which I will allude, then she shall have made satisfaction in the sense of section 29 of the Bankruptcy Act 1913, and will be entitled on such consignation having been made to have the petition for her sequestration dismissed. The respondent in a case of this sort in making consignation ought also, in my opinion, to consign such a sum as will reasonably satisfy the expenses to which the petitioner has been put up to the present time, or make payment of those expenses as I may modify them.

I therefore decide that on consignation by the respondent in the hands of the Accountant of Court of the sum of £275, and on payment to the petitioner of the sum of 12 guineas, she is entitled to have this petition dismissed.

The Lord Ordinary refused the prayer of the petition.

Counsel for the Petitioner—M'Lennan, K.C.—Maclaren. Agent—John Robertson, Solicitor.

Counsel for the Respondent—Macphail, K.C.—Dykes. Agent—James Scott, S.S.C.

Thursday, July 2.

EXTRA DIVISION.

[Sheriff Court at Aberdeen.

BURNETT *v.* PRESSLEY.

Reparation — Negligence — Contributory Negligence—Cycling on Wrong Side of Road—Motor Car Insufficiently Lighted — Motor Cars (Use and Construction) (Scotland) Order 1904, *Art. II* (7) (*i*).

Circumstances in which *held* that a cyclist having deviated from the right side of the road and a collision having occurred, the accident was solely due to the fault of the other party, and contributory negligence could not be imputed to the cyclist.

The Motor Cars (Use and Construction) (Scotland) Order 1904, dated March 30, 1904, Art. II (7) (i), provides that the lamp to be carried attached to a motor car in pursuance of section 2 of the Locomotives on Highways Act of 1896 "shall be so constructed and placed as to exhibit during the period between one hour after sunset and one hour before sunrise a white light visible within a reasonable distance in the direction towards which the motor car is proceeding," and shall be placed "on the extreme right or off side of the motor car."

George Pressley, teacher of dancing, 494 King Street, Aberdeen, *pursuer*, brought an action in the Sheriff Court at Aberdeen against John Alexander Burnett of Kemnay, Kemnay House, Aberdeenshire, *defender*, in which he claimed £500 damages for bodily injuries and loss sustained by him "through having collided on 20th September 1912 on the public road between Blackburn and Kintore with a motor car driven by and belonging to defender."

The pursuer averred—"(Cond. 2) Pursuer has dancing classes at Inverurie, Oldmeldrum, and other places. On 20th September 1912 he opened a class at Inverurie, and after the classes were closed for the evening he started to cycle from Inverurie to his home in Aberdeen on a motor bicycle. He left Inverurie at 10 o'clock p.m., and when riding on the public road between Kintore and Blackburn he was run into by a motor car driven by and belonging to defender. (Cond. 3) Said collision happened a little after 10·30 p.m. on said 20th September 1912, being at a period between one hour after sunset on 20th September and one hour before sunrise on 21st September 1912. Between these hours it was the duty of defender, in terms of Art. II (7) Motor Cars (Use and Construction) (Scotland) Order 1904, in driving his said motor car to carry on the extreme right or off side a lamp, lighted, constructed, and placed so as to exhibit a white light, visible within a reasonable distance in the direction towards which his car was proceeding, and in this duty he failed."

The defender admitted that he had contravened Art. II (7) (i) of the Motor Cars (Use and Construction) (Scotland) Order 1904, but maintained that the collision was entirely due to the fault and negligence of the pursuer in riding his bicycle at too high a rate of speed and on the wrong side of the road.

The Sheriff-Substitute (YOUNG) having held that the accident was due to the fault of the defender in disregarding a statutory order, and that contributory negligence on the pursuer's part had not been proved, awarded the pursuer £100 damage.

The defender appealed to the Court of Session, and argued—It was a well-established rule that people on public roads must take care of themselves, and it was the pursuer's own fault to assume that the approaching vehicle was a cycle. He had acted wrongly in attempting to cut in between what he thought was a cart and a cycle. In similar circumstances, in *Edinburgh and Leith Hiring Company, Limited* v. *Midlothian County Council*, February 17, 1906, 13 S.L.T. 758, the plea of contributory negligence had been upheld, and this case was *a fortiori* in respect that the pursuer had no reason to leave his own side of the road—*Gibb* v. *Edinburgh and District Tramways Company, Limited*, 1913 S.C. 541 (L.P. Dunedin at 544), 50 S.L.R. 347. Assuming that the defender was in fault, if the pursuer could have avoided an accident then he was guilty of contributory negligence—"*The Bernina*," 1887, L.R., 12 P.D. 58 (Lindley, L.J., at 89). The defender in no way induced him to leave his own side of the road, and thus the case of "*The Bywell Castle*," 1879, L.R., 4 P.D. 219, was inapplicable—Pollock on Torts, 9th ed., 490. There was no authority for the proposition that breach of a statute or statutory order ruled out the plea of contributory negligence, and it was against the practice in shipping collision cases.

Argued for the respondent—The course which the pursuer took was reasonable in the circumstances. Even were he guilty

of an error of judgment it was induced by the defender, and in any event it was of no value to the defender's case, as contributory negligence must be proved, which had not here been done. In the case of an accident caused by the breach of a statutory duty it was doubtful if the defence of contributory negligence was allowable—*Pringle* v. *Grosvenor*, February 3, 1894, 21 R. 532 (Lord Justice-Clerk Kingsburgh at 535), 31 S.L.R. 420. In such circumstances the defences of *volenti non fit injuria* and common employment were not allowed—*Baddeley* v. *E. Granville*, 1887, 19 Q.B.D. 423; *Black* v. *Fife Coal Company, Limited*, 1912 S.C. (H.L.) 33, 49 S.L.R. 228; *David* v. *Britannic Merthyr Coal Compauy*, 1909, 2 K.B. 146 (affirmed in House of Lords, [1910] A.C. 74). Probably the rule was that in such a case the contributory negligence must be palpable to be founded on—*Wilson* v. *Wishaw Coal Company*, June 21, 1883, 10 R. 1021, 20 S.L.R. 680; Glegg on Reparation, 2nd ed., pp. 456-7.

At advising—

LORD DUNDAS—The accident out of which this action of damages arises occurred about 10·30 p.m. on 20th September 1912 upon the public road between Aberdeen and Kintore, about 10 miles from Aberdeen. The pursuer was riding on a motor bicycle; the defender was driving his motor car unaccompanied by anyone. The machines were going in opposite directions; they collided; and the pursuer sustained serious injuries. The Sheriff-Substitute awarded him £100, and no question is raised by either party as to this award if liability attaches to the defender.

It is, I think, proved that at and prior to the point of collision the defender's car was proceeding at a moderate speed on the proper side of the road. But he did not exhibit a white light on the extreme right or off side of the car, as he was bound to do in terms of the Motor Car Order set out on the record. The defender seems to have his own ideas as to the scope and meaning of the Order; but he admits that he pleaded guilty in the Sheriff Court to a complaint charging him with having contravened the Order. Now I do not say that breach of a statutory Order such as this would as a fact *per se* necessarily infer fault on the part of the contravener so as to involve him in liability for damages if an accident occurred—*cf.*, *e.g.*, *Macfarlane* v. *Colam*, 1908 S.C. 56. It might be established that the absence of the prescribed light had no material bearing upon or relation to the occurrence of the accident. On the other hand, the fact of contravention may be of the greatest moment, and may of itself import liability as for fault and negligence, if it appears that the absence of the light was intimately connected with the occurrence of the catastrophe. I am satisfied that this was so in the case before us, and that the defender was in fault. He pleads, however, that the pursuer cannot recover damages because he himself was guilty of grave contributory negligence. The case in this aspect of it is, in my judgment, a narrow one, but I have come to be of opinion that the Sheriff-Substitute arrived at the right conclusion.

The negligence attributed to the pursuer is stated on record under three heads—(1) that he was on the wrong side of the road; (2) was not keeping a proper lookout; and (3) was riding too fast. I do not think there is any sufficient proof of the second and third heads. The defender's evidence is in conflict with the pursuer's, and is not materially corroborated. It is in regard to the first head that the difficulty and delicacy of the case arise. It is proved that at the moment of the accident the pursuer's cycle was on the wrong side of the centre of the road to the extent of about three feet. The defender's counsel presented a formidable argument to the effect that this was the proximate cause of the accident; that it would not have occurred if the pursuer had kept to his proper side; and that the defender had done nothing to induce the pursuer to deviate from that position. I have come to the conclusion, however, that the pursuer's deviation, to the extent mentioned from his proper course was due, as I shall explain, to the defender's fault in not showing an off-side light, as required by the Order; and that the pursuer's error, not in itself a very large one, cannot be founded on by the original wrongdoer as contributing to the accident, and relieving him of his liability. The pursuer—the general honesty of whose testimony there seems to be no reason to doubt—says that he saw a single light, apparently approaching him, at a distance which he estimated at about 200 yards. There is a good deal of conflict or confusion in the evidence as to whether or not the defender's car at the time in question was showing a head-light as well as the near side-light. I do not propose to go into that matter; it does not seem to me to be of much importance; I think we are bound to assume that the pursuer saw only one light—it may, for all that appears, have been the acetylene head-light, or it may have been the near side-light. He says—"I have always found that one light represents a cycle, and I took this light to be the light of some bicycle." I do not think the supposition was in any way unreasonable. I notice, for what it is worth, that the witness Hardie, a motor and cycle agent says—"If I met a single light on the road I certainly would assume it was a bicycle, until I could see it was any other thing." The pursuer further states that by the side of the single light which he saw "there appeared to be a huge dark mass" which was only visible for a few seconds, and which he took to be a cart proceeding in front of and in the same direction as his own cycle. "This induced me to go to the centre of the road with the intention of getting on the right of this dark mass . . . I anticipated no danger in passing the light, having made up my mind it was a bicycle; but having lost sight of the dark mass, I took the centre of the road so as to make sure of not running into the back of it." The pursuer says he did not intend to go beyond the centre of the

road, but in point of fact he did so, as already mentioned. It was urged for the defender that, taking the pursuer's story as correct, he adopted a grossly negligent course in endeavouring to cut in between the (supposed) approaching cycle and the (supposed) retreating cart; and two witnesses — Betts and Hardie — the latter a witness for the pursuer, give their opinions to this effect in answer to hypothetical questions. I do not, however, think that the pursuer's course can correctly be described as an attempt to "cut in" between the two objects he supposed himself to be dealing with. If at the moment of his first observation of the light, it was about 200 yards distant, and if (as the pursuer depones) he was then riding uphill at a rate of about twelve miles an hour, he would not take more than about thirty seconds to overtake and pass the retreating vehicle; and his divergence to the right in order to pass it could scarcely be regarded as premature; and if the approaching light had in fact been that of a cycle, he would, looking to the evidence as to the width of the road, have cleared it with abundant ease, notwithstanding his deviation from his previous course. The truth, of course, is that the approaching light was not upon a cycle, but was a light, either the near one, or possibly the headlight of the defender's motor car; and that a considerable portion of the road, which the pursuer supposed to be unoccupied, was occupied by the body of the car as it projected between the light exhibited and the extreme off side, where a white light ought to have been shining. If an off-side light had been exhibited I do not see how the accident could have occurred. The pursuer would have seen that a motor car was approaching and kept to his own side of the road. The absence of the off-side light was, to my mind, the true cause of the mishap. I do not think the pursuer can be held in fault because being misled by the darkness of the car's off side he misjudged the situation, even though in the course of a manœuvre which, if his conception of the situation had been correct, would have involved no danger, he came over the centre line of the road to the extent of about three feet. In my judgment, therefore, the defender was in fault, and the pursuer was not guilty of contributory negligence. I am for affirming the interlocutor of the Sheriff-Substitute.

LORD MACKENZIE—This is a narrow case, but in my opinion there are not sufficient grounds for disturbing the judgment of the Sheriff-Substitute. The defender does not deny that he was in fault in respect that he was not at the time of the accident carrying a light on the extreme right or off side of his motor car. His case is that he has proved such negligence on the part of the pursuer as to disentitle him from recovering damages. It is, of course, just as necessary for the defender to prove affirmatively contributory negligence on the part of the pursuer as it is for the pursuer of an action to prove primary fault on the part of the defender. The pursuer maintains that what is charged against him as fault is at most an error of judgment, and that this error of judgment was due to the fact of his being misled owing to the defender not carrying the necessary light. This view I am prepared to take. Upon the question whether the defender had his head lamp lit and the lamp on his near side, I think the evidence is in such a state that we are not in a position to differ from the view of the Sheriff-Substitute, who accepts the pursuer's statement that before the accident he saw only one light advancing to meet him. If this were so, I take it from the evidence of James Hardie who is a cycle and motor agent, that the pursuer was entitled, meeting a single light on the road, to assume it was a bicycle. The same witness points out that a motor car having only one side light would be apt to mislead a motor cyclist coming from the opposite direction. The pursuer says that he was misled. The situation as it presented itself to him was as follows—when he was travelling on his own, the left side of the road, at a rate which he estimates at about 12 miles an hour, he saw travelling on the opposite side of the road, at a distance of 200 yards off, a light which he took to be that of a bicycle. At the side of that light there appeared to him to be a huge dark mass. The dark mass which he saw appeared to him to be an object which he was going to overtake. He thought it was a cart. This induced him to go to the centre of the road with the intention of passing on the right side—*i.e.*, the proper side—of the cart. He took the centre of the road so as to make sure of not running into the back of the cart, leaving at the same time sufficient room for what he thought was a cyclist to pass him. It is plain, from an examination of the evidence, that the pursuer cannot be charged with an attempt to cut in between what he supposed was a bicycle and a cart, because according to his theory by the time he overtook the cart the bicycle would have travelled a considerable way past it. According to my estimate of the time it would have taken the pursuer to overtake the cart from the moment he first saw it this would have been about half a minute. Instead of overtaking the cart as he expected, he ran into the defender's motor car in about a quarter of a minute. The defender says that he kept as near to his left side of the road as possible (and I accept the evidence of the defender's witnesses on this point), but this only emphasises the fact that there would be the more free space, according to the expectation of the pursuer, even if he crossed somewhat the *medium filum* of the road. The pursuer had no warning, owing to the state of the defender's lights, that any part of that space was occupied by a motor car. I am unable to hold that the pursuer was not entitled, half a minute before he expected to overtake a cart going in the same direction, to pull out from his side of the road for the purpose of passing. These considerations appear to me to be sufficient for the disposal of the case. I am unable to hold that the defender has proved contributory

negligence, and am therefore of opinion that the judgment appealed against should be affirmed.

LORD CULLEN—I concur. It is clear, and is not disputed, that the defender was in fault in not having a lighted lamp on the off side of his car. The absence of this light was calculated to mislead the pursuer regarding the species of vehicle which was approaching him, and according to his evidence, which I see no reason to doubt, it did mislead him. He judged the approaching vehicle to be a bicycle. I do not think he can be blamed for so thinking. The bulk of the defender's car, vaguely perceived in the darkness, he took to represent some other vehicle proceeding in the direction in which he was going. With a view to passing it he swung out into the roadway, crossed the middle line, and collided with the off side of the car. If the light he saw had been that of a bicycle, as he supposed, he would have been in safety, as the part of the road where the collision occurred would have been free for his passage. It was the defender's fault which led the pursuer to make more free with the roadway than would have been in accordance with his duty had he had warning that the other side of the road was occupied to a width of five feet or so by a motor car. In these circumstances I am of opinion that the defender is not entitled to charge the pursuer with contributory negligence.

The Court affirmed the interlocutor of the Sheriff-Substitute.

Counsel for Appellant—Sandeman, K.C. —Lippe. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondent—M. P. Fraser—Mackenzie Stuart. Agents — W. & J. L. Officer, W.S.

HIGH COURT OF JUSTICIARY.

Monday, July 6.

(Before the Lord Justice-General, Lord Salvesen, and Lord Dewar.)

BLACKWOOD *v.* M'INTYRE.

Justiciary Cases — Statutory Offence — Police — Person Managing Brothel — Found in the Building — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 403.

On the same premises there were two tenements, one fronting the street, the other, the back tenement, entirely separated from the front tenement by a common court. In the front tenement the police arrested a woman who it was said was the manager of a brothel which was conducted in the back tenement. A conviction against her under the Burgh Police (Scotland) Act 1892, sec. 403, of being found in a building which she managed as a brothel *quashed*, the Court *holding* that the two tenements did not constitute "a building" in the sense of the Act, and consequently that the accused was not found in the building which it was said she managed as a brothel.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55) enacts:—Section 403—"The magistrate may, on a complaint by the burgh prosecutor, grant warrant to enter into and search from time to time, during any period not exceeding thirty days from the date of such warrant, any house or building, or part of a house or building, or other place which on examination of the chief-constable or an inspector or lieutenant of police, and at least one other person not holding any office or situation under this Act, the magistrate is satisfied there is reasonable ground for believing to be kept, managed, or used, or suffered to be used, as a brothel; and any constable under authority of such warrant may take into custody and convey to the police office the occupier of such house or building, or part of a house or building or place, or any person found therein who either temporarily or permanently manages or assists in the management of such brothel, and every such person shall be liable on conviction before the sheriff or two magistrates of being the occupier of, or of temporarily or permanently managing or assisting in the management of such brothel, to a penalty not exceeding twenty pounds, or to imprisonment without the option of a fine for any period not exceeding sixty days, and failing payment of any such penalty, to imprisonment not exceeding sixty days. . ."

Mary Ann M'Spirits or Blackwood, 93½ Green Street, Calton, Glasgow, *pursuer*, was charged in the Eastern Police Court of the City of Glasgow by John James M'Intyre, Procurator-Fiscal, *respondent*, on a summary complaint, that "you, being a person found in a house situated at 93½ Green Street, Calton, Glasgow, and occupied by Jane Murray, on the 18th day of November 1913, did on said 18th day of November 1913, and for a period of eleven days immediately preceding said date, manage or assist in the management of said house as a brothel, contrary to the Burgh Police (Scotland) Act 1892, section 403. . . ."

The Magistrates having held in law "that the building known as 93½ Green Street aforesaid, comprising the front tenement and the back tenement as aforesaid, is a 'building' within the meaning of section 403 of the Burgh Police (Scotland) Act, and that the accused was a person found in said building in terms of said section 403 of said Act," found the accused guilty as libelled and passed sentence of a fine of £5, and in default of payment thirty days' imprisonment.

At the request of the accused a Case was stated for the High Court of Justiciary, which set forth, *inter alia*—"We found the following *facts* proved:—That the building known as No. 93½ Green Street, Calton, Glasgow, consists of two separate tenements of dwelling-houses, one fronting the street and the other a back tenement