled to a decree reducing and setting aside the Orders of the Commissioners, dated respectively the 21st March 1890 and the 10th April 1890: Cause remitted to the Court of Session with directions to pronounce decree to that effect: The respondents to repay the appellants the costs received by them in the Court below: Remitted to the Court below to dispose of the conclusions of the summons with respect to the documents 1st, 2nd, and 3rd called for and sought to be reduced: No costs of appeal allowed.

Counsel for the Appellants—Finlay, Q.C. —Dickson—Pitman. Agents—Grahames, Currey, & Spens—J. & F. Anderson, W.S.

Counsel for the Respondents—Sir Henry James, Q.C.—Asher, Q.C.—A. Robertson. Agents—Martin & Leslie—J. Smith Clark, S.S.C.

COURT OF SESSION.

Friday, March 15.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

GIBSON *v.* NIMMO & COMPANY.

Reparation—Master and Servant—Mine—Manager—Defective Plant—Child Employed by Manager at Dangerous Work—Responsibility of Master.

A boy, twelve years of age, brought an action of damages at common law against his employers, a firm of coalmasters, on account of injuries received by him while in their service. The case was sent to trial by jury. The pursuer led evidence to the effect that he had been employed by the certificated manager, who in terms of the Mines Regulation Act had control of the defenders' mine, to grease hutches at the pithead; that the work was dangerous for a boy of his age, and that the accident, which had caused the injuries complained of, had been occasioned by the defective condition of the defenders' plant. The pursuer led no evidence to show that the defenders knew of the alleged defects in the plant, or of his being employed at the alleged dangerous work. At the close of the pursuer's case the judge, on the defenders' motion, directed the jury that the pursuer had adduced no evidence sufficient to prove his contention under the issue, and that they should return a verdict for the defenders. The jury, in respect of this direction, found for the defenders.

The pursuer having presented a bill of exceptions, the Court (*diss.* Lord Wellwood) *allowed* the exceptions.

Opinions by the Lord Justice-Clerk and Lord Trayner that the jury would have been entitled to find the defenders liable on the ground that their representative had employed the pursuer at work which was dangerous for a boy of his age.

Opinion by Lord Young that, *prima facie* and in the absence of evidence to the contrary, the defenders were to be dealt with as traders attending to their own business, and were responsible if their system and works were in a dangerous, unusual, or faulty condition, or if they employed children at work at which they should not be employed, and that there was evidence to support both these grounds of liability.

Process—Jury Trial—Withdrawal of Case by Judge.

Opinion by Lord Young that a judge has no authority to withdraw a case from the consideration of the jury.

Opinion by Lord Trayner that it is competent for a judge to withdraw a case from the jury, if he is of opinion that no evidence has been led to support it.

Process—Expenses—Jury Trial—Withdrawal of Case by Judge—New Trial—Expenses of First Trial and Bill of Exceptions.

After the pursuer in a jury trial had closed his case, the presiding judge, on the defenders' motion, directed the jury that the pursuer had led no evidence sufficient to support his contention under the issue, and that they must return a verdict for the defenders. The jury having returned a verdict as directed, the pursuer presented a bill of exceptions.

The Court, having allowed the exceptions and granted a new trial, *found* the pursuer entitled to the expenses of the first trial in so far as not available for the second, and to the expenses of the bill of exceptions.

William Gibson entered the employment of James Nimmo & Company, coalmasters, at one of their pits near Coatbridge, on 7th March 1893. He was twelve years and three months of age, and was employed to grease the wheels of the hutches on the pithead frame. In the afternoon of his first day's employment a hutch at which he was working fell over the frame, dragging him with it, with the result that he sustained serious injuries.

On account of the injuries so received, Gibson brought an action of damages at common law against his employers in the Sheriff Court at Glasgow.

The grounds upon which he claimed damages were (1) that the work of greasing trucks was conducted at the defenders' pit under a defective and dangerous system; and (2) that the work was dangerous for a boy of twelve years.

The defenders averred, *inter alia*—"The work was carried on under the supervision and direction of Andrew Henderson as certificated manager in charge of the colliery. Both he and Andrew Robb, the pitheadman, to whose orders pursuer worked, were careful, competent men, and had full power to do whatever was necessary to provide for the safety of the men working under them. They were both fellow-workmen with the pursuer, and engaged in the same common employment. If there was any defect or fault in connection with the works or the orders given to pursuer, such defect or fault was on the part of fellow-workmen for whom the defenders are not responsible."

The Sheriff-Substitute (BALFOUR) appointed Mrs Gibson *tutrix ad litem* to her son, and allowed a proof.

The pursuer appealed for jury trial to the Second Division, and the case was tried before Lord Wellwood and a jury on the usual issue of fault.

The evidence led for the pursuer showed that he was engaged by the defenders' manager Henderson. He went to the pit on 7th March 1893, and was ordered by Robb, the defenders' pitheadman, to grease the wheels of the hutches on the pithead frame. This frame was a broad wooden platform 15 feet high, along which hutches ran with coals from the pit shaft to railway waggons. The pursuer's duties were to grease the wheels of the hutches when empty, and the practice at the defenders' pits was to run each empty hutch along a line of rails to the edge of the frame, where its progress was checked by the wheels catching on a strip of wood or "tree" placed on the edge of the frame. The pursuer's duty was then to attach a chain fastened to the pithead frame to the drawbar of the hutch, and having done this, to tilt the hutch up on end and grease the wheels. The drawbar was attached to the bottom of the hutch, and had a hook at each end to which coupling chains could be attached. The pursuer and his brother, a boy of fifteen, who was also employed on the pithead frame, both gave evidence to the effect that the "tree" on the edge of the pithead frame had been worn thin by long use, and that the hutch which went over the edge of the frame had no drawbar to which the chain could be attached. They attributed the accident to these two causes.

The pursuer deponed—"There was a piece of tree or wood at the bottom, but it was worn away almost like a nail, and it was not sufficient to stop the wheels when I drew up the hutch. That wood would not prevent the hutch going over. . . . It couped over when I had got it up on its end, and I tried to keep it back, and we both went over together. Do you know what made it coup over?—It was without a drawbar. There was nothing to keep it steady. *Cross.*—I say everything would have gone safely here if there had been a drawbar."

The pursuer's brother deponed:—"There was a piece of wood or tree at the end of the platform, and on the level of the pithead, but it was worn quite thin. If that piece of wood had been in proper condition it would have stopped the wheels of the hutches. It was put there for that purpose, but it had been worn quite thin. *Cross.*—Even if there had been a draw-bar with the chain in this case, there might have been an accident, because the wood was worn. (Q) But there could not have been the same accident that happened?—(A) Yes, because if the hutch had gone over he would have gone over with it. I think that the accident arose partly from the lack of a draw-bar, and partly through the wood being worn."

Several witnesses expressed the opinion that the system of greasing hutches at the edge of an imperfectly protected platform was dangerous and unusual, and that the safe system was to tilt the hutches at some distance from the edge of the frame, or in a hole specially made for the purpose. These witnesses, however, did not go the length of saying that the accident in question could have happened if the "tree" at the edge of the frame had been of sufficient size to prevent the wheels of the hutch slipping over, and the hutch had had a drawbar, and the chain had been fastened to it before the hutch was tilted.

Several witnesses deponed that, in their opinion, it was a very dangerous thing to employ a boy of 12 or 13 to grease hutches at the top of a pithead-frame, and was likely to lead to such an accident as had occurred.

On the conclusion of the evidence adduced for the pursuer counsel for the defenders moved the Court to direct the jury that the pursuer had adduced no evidence to maintain and prove his contention under said issue; and in particular no evidence that the defenders knew of the alleged defects in the ways, works, or plant, or of the employment of the pursuer at the work at which he was engaged when injured, and that the jury should return a verdict for the defenders.

Counsel for the pursuer objected, and contended—(1) That evidence of a dangerous and defective system of working at defenders' pit had been adduced; (2) that evidence had been adduced that the pursuer, while under thirteen years of age, had been employed at a dangerous occupation in the defenders' service; and (3) that the defenders were responsible at common law on both grounds.

Lord Wellwood repelled the objections of pursuer's counsel, and directed the jury that the action being laid at common law the pursuer had adduced no evidence in law sufficient to maintain and prove his

contention under the issue, and that they should return a verdict for the defenders.

Whereupon the counsel for the pursuer excepted to the said direction.

The jury, in respect of his Lordship's direction, unanimously found for the defenders.

The pursuer presented a bill of exceptions.

Argued for the pursuer—The exceptions stated in the bill should be allowed, and the verdict set aside. There were two grounds of action, on both of which evidence had been led. (1) The system of work at the defenders' pit was dangerous and unusual. The defect consisted in tilting waggons at this particular place without sufficient protection. The operation was dangerous, and the defenders had failed to take reasonable precautions for the safety of the pursuer—*Grant* v. *Drysdale*, July 12, 1883, 10 R. 1159; *Murdoch* v. *Mackinnon*, March 7, 1886, 12 R. 811; *M'Guire* v. *Cairns*, February 28, 1890, 17 R. 540. (2) The defenders were responsible for employing a boy of twelve at such dangerous work, and they could not delegate their responsibility to another—*Sharp* v. *Pathhead Spinning Company*, January 30, 1885, 12 R. 574; opinion of L.C. Chelmsford in *Bartonhill Coal Company* v. *Macguire*, June 17, 1858, 3 Macq. 311; *Grizzle* v. *Frost*, 1863, 3 F. and F. 622.

Argued for the defenders—The action of the Lord Ordinary in withdrawing the case from the jury was right. There was no dispute that there would have been entire safety if there had been a drawbar. One hutch wanted a bar, but that was entirely exceptional. It was not a defective system, it was a mere detail in the working of the pit. Again it was said that the piece of wood placed to stop the wheels was worn out, but that again was not part of the system. The owners of the mine were not to be held liable, because persons employed in the pit had been in fault in not renewing the trees that had become worn—*Stewart* v. *Coltness Iron Company*, June 23, 1877, 4 R. 952, and *separatim*, the mineowner who employed a competent manager could only be held responsible when personal knowledge of the defect had been brought home to him. Under section 20, sub-section (1), of the Coal Mines Regulations Act 1887 (50 and 51 Vict. cap. 58) every mine was required to be under a certificated manager, who was to be responsible for the control, management, and direction of the mine. Under the Act the owners of the mine were compelled to surrender the management of the pit to a certificated manager, and the owner was precluded from interfering. There was therefore no responsibility upon the owner unless personal knowledge was brought home to him—*Sneddon* v. *Mossend Iron Company*, June 23, 1876, 3 R. 868; opinion of Lord Cairns in *Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H. L.) 89. Under the Coal Mines Regulations Act it was competent to employ a boy above the age of twelve above ground at a mine, and there was no provision making such employment illegal. There was no evidence that putting a boy of twelve to grease hutches was dangerous work if the apparatus was sufficiently protected.

At advising—

LORD JUSTICE-CLERK—Two points were raised in this case. The first was whether the system in the pit for carrying on the work at which this boy was engaged when he was injured was a faulty system or not.

On this branch of the case the defenders contended that in coal mines where the practice is to put the management of the work in the hands of a certificated manager, if a fault should be proved against the manager, the mine-owners are not liable, Whatever force there might be in that plea so far as regards an accident at the working face of the mine, I doubt if it would apply to work done at the top of the pit. But although upon the first point in the case there is some evidence before us, it is not necessary for me, in view of my opinion upon the second point in the case, to pronounce any decision upon it. I therefore give no opinion regarding it.

The second point is that there was fault on the part of the defenders in employing a boy of thirteen years of age at the work in which the pursuer was engaged when he was injured. Upon that point there was a good deal of evidence, both of persons accustomed to work in mines and of those experienced in the inspection of mines, and that evidence appears to me to be evidence which the jury should have been allowed to consider.

Upon the whole matter I am of opinion that we ought to sustain the bill of exceptions.

LORD YOUNG—The two questions in the issue are—(1) whether the pursuer while in the employment of the defenders was injured in his person, and if so then (2) whether the defenders were in fault. At the trial the pursuer adduced ten witnesses, all of whom were examined and cross-examined at considerable length. Their evidence related exclusively to the occurrence of the accident to the pursuer, and what led to it, including of course the grounds in fact on which the pursuer imputed fault to the defenders. It is not, I think, doubtful that the whole evidence was pertinent to the issue, and certainly no objection was stated to the admissibility of any of it.

The bill of exceptions bears that "upon the trial of the said issue the counsel for the pursuer adduced evidence to maintain and prove his contention under said issue." This is certainly true, and being so what immediately follows in the bill is somewhat surprising—"and on the conclusion of the evidence adduced for the pursuer in the cause the Solicitor-General as counsel for the defenders moved the Court to direct the jury that the pursuer had adduced no evidence to maintain and prove his contention under said issue." The evidence adduced by the pursuer may have been insufficient, but the suggestion that he "had adduced no evidence" was absurd.

Accordingly the case for the defenders, as argued to us, was put upon the "in particular, no evidence that the defenders knew of the alleged defects in the ways, works, or plant, or of the employment of the pursuer at the work at which he was engaged when injured, and that the jury should return a verdict for the defenders."

The learned Judge at the trial thought the proper course was to stop the case on the conclusion of the pursuer's evidence, to decline to call upon the defenders for a defence, and to direct the jury that they should return a verdict for the defenders. This was accordingly done. The first question now before us is whether this was a right course of procedure, and I am very clearly of opinion that it was not.

I see no reason why the defenders should not have been called upon to state their defence to the jury in the usual way, to lead their evidence if they had any, and why the counsel for both parties should not have been allowed to address the jury and pray the Judge for any directions in law which they respectively thought fit to ask.

There was certainly evidence bearing distinctly and directly on the system of working at the defenders' pit, and tending to show that it was dangerous and unusual; and also evidence to the effect that it was dangerous and so esteemed, and therefore unusual, to employ a boy of the pursuer's age at such work as he was engaged for and set to. Why the jury should not have had an opportunity of expressing their opinion on these matters after hearing the parties and the Judge I cannot conceive. Had they considered them, with the result that in their opinion there was nothing unusual and dangerous in the works or system, or in employing a child under thirteen, and so negatived fault, the result must have been a verdict for the defenders. On the other hand, if on the evidence they condemned the works and system and the employment of a child as unusual and dangerous, the question would have remained whether the defenders, or some others for whom the defenders were responsible, were in fault, and to blame therefor. It would have been on this question only that the defenders' knowledge or ignorance would have signified. Some one, or more, must, on the assumption I am making, have been in fault, and so blameworthy. The defenders are James Nimmo & Company. We have no information on record or in the evidence who are the partners of the firm, or whether we are dealing with a sole trader, and I daresay the pursuer does not know. But, *prima facie*, and in the absence of anyhing to the contrary, I should say that James Nimmo & Company must, in the absence of any evidence to the contrary, be dealt with as traders attending to their own business, and that they are responsible if their system and works are in a dangerous, unusual, and faulty condition, or if they employ children where children ought not to be employed, and that if they excuse and defend themselves on the ground of excusable ignorance, and throw the blame on others, they must exhibit a special case. The question did not regard any special or single matter of sudden occurrence, but the bad worn-out state and condition of their works, and the dangerous system on which they were planned and continuously used day by day. I cannot say that I think there was even plausibility in the suggestion of ignorance as a thing to be presumed. It would rather have occurred to me that, if they pleaded excusable ignorance, and so put the blame on another (for if there was fault some person was to blame), it was for them to prove it. But neither James Nimmo nor any partner of his, or superintendent or foreman, was examined.

I think the exception must be allowed, but I desire to repeat that I think the course of stopping the case and not even allowing the pursuer's counsel to address the jury was altogether irregular. The case has occasionally occurred both here and in England, where the judge saw fit, on the suggestion of the defender's counsel and with the approbation of the pursuer's, to ask the jury on the conclusion of the pursuer's evidence whether they desired to hear more of the case, or were prepared to find for the defender; and some clear cases have been thus terminated without final speeches and summing up. But for the judge to withdraw the case from the jury, and to direct, in the sense of order, a verdict for the defenders, is in my opinion altogether irregular and unauthorised by either statute or common law. A jury cannot be lawfully ordered to return a particular verdict dictated to them by the judge or any number of judges. The judge will of course state the law which he thinks applicable, and if the jury return a verdict contrary to the law, it will be set aside. But a verdict will not be set aside because it is contrary to the judge's direction in point of law if the Court think the direction erroneous. The jury are absolute masters of the situation, subject only to their verdict being set aside and a new trial granted on what the Court may deem sufficient grounds.

LORD RUTHERFURD CLARK—I am of opinion, though not without considerable hesitation, that the exceptions should be allowed.

LORD TRAYNER—The issue which was sent to the jury in this case was whether the pursuer had been injured in his person through the fault of the defenders. This general issue of fault was, of course, controlled by the record, from which I find that the fault charged against the defenders was twofold—(1) that their system was a bad system, and involved or directly led to the injury complained of, and (2) that the defenders were wrong in putting the pursuer to a work which was dangerous for a boy of tender years. The pursuer was little more than twelve years of age.

The Judge who presided at the trial, at the end of the pursuer's case, and on the motion of the defender's counsel, withdrew the case from the jury, directing them to return a verdict for the defenders on the

ground that there was no evidence on which they could return a verdict for the pursuer. To this direction the pursuer excepted.

I entertain no doubt as to the competency of the Judge presiding at a trial like this to withdraw the case from the jury if he is of opinion that no evidence has been adduced in support of the pursuer's case. On the one hand, if there is evidence, no matter how little the Judge may think of its value or weight, the pursuer is entitled to have the judgment of the jury upon that evidence, and the Judge must leave it to the jury to determine what the value or weight of the evidence is.

Taking the case on this footing, I am of opinion that as regards the first ground of fault attributed to the defenders, the Judge was right in directing the jury as he did. I see no evidence in the notes before us that the defenders' system was a bad system. I find evidence to the effect that their pithead frame and one of the hutches were out of repair, but no knowledge of that is brought home to the defenders, nor is it suggested that the defenders had failed to supply their servants with all the needful appliances and material for keeping their apparatus in good order and efficient condition. The fault of not repairing the pithead frame and hutch appears to me to be the fault of the pursuer's fellow-servants and for which at common law the defenders are not responsible. As regards this part of the case, I repeat, I find no evidence of fault on the part of the defenders.

The second ground of fault stands in a different position. There is a good deal of evidence to the effect that the work in which the pursuer was engaged was a dangerous employment for a boy of his age, and work to which, in the opinion of the witnesses examined, no boy of that age should have been put. This, of itself, would perhaps not under all circumstances have been enough to infer liability on the defenders. If, for example, the defenders or their responsible representative had engaged the pursuer for an employment that was in itself not dangerous, and a fellow-servant of the pursuer without authority from defenders had set him to a dangerous work, or to work in a place where it was dangerous for a boy to be, the defenders' liability for the consequences of such an act would be, at best, very doubtful. But no such difficulty is presented in this case, for there is some evidence (not much I confess) that the pursuer was engaged by the defenders or their representative for the very work in performing which he received his injury.

This ground of action, therefore, and the evidence in support of it, should have been left to the jury, and in withdrawing it from the consideration of the jury, the judge, in my opinion, erred.

As it is impossible to divide the direction complained of, I am of opinion that the defenders' exception should be allowed.

LORD WELLWOOD—The action is laid at common law alone, probably in consequence of notice not having been given in time. No claim is made under the Employers Liability Act. This is a misfortune for the pursuer, but it cannot extend the liabilities of the defenders at common law.

The action being laid at common law the pursuer could only succeed if he were able to prove that the accident was due to the defenders' failure to discharge some duty incumbent upon them at common law. The record shows that the pursuer's advisers were conscious of the burden laid upon them, because the sixth article of the condescendence, which is devoted to stating the ground of liability, reads thus:—"The said system of working and the condition of the said works, machinery and plant, were well known to the defenders, and they were aware of all this and did not remedy said defects till after the accident, when the above defective system was altered and the said defective hutch was removed. The defenders are thus at fault and are liable at common law to pursuer."

Thus according to the structure of the condescendence the ground of action against the defender is not that what is called the "system" adopted at the pithead was defective, but that the defenders were well aware of the defects both of the system and the condition of the works and plant, and did not remedy them.

At the close of the pursuer's proof it was seen that no attempt had been made to prove knowledge on the part of the defenders; and even when I was asked by the defenders' counsel to withdraw the case from the jury the pursuer's counsel did not suggest that knowledge on the part of the defenders was to be inferred. The pursuer's case was boldly rested upon the grounds stated in the bill of exceptions.

1. The question whether I was right or not in withdrawing the case from the jury depends, I apprehend, upon whether there remained any disputed material question of fact for the consideration of the jury. If all the material facts were admitted, and there remained only the question of law as applied to the facts, that was a matter for my consideration and not that of the jury; and if in my opinion the pursuer on the admitted state of the facts could not recover I was entitled to stop the case, subject always to any exceptions which the pursuer's advisers might think fit to take to my view of the law. I directed the jury that there was no legal evidence to support the pursuer's case, for the following reasons. According to the pursuer's witnesses the accident was due to two causes combined, or one of them. First, one of the hutches had lost its drawbar, and in consequence there was nothing to which to attach the chain. As it is proved that the pursuer, so long as he did not handle the hutch without the drawbar, did the work to which he was put with perfect safety, it would seem that the main cause of the accident was the want of the drawbar. Secondly, the tree or barrier which was intended to stop the wheels of the hutches was worn thin, so that it could no longer serve its purpose properly.

The witnesses are agreed that if the hutch had had a drawbar and the tree had been sound the accident would not have occurred. For instance, the pursuer says—"There had been a drawbar on all the other hutches that came up, and there was no danger or difficulty with them. I say that everything would have gone safely here if there had been a drawbar."

By far the strongest evidence to my mind given for the pursuer was that of his brother Charles Gibson, an intelligent boy of fifteen, who gave his evidence boldly, and certainly with no desire to favour the defenders. He says—"There was a piece of wood or tree at the end of the platform, and on the level of the pithead, but it was worn quite thin. If that piece of wood had been in proper condition it would have stopped the wheels of the hutches. It was put there for that purpose, but it had been worn quite thin." And he again says—"Even if there had been a drawbar with the chain in this case, there might have been an accident because the wood was worn. (Q) But there could not have been the same accident that happened?—(A) Yes, because if the hutch had gone over, he would have gone over with it. I think that the accident arose partly from the lack of a drawbar, and partly through the wood being worn." I may also refer to the evidence of Bulloch, Pryde, James D. Gibson, and Gray. Thus all the essential facts were ascertained—the nature of the defects which caused the accident were established beyond dispute, and it was also admitted that there was no evidence that the defenders knew of the defects. It remained only to apply the law.

If a sound hutch and a sound tree, or either of them, would have prevented the accident, surely the responsibility for allowing the hutch and the tree to be in that defective condition did not rest with the employer, but with the manager and officials of the mine. The system, if such it may be called, was apparently quite safe, and as it is not proved that the defects were ever brought to the knowledge of the defenders, or that they ever refused to furnish proper materials for making repairs, in my opinion no ground of liability on their part is disclosed. In this view it does not matter whether the system was unusual or not. In the view which I have stated it was safe if properly attended to, and it is enough that according to the pursuer's evidence the accident would not have happened if the tree had been sound, and there had been a drawbar on the hutch.

But I am prepared to go further. I think that even if, in addition to a sound tree and a drawbar, there should have been a bar or barricade to prevent the hutch going over the parapet, or if the place for greasing the wheels of hutches should have been some distance back from the edge of the parapet, that also is a matter of detail for which the defenders are not responsible. A few pounds, or possibly a few shillings, would have been sufficient to provide the necessary protection. Indeed, the question is foreclosed by the decision of *Wilson* v. *Merry & Cuninghame*, 5 Macph. 807, and 6 Macph. (H. of L.) 84. There the matter complained of was scaffolding which was alleged to be imperfectly constructed as regarded ventilation, a work which might with much greater propriety, be described as part of the system than the mode of greasing wheels now in question. The Lord President says—"I think that whereever the master of a coal-pit or of any other work has occasion to purchase and provide a machine or apparatus to be used by his workpeople, or for the protection of his workpeople, he is liable for the insufficiency of that machine or apparatus if it should turn out to be insufficient. But this is not the providing of a machine or apparatus at all. It is an ordinary operation carried on by the ordinary workmen of the pit with the materials constantly in their hands, namely, wood, one of the materials most commonly in use in a coal pit. There is no machine or apparatus to be provided, but the operation is one proper to the carrying on of the pit itself, and carried on by the workmen of the pit under the superintendence of the pit manager. Now, in these circumstances if the pit manager, against whose capacity and fitness for his occupation no allegation was made, and no evidence was led—if he commits a mistake or acts negligently in superintending such an operation as this, the question of law is, whether the master is answerable for that, and I am of opinion, giving full weight and fair construction to the case of the *Bartonshill Coal Company*, as decided in the House of Lords, and to the more recent case of *Wright* v. *Roxburgh and Morris*, as decided in the Second Division of this Court, that it is impossible to hold that the master is answerable for it." In *Wilson* v. *Merry & Cuninghame* the case went to the jury, because there were questions of fact still in dispute on which the verdict of the jury was required, and accordingly both the direction which the presiding Judge gave, and that which he refused to give are worded so as to depend upon the view which the jury might take of the evidence on certain points. But in the present case, as I have stated, there remained no material questions in dispute, and all that was required was a direction in law.

The judgment in the case of *Wilson* v. *Merry & Cuninghame* was followed in the subsequent case of *Sneddon* v. *Mossend Iron Company*, 3 R. 868.

It is unnecessary to invoke the regulations of the Mines Regulations Act which were so strongly founded on by Mr Ure. But this may be said, that the duties and corresponding responsibility thereby laid upon the certificated manager of a mine, if they do not liberate the employer altogether, serve to define the existing limits of his liability.

On this point, therefore, I agree with Lord Trayner.

2. The other ground stated in the bill of exceptions is that the pursuer was employed at a dangerous occupation when under thirteen years of age. The facts as to employment are these—The pursuer's mother asked

the manager, Henderson, if he had any work for her boy, adding that he was "just about thirteen." The manager did not engage him at that time, but said he would keep him in mind. He afterwards sent for him, and put him to grease hutches at the pithead under the directions of James Robb, pitheadman. There was no bargain as to wages. The boy was in point of fact above twelve, but I think the manager was entitled to believe that he was thirteen.

Under the Coal Mines Regulations Act of 1887 it is lawful to employ boys above the age of twelve above ground at a mine. It is true that the statute does not abrogate the common law, but it is a statute passed for the protection of women and children employed at such works, and it recognises and regulates such employment. The engagement of boys to work at a pithead, and the selection of the work to which they are to be put, necessarily rests with the certificated manager, who is responsible "for the control, management, and direction of the mine;" and I should be disposed to think that if the manager, instead of putting a boy above twelve to safe work, put him to dangerous work at the pithead, that would be a fault for which the manager and not the employers would be responsible. But I do not think it is necessary to proceed upon that ground, because in my opinion there is no evidence that the greasing of hutches was a dangerous occupation for a boy of thirteen or for a boy of twelve if the apparatus was sufficiently protected. I think the proper way to look at the question is not to consider whether in the abstract greasing the wheels of hutches is too hard work for a boy of that age, because not only must fault be proved, but it must also be proved that the fault alleged caused or conduced to the accident. The next question is, whether in the absence of knowledge the employers are responsible for the dangerous state in which the existing apparatus was left in consequence of which the pursuer was injured. Even on the abstract question the only direct evidence as distinguished from theoretical evidence is to the effect that boys of that age can safely be engaged in greasing the wheels of hutches if the apparatus is sufficiently protected. The hutches are small, standing only 4 or 4½ feet high when up-ended. The pursuer's witness William Pryde, in his examination-in-chief, says—"In my experience the greasing of hutches is generally done by boys, and they should not be under thirteen. Where the hutch is put into a hole and up-ended there, a boy of thirteen can grease it quite safely, and there is no danger. If, however, the hutch was up-ended at the edge of a pithead frame without any barricade, a boy should not be employed there, and as a practical pitheadman I would not allow a boy to do it." The pursuer himself had managed to do the work for some hours with ease and safety until he came to the hutch without the draw-bar. He says—"I had no difficulty in raising the hutches upon their ends;" and he explains the way in which the accident happened thus—"That hutch had come up two or three times and my brother always greased it. When I was at it myself I was holding it up with the one hand and greasing it with the other when it couped over. It couped over when I had got it up on its end, and I tried to keep it back, and we both went over together. (Q) Do you know what made it coup over?—(A) It was without a drawbar. There was nothing to keep it steady. It went over before I began to grease it." And his brother Charles Gibson, who was at the work for eight months, did not complain about the work as being too hard, but of the absence of a drawbar and a sound tree.

But it is sufficient to say that if there had been a sound tree and a drawbar, or if the place for greasing wheels had been some distance back from the edge of the platform, this accident could not possibly have occurred. It may safely be said that the pursuer's witnesses are unanimous on that point. What they all object to is the position in which the hutches are cleaned, and the absence of safeguards to prevent the hutches going over the parapet. As I have already said, these defects which I assume to have been proved to exist are defects for which the employers are not responsible, and therefore on practically the same considerations which lead me to decide the first question in favour of the defenders, I think the second question also should be decided.

This question, again, is covered by the case of *Wilson* v. *Merry & Cuninghame*. The man Wilson who was killed was engaged by John Neish, the defender's manager, and although it was averred that the scaffold was in a dangerous condition before Wilson was engaged, it was held that the employers were not responsible, because the defect in the ventilation was due to the fault of a fellow-servant. I refer particularly to the direction given by Lord Ormidale, and the remarks of the Lord President upon that direction (5 Macph. 812). The latter says—"He seems to consider it material that the scaffold had been erected, and the openings either left imperfect or not left at all before the deceased, Wilson, came to work in the pit. I confess that does not appear to me to be a matter of any consequence. If it were good for anything at all, it must lead to this conclusion, that the defenders must be liable for the fault of one servant affecting the life of another, because the fault of the one servant was committed before the other servant came into the place where he was injured, and that must be upon the footing that the injured servant is not to be considered in this question a servant at all. Now, I think that is entirely out of the question."

The real hardship of the case, if there is hardship, is due to this, that by oversight or misfortune notice was not given of a claim under the Employers Liability Act. I do not know whether, if such a claim had been made, it would have been successful, but at least there would have been a case to go to a jury. In the whole circumstances, notwithstanding all that I have heard to the contrary, I remain of the same opinion.

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 Regulaations 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-