no satisfactory reason was stated why we should deny effect to the manifest intention of the mine-owners that their additional notice should receive the same construction. I agree that both the questions of law should be answered in the negative.

LORD CULLEN—I concur in thinking that the notice in question cannot be read as merely an exegesis of section 3 (*a*) of the Coal Mines Order of 1913. It seems clear from the second part of it, which begins thus—"It is hereby directed . . ." that the employers are purporting to lay down on their own authority a rule of their own for their mine. As to the meaning of that rule it appears to me that its terms were clear in conveying to the mind of a reader that where an attempt was made to fire a shot in the mine none of the men who retired should return within a certain period. In the next place I think it clear that the rule which the employers themselves thus laid down is not of the nature of an interference with or alteration or modification of the statutory rule of section 3 (*a*), but that it represents a conventional rule which they were entitled to issue if they saw fit for obedience by their employees. If that is so, it is not, as I understand, disputed that such a notice, having been duly posted up and having been read by the employee, bound him as part of his contract; and the only remaining question is whether the prohibition contained in the rule was one limitative of the employment or one which only went to the quality of conduct within the sphere of the employment. On that question it appears to me that we have a clear guide, because it has been decided that a similar prohibition addressed to a shot-firer and contained in a statutory regulation is limitative of the employment. The analogy is complete, and it follows that we must here hold that the prohibition was limitative of the respondent's employment.

LORD SANDS—Any difficulty in this case arises not from any uncertainty in regard to the facts, which are clear and simple, but from uncertainty and hesitation, if I may use the expression, in the expositions of the law on this subject. The rules that have been established are, no doubt, to a certain extent artificial and they appear to be somewhat arbitrary, but I think the result at which your Lordship has arrived is in harmony with the latest developments, and accordingly I concur in the judgment proposed.

The Court answered both the questions of law in the negative.

Counsel for Appellants—Robertson, K.C. —Russell. Agents—W. & J. Burness, W.S.

Counsel for Respondent—Fenton, K.C.—Keith. Agents—Simpson & Marwick, W.S.

Thursday, June 28.

FIRST DIVISION.

[Lord Constable, Ordinary.

ROBINSON *v.* WILLIAM HAMILTON (MOTORS), LIMITED.

Process—Jury Trial—Verdict—Contributory Negligence—Verdict of Contributory Negligence on the Part of Both Parties.

Process—Jury Trial—Bill of Exceptions—Ambiguous Verdict—Duty of Party Excepting to Ask for Further Directions if he Thought some Misunderstanding as to the Law Involved Underlay the Jury's Finding.

Reparation — Negligence — Contributory Negligence.

In a trial by jury of an action of damages at the instance of a pursuer who had been run down by a motor car the jury returned a verdict in the following terms — "The jury unanimously agree that there was contributory negligence on the part of both parties in not keeping a proper look-out." The Judge directed the jury to return a verdict for the defenders. In a bill of exceptions for the pursuer, *held* that as the case was not one in which the jury had to select from a series of sucesssive acts of negligence committed by the parties respectively the true cause of the accident, the verdict meant that both parties were to blame, and bill *refused.*

Opinion (*per* Lord Skerrington) that where exception is taken and counsel thinks that some misunderstanding as to the law underlies the jury's finding he ought to raise the question at the time and ask the Judge to give further directions to the jury in regard to the law applicable to the case.

This was a bill of exceptions for John Robinson, Glasgow, *pursuer*, in an action at his instance against William Hamilton (Motors), Limited, *defenders*, in which he claimed £500 damages for personal injuries sustained by him through being run down by a motor car belonging to the defenders.

The action was founded on alleged neglect of a motor driver in the service of the defenders to keep a good look-out or give proper warning of his approach. The defenders denied the existence of any negligence on their part and maintained that the accident was due to the fault of the pursuer in respect that he stepped off the pavement without looking to see if any vehicle was approaching, with the result that he sustained the injuries of which he complained.

The case was tried on 15th and 16th March 1923 before Lord Constable and a jury.

The Bill stated, *inter alia*—"After the evidence for both parties had been closed, and after their respective counsel had addressed the jury, the presiding Judge charged the jury, who thereafter retired to consider their verdict. On their return to the Court the Clerk of Court asked the jury

if they had decided on their verdict, and the foreman thereof answered in the affirmative, and on the Clerk of Court asking the jury what their verdict was the foreman thereof said—'The jury unanimously agree that there was contributory negligence on the part of both parties in not keeping a proper look-out.' Thereupon the counsel for the defenders asked the presiding Judge to tell the jury that their finding amounted to a verdict in favour of the defenders, and to direct them to return that verdict accordingly, which direction his Lordship agreed to give and did give. Whereupon the counsel for the pursuer excepted to the said direction. Thereupon the counsel for the pursuer asked the presiding Judge to tell the jury that their finding amounted to a verdict in favour of the pursuer, and to direct them to return that verdict accordingly, which direction his Lordship refused to give. Whereupon the counsel for the pursuer excepted to the said refusal. Thereafter the presiding Judge recorded the verdict of the jury for the defenders in the following terms—'At Edinburgh, the 16th day of March 1923, in presence of the Honourable Lord Constable, compeared the pursuer and defenders by their respective counsel and agents, and a jury having been empanelled and sworn to try the issue between the parties, say upon their oath that in respect of the matters proved before them yesterday and to-day they "unanimously agree that there was contributory negligence on the part of both parties in not keeping a proper look-out," and on the direction of the Honourable Lord Constable that what is hereinbefore quoted is a finding for the defenders, the jury unanimously find for the defenders accordingly.' And the counsel for the pursuer having there and then proposed the foresaid exceptions, requested the said Lord Constable to sign this bill of exceptions according to the form of statute in such cases made and provided, and the said Lord Constable did sign this bill of exceptions."

At the hearing on the bill counsel for the pursuer argued—Negligence might be contributory in the legal sense as jointly causative of the accident, in which case it barred the remedy of damages, or it might be contributory merely in fact in the sense that it was an incident of the circumstances, in which case it did not necessarily bar the remedy—Salmond, Law of Torts, 5th ed., p. 46; *Radley* v. *London and North-Western Railway Company*, (1876) 1 App. Cas. 754; *Grand Trunk Railway* v. *M'Alpine*, [1913] A.C. 838; *Gaffney* v. *Dublin United Tramway Company, Limited*, [1916] 2 I. 472; *British Columbia Electric Railway Company, Limited* v. *Loach*, [1916] 1 A.C. 719; *Admiralty Commissioners* v. *S.S. "Volute,"* [1922] 1 A.C. 129; *Mitchell* v. *M'Harg & Son*, 1923, 60 S.L.R. 393. The jury had clearly used "contributory" in the non-legal sense, or they would not have applied it to the negligence of the defenders. The verdict was therefore ambiguous in respect that it failed to answer the question as to whose negligence caused the accident. There was no duty on the pursuer to ask the Judge to direct the jury to clear up the verdict. Unless the defenders obtained an unambiguous verdict the pursuer could challenge it. A verdict should therefore be entered for the pursuer or there should be a new trial.

Counsel for the defenders was not called upon.

LORD PRESIDENT—This bill of exceptions is presented under unusual circumstances. We learn from the bill and from the record that the pursuer's action was founded on the alleged neglect of the motor driver to keep a good look-out or give proper warning of his approach. The answer of the defender was a denial of negligence on his own part, and a counter-charge of negligence against the pursuer, in respect that he stepped off the foot-pavement in a direction at right angles to the course of the motor car and without looking to see if any vehicle was approaching with the result that he brought himself into the way of the motor car. The jury delivered their verdict in the following words—"The jury unanimously agree that there was contributory negligence on the part of both parties in not keeping a proper look-out."

At first blush I should read that verdict as the presiding judge interpreted it—that is to say, as meaning the same thing as if the jury had said that both parties were to blame for what happened. But Mr Carmont has argued, with much ingenuity and ability, that the verdict ought to be held bad because when carefully examined it is really not intelligible, and his motion is for a new trial.

The expression "contributory negligence" is of course not one which lawyers use to describe the negligence of a defender who escapes liability because of "contributory negligence" (in the proper sense of the term) committed by the pursuer. Moreover, it is a familiar doctrine that a pursuer cannot be convicted of "contributory negligence" merely because there has been some act of negligence on his part which was an incident or ingredient of the circumstances of an accident. In short, the technical meaning of "contributory negligence" is negligence on the part of a pursuer which is itself jointly causative of the accident along with the negligence of the defender. Thus, if the defender using ordinary care could have prevented the accident, the pursuer's antecedent want of care is not "contributory negligence." The case of the donkey left hobbled on the highway (*Davies* v. *Mann*, 1842, 10 M. & W. 546) is perhaps the most famous instance. *Barty* v. *Harper & Sons* (1922 S.C. 67) in this Division is a recent application of the same doctrine. It is plain that the jury used the expression "contributory negligence" without reference to its technical meaning, for they applied it to the defender; and it was urged that in so applying it the jury may have meant no more than that the defender had been guilty of an act of carelessness which —while it was an ingredient of the circumstances of the mishap—was not jointly causative of it along with negligence on the part of the pursuer.

This argument might have been a formidable one if there had been any ground for suggesting that the case as presented to the jury required them to select among a series of successive incidents of negligence, now by one party and now by the other, the true cause of the accident. If the circumstances of the case had been such as to raise a question of that kind it would necessarily have been the subject of argument by counsel at the trial and of direction by the judge, and if that had been so there might have been force in Mr Carmont's argument that the verdict was not such as could be relied upon as having decided the delicate questions which would then have been left with the jury for decision. But there is nothing on record to disclose any circumstances out of which a question of that kind could arise, and I did not understand it to be suggested that there did in point of fact arise any question of the kind at the trial of the case.

If any such question had arisen, a verdict in the form adopted by the jury would not have been accepted, and the presiding judge would no doubt have asked them to reconsider it. For the subsequent and truly causative act of negligence of the pursuer would have wiped out any contribution to the accident made by the earlier act of negligence on the part of the defender. In the case of *M'Naughton* v. *Caledonian Railway Company* (1858, 21 D. 160, at p. 166), Lord Wood in expounding the principles of law subsequently illustrated in *Radley* v. *London and North-Western Railway Company* ((1876) 1 App. Cas. 754), said — "It certainly cannot be said that because the party injured has been guilty of some fault or negligence he cannot recover. It is not sufficient to disentitle to damages that there has been fault on his part—that he has been doing something which, strictly, he ought not to have done, and without which having been done the injury would not have occurred. The fault must be such as to have directly conduced to the injury suffered, and not merely remotely connected with it, for in that case it is not to be considered as contributing to the injury, within the principle that fault or negligence on the part of the individual injured shall afford a good answer to a claim by him for damages against a defender who has also been guilty of fault or negligence. The fault by the injured party when only remotely connected with the accident is to be, as it were, discounted from the case." In short, it is wiped out as not being truly causative either by itself or jointly with the pursuer's negligence of the accident. In like manner if the negligence of the defender is no more than an historical incident in the circumstances of the mishap, it is to be discounted from the case and is in effect wiped out so far as liability is concerned. It is not truly causative of the accident.

In the result the appellant has not convinced me that the jury's verdict could mean anything else than that the responsibility for the accident was shared by both parties.

I am the less disposed to regard Mr Carmont's argument with favour in view of the exposition of the law of contributory negligence in the recent case of the "*Volute*," [1922] 1 A.C. 129. The judgments delivered in that case show that to make acts of negligence by the pursuer and defender jointly causative of an accident they need not be contemporaneous. If the law were otherwise the doctrine of contributory negligence would practically disappear. I respectfully express my agreement with what was said by the Lord Chancellor at p. 144 — "Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while, no doubt, where a clear line can be drawn the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the '*Bywell Castle*' rule, might on the other hand invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution." I find in that a further reason for refusing to entertain the argument Mr Carmont presented to us in a case in which there is no ground to believe that any occasion arose for attempting to draw any line between prior negligence on the part of the defender and subsequent negligence on the part of the pursuer.

Therefore it appears to me that we are safe to accept this verdict, as the presiding judge before whom it was returned accepted it, as meaning according to the common-sense language of a jury that both parties were to blame. If that be right, then the bill of exceptions ought to be refused.

LORD SKERRINGTON — I agree, and I do not think that I can usefully add anything as regards the aspect of the matter with which your Lordship has dealt. There seems to me, however, to be a separate though a technical ground upon which this bill of exceptions must be refused. The first exception taken by the pursuer's counsel was to the direction given by the presiding judge to the effect that the jury's finding amounted to a verdict in favour of the defenders. As in duty bound, however, counsel did not stop there, but he went on to state the law as he thought that it ought to have been laid down — *Baird* v. *Reilly*, 1856, 18 D. 734. Now the only direction which the pursuer's counsel asked the presiding judge to give to the jury was a direction that their finding amounted to a verdict in favour of the pursuer. The judge rightly refused to give any such direction, and that as it seems to me was the end of matter. If counsel had thought that some misunderstanding as to the law of contributory negligence underlay the jury's finding he ought to have said so at the time, and to have asked the judge to give such further directions in regard to the law of contributory negligence in its bearing upon the facts of the case as he (counsel) con-

sidered to be necessary. I am informed by the presiding judge that the bill as printed correctly sets forth all that passed in regard to the exceptions, and that it was not argued that the jury's finding was ambiguous, or that the judge ought to give the jury any further directions in regard to the law applicable to the case.

LORD CULLEN—I concur.

LORD CONSTABLE—I agree with your Lordship in the chair, and also with the additional observations of Lord Skerrington. In charging the jury I gave them the usual general directions with regard to the nature of contributory negligence and no exception was taken thereto. Further, when the jury returned their verdict no special argument was stated to the effect that in the circumstances the pursuer's failure to keep a look-out had not contributed to the accident, and no further special direction to the jury was requested. It appeared to me at the time that the verdict was not seriously open to misconstruction, and I think so still.

The Court refused the bill of exceptions.

Counsel for the Pursuer—Watt, K.C.—Carmont. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Robertson, K.C.—Ingram. Agents—Allan Lowson & Hood, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, June 30.

(Before the Lord Justice-General, Lord Cullen, and Lord Sands.)

[Sheriff Court at Rothesay.

TORRI *v.* H.M. ADVOCATE.

Justiciary Cases—Procedure—Jury Trial—Composition of Jury—Jury Composed of Six Special and Nine Common Jurors instead of Five Special and Ten Common Jurors—Objection not Taken till after Jury Sworn—Objection Too Late—Qualification of Jurors Act 1825 (6 *Geo. IV, cap.* 22), *secs.* 16 *and* 17.

The qualification of Jurors Act 1825 (6 Geo. IV, cap. 22) in dealing with the right of an accused to object to jurors enacts (sec. 16) that "it shall not be competent to take any objection to any juror after he shall have been sworn to serve."

In a criminal trial before a sheriff and jury the jury by which the case was tried was by an error in balloting composed of six special and nine common jurors instead of five special and ten common jurors as provided by section 17 of the Qualification of Jurors Act 1825. The accused was found guilty and sentenced to imprisonment. No objection was taken to the composition of the jury until the verdict had been returned and the prosecutor had moved for sentence. The accused having brought a suspension on the ground that the jury before whom he was tried had not been properly constituted, *held* that section 16 of the Qualification of Jurors Act 1825 was applicable and that the objection to the composition of the jury had not been timeously made.

Justiciary Cases—Procedure—Jury Trial—Irregularity—Omission to Read over Verdict of Jury after it had been Recorded—Whether Sufficient to Invalidate Sentence.

In a criminal trial before a sheriff and jury the jury returned by a majority a verdict of guilty along with a recommendation to leniency. No exception to the verdict as so announced in the hearing of the jury was taken by any member of it. A verdict of "guilty as libelled" was thereafter recorded, but this verdict was not read over to the jury by the Clerk of Court. *Held* on appeal that there was no absolute requirement that the verdict should be read to the jury, and that the failure to do so, though it should not have occurred, did not constitute an irregularity sufficient to render it necessary that the sentence should be suspended.

Mansueto Torri, provision merchant, Rothesay, *complainer*, was tried on 27th and 28th February 1923 in the Sheriff Court at Rothesay before the Sheriff of Renfrew and Bute and a jury on an indictment at the instance of His Majesty's Advocate, *respondent*, under which he was convicted of attempting to defraud the Scottish Insurance Corporation, Limited, and was sentenced to three months' imprisonment.

The complainer brought a bill of suspension, in which he averred, *inter alia*—"(Stat. 5) The diet for the trial of said indictment was called in the Sheriff Court, Rothesay, on 27th February 1923 before James Mercer Irvine, Esq., K.C., Sheriff of Renfrew and Bute. Mr Watson, Sheriff-Clerk-Depute for the county of Bute, was Clerk of Court. The complainer having adhered to his plea of not guilty, the said Clerk of Court proceeded to ballot a jury from the list of assize. The complainer exercised his right of peremptory challenge against two special and three common jurors. The respondent exercised his right of peremptory challenge against two common jurors. Ultimately the said Clerk of Court arranged in the jury box six special and nine common jurors, being the jurors drawn and appearing as the result of said ballot. The said Clerk thereupon read over the charge and administered the oath in common form to the six special and nine common jurors. The trial of the complainer upon said indictment proceeded thereafter on 27th and 28th February 1923 before the said Sheriff and the said pretended jury, contrary to the Statute 6 Geo. IV, cap. 22, and in particular contrary to section 17 of said statute. (Stat. 6) Said section 17 provides as follows—'And be it enacted that in all criminal trials by jury the number of jurors to be returned by the sheriffs and stewards to the criminal court shall be forty-five unless otherwise