p. 256. *Quoad ultra* John Borland junior was entitled to have the bonds conveyed to him *in forma specifica*, and therefore his right to the bonds was of the same character as the bonds themselves, and was not subject to *jus relictæ*—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 117. *Gilligan* v. *Gilligan*, 1891, 18 R. 387, 28 S.L.R. 172, was distinguished from the present case. Here one individual took the whole residue of the trust estate. Further, Lord Rutherfurd Clark's opinion at p. 389 was *obiter*, and section 3 defining "creditor" in the sense of the Act of 1868 was not quoted. Question 1 (*a*) should be answered in the negative. Question 1 (*b*) should also be answered in the negative; the reinvestment was a pure act of trust management and could not affect John Borland junior's succession.

Counsel for the other parties were not called upon.

LORD PRESIDENT—I am unable to see that the claim for the fifth party to this Special Case has any substantiality. As it has been stated and argued by counsel today, it appears to me to be totally destitute of any foundation in law.

John Borland junior had apparently nothing more than a *jus crediti* in a moveable succession. He was not creditor in one of these bonds and dispositions in security, nor was he the successor of a creditor. It appears to me therefore that the words of Lord Rutherfurd Clark in the case of *Gilligan* v. *Gilligan*, 1891, 18 R. 387, p. 389, 28 S.L.R. 172, are applicable to this case. "I think," he says, "that the estate of the truster was by the operation of the recent statute wholly moveable, and that the son as a beneficiary under the trust had merely a moveable *jus crediti*. He was not entitled to any share of the heritable bond. His right was to a certain share of a moveable estate. His claim being a moveable *jus crediti*, his widow is entitled to one-third as her *jus relictæ*." That opinion applies to the case before us in terms. I think it is sound.

I therefore propose to your Lordships that we should answer the first question in the affirmative, and if so the second question does not arise.

LORD JOHNSTON, LORD MACKENZIE, and LORD SKERRINGTON concurred.

The Court answered the first question in the affirmative.

Counsel for the First, Second, and Third Parties — Blackburn, K.C. — Leadbetter. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Fourth Party—Christie, K.C. — Dunbar. Agents — Clark & Macdonald, S.S.C.

Counsel for the Fifth Parties—Moncreiff, K.C. — Hamilton. Agents — Cameron & Orr, S.S.C.

Counsel for the Sixth Party — Wilson, K.C. — Scott. Agents — Wallace & Begg, W.S.

Thursday, July 19.

SECOND DIVISION.

[Lord Anderson, Ordinary.

WATSON *v.* GLASGOW CORPORATION.

Reparation — Negligence — Contributory Negligence — Tramway — Foot-Passenger in Crossing Street Failing to Observe Approaching Car — Second Verdict Set Aside.

A foot-passenger in crossing a street had to cross two sets of tram rails. Having looked and seen a car coming he let it pass, then proceeded to cross, and after crossing the second line of the first set of rails looked again to see if any car was coming, and observed one standing at the points some 40 yards away. He then went on in a slanting course with his back towards the stationary car without looking again in that direction, and just as he was stepping on to the first rail of the second set the bonnet of a car brushed against him and knocked him down. In an action of damages a jury gave him a verdict, and in a second trial he again obtained a verdict. *Held* that he had been guilty of contributory negligence, and the verdict in his favour set aside and judgment *entered for the defenders.*

Alexander Watson, 531 Duke Street, Dennistoun, Glasgow, *pursuer*, brought an action against the Corporation of Glasgow, *defenders*, for damages in respect of personal injuries sustained by him in consequence of having been knocked down by a tramway car belonging to the defenders.

The defenders *pleaded, inter alia*—"2. The accident not having been caused by any fault or negligence on the part of the defenders or those for whom they are responsible, decree of absolvitor should be pronounced. 3. The accident having been caused, or at all events materially contributed to, by the fault and negligence of the pursuer himself, the defenders should be assoilzied from the conclusions of the summons."

An issue having been allowed the action was tried before Lord Anderson and a jury, and a verdict for £50 damages was returned in favour of the pursuer. The Court set aside this verdict, and ordered a new trial to take place before Lord Salvesen and a jury. A verdict was again returned in favour of the pursuer, the damages being this time assessed at £200. The defenders obtained a rule on the pursuer to show cause why the verdict should not be set aside as being contrary to the evidence.

The *facts* established at the trial were thus narrated by Lord Salvesen—"The facts of the case as disclosed in the pursuer's evidence are that he was crossing from the Olympia Theatre in the direction of the Union Bank, which is on the south-west side of Bridgeton Cross. In doing so he had to cross two sets of car rails, and he says that before crossing the first line of the first set of rails he looked to see if any cars were

coming. He saw one coming. He waited until it passed, and then he proceeded to cross. After he had crossed the second line of rails he looked again in the direction of Canning Street, and there he saw a car—which was presumably the car with which he afterwards came in contact—standing at the points. Although he was given repeated opportunities of indicating in yards the distance he had passed the second line of rails when he saw this car at Canning Street he declined to put any figure upon that distance. So the case stands upon his evidence-in-chief—which I think is putting it in the most favourable aspect for himself—for he says—'After we crossed the first line of rails we looked again and the car was still standing there. After that we were slightly with our backs to the Canning Street direction and going in a slant towards James Street.' I take that to mean that immediately after crossing the second line of the first set of rails he looked in the direction of Canning Street and saw the car there, and that he proceeded in an oblique direction towards the second set of car rails, but did not look again in the direction from which traffic might be expected, and he was caught by the curved portion of the front of the car just as he was stepping on the line of rails without having ever seen the car approaching at all, although it must have been in motion for a distance of 40 yards. Now in answer to me the pursuer said—'I was struck by the car just as I was going to cross the rail. At the moment I stepped on to the rail the car must have been quite close to me. If I had paused for a fraction of a second and looked the way in which the car was coming I would have seen it and avoided it.' Then he is asked—'(Q) It is the habit of people to walk so far across a street, and then if they see a car approaching to stop before they get to the rail. If you had done that nothing would have happened?—(A) That is so. (Q) Were you talking with Mr Caldwell at the time?—(A) We might be passing remarks.' The position therefore of this gentleman is that he considered himself entitled to walk a distance of approximately 20 yards without looking in the direction in which alone he might apprehend danger before stepping on to the car rails. As I remarked when the case was last before us, it is very easy for a foot-passenger to protect himself against a tramway car. He knows exactly the zone—the very limited zone—in which there is danger, and if he proceeds to cross a line of tramway rails without looking to see whether a tramway car is approaching it seems to me that he takes the risk of any injury which may happen to him. In the present case the pursuer's witness Caldwell said that the accident happened when the foot-passenger was just practically in the same line as the driver of the car. He says—"I was just struck by the edge of the rail, and I was never in front of the car so as to be an obstacle in the way of the driver."

The pursuer argued—The three facts, that the motorman did not keep a proper look-out, that he drove the tramcar at a dangerous and excessive speed, and that he gave no warning by means of his gong, were amply proved. Had the tramcar been under proper control the motorman could easily have stopped it ere it reached the pursuer. There had been no contributory negligence on the part of the pursuer. In crossing the street he was entitled to assume that the car-driver would give warning of his approach instead of running him down without warning as had been the case in the present instance. Counsel referred to *Radley* v. *London & North-Western Railway Company*, (1876) 1 A.C. 754, and *Davies* v. *Mann*, (1842) 10 M. & W. 546, as ruling the present case in favour of the pursuer.

The defenders argued—The verdict was contrary to the evidence. As the pursuer had, in disregard of oncoming traffic, essayed to cross the street without observing an ordinary and reasonable amount of care, he was guilty of contributory negligence. The evidence clearly proved that the pursuer had in actual fact received his injuries through walking into the curved portion at the front of the tramway car. No proof of negligence had been established against the defenders' car-driver, as he had given due warning of the approach of his car by sounding his gong, which warning, however, the pursuer had completely ignored. The pursuer's admission that he had observed the car and yet proceeded on his way across the rails amply proved his contributory negligence.

LORD SALVESEN—[*After pointing out that no new evidence had been led at the second trial, and narrating the facts*]—It seems to me upon that evidence and upon the pursuer's evidence, that the proximate and effective cause of the accident was the pursuer's walking into the front of the car—an accident which he could easily have avoided if before venturing upon the rails he had taken the precaution of turning his head to the right and looking to see if any car was approaching.

This is not a new doctrine which we are laying down. It has been over and over again said that while drivers of vehicles must take reasonable care to prevent injury to foot-passengers, foot-passengers also owe a duty to themselves and must take reasonable care in crossing crowded thoroughfares. I never saw a case that was more clearly made out, on the pursuer's own admissions, of his having failed in the duty of taking reasonable care. It is not too much to expect of foot-passengers that they will keep an eye in the direction in which traffic may approach when they are going to cross in front of that traffic, and I think it would be very unfortunate if the notion should get abroad that foot-passengers may cross crowded streets, in which there is constant vehicular traffic, without paying the smallest regard to their own safety—in short, that they are entitled to monopolise the traffic on the footing that if anybody does them an injury by running them down they are entitled to recover damages for that injury.

Mr Macquisten referred us to the cases of *Radley*, 1 A.C. 754, and of *Davies* v. *Mann*, 10 M. & W. 546. These cases appear to me

to have absolutely no application to a case such as the present, where the accident was the joint result of two separate movements by two moving bodies. The decisions in these cases are to the effect that the mere fact that there has been a precedent act of negligence on the part of the injured person does not necessarily bar him from recovering if the true, effective, and proximate cause of the accident was the negligence of the driver of the vehicle causing the injury. *Radley's* case was the case of a stationary truck which had been piled too high and which was negligently moved underneath a bridge with the result that the bridge was damaged. *Davies* v. *Mann's* case was that of a donkey fettered on the highway which had a very limited power of movement, and which could be seen in ample time by the driver of the horse vehicle to permit him to avoid it. These cases just illustrate the elementary proposition that you are not entitled to injure a person because he is doing what he is not entitled to do if you can by reasonable care avoid it. But they have no application so far as I can see to a case where a collision occurs between two moving bodies who contribute each in the same measure or in different degrees to the accident, the act of each being necessary to the result. Here it is obvious that the pursuer would not have met with any injury if he had taken the simple precaution of stopping and looking before he entered on the line of rails. Caldwell says he was often in the habit of not looking until he was within two feet of the line of rails, and that he was in perfect safety if he stopped at that distance. Accordingly I think that there was here a perfectly clear case of contributory negligence on the part of the pursuer, and that is sufficient for setting aside this verdict.

On the question of fault the case made for the pursuer was of the slenderest description. On the evidence as a whole I do not think it possible to affirm that this tramway car was proceeding at more than four or five miles an hour at the outside, which is a very moderate pace for a tramway car, especially such as those in Glasgow which are propelled by electric current. As to whether the gong of the car was sounded, it may be that the evidence of the three witnesses that they did not hear the gong would be sufficient evidence on which to leave to the jury the question whether the gong was in fact sounded. I think it would have been dangerous for the defenders to have allowed the case to stand upon the evidence of the pursuer on that point, for in that case I think I would have been bound to hold that there being no evidence except that of three people who were in a position if they had kept their ears open to have heard the gong, that it had not been sounded, there was evidence that it was in fact not sounded. Here, no doubt, there was the evidence of three witnesses for the defenders to the effect that it was sounded and that they heard it sounded, but if the case had depended upon this question alone I think there would have been evidence at least to go to the jury on that head. It by no means follows, however, that the failure to sound the gong was a fault on the part of the driver of the car or that it caused or contributed to the accident. It is unnecessary to pursue this topic, for the pursuer himself has put himself out of Court by the conclusive proof that he was himself negligent and that but for his negligence the accident would never have occurred.

LORD JUSTICE-CLERK—I agree in the course proposed by Lord Salvesen. Assuming that there was evidence which would have entitled the jury to find that there had been fault on the part of the defenders, I think the evidence of contributory negligence here is as clear as in any case I ever saw, and that the evidence is all one way. Instead of the pursuer's case being improved in the second trial, my opinion is—and I have looked not fully indeed but generally at the evidence in the previous case—that it is weaker than it was before. The pursuer's counsel, indeed, when asked what was the difference in the evidence at the second trial said that it was in the pursuer's explanation of his not looking in the direction from which the car which struck him came, viz., that he was looking for cars coming from the east. In examination-in-chief as to how the accident happened he says—"When we came to the other set of rails"—that is, the second set—"a car came right on the top of us." Later on, still in chief, he says—"Immediately after Caldwell was struck I was struck. . . . The part of the car that struck me was the corner of it about where the glass is. (Q) That would be just as you were entering the car line?—(A) Yes. I had not crossed, but was just on the first rail of the car line." The pursuer, therefore, at a time when it is agreed that there was plenty of artificial light and no other traffic obstructing his view deliberately tried to get across the line as a car was approaching, and on the instant that he was entering on or was just on the first rail of the car line he was struck by the car.

It appears to me that the examination of the pursuer by the Court conclusively shows that there was contributory negligence on his part, and it would have the worst possible effect if in such circumstances pursuers were to be entitled to recover damages. That would just go to establish a rule that no pedestrian need take any trouble to look after his own safety, and the consequence would be that there would be an increase in the number of tramway accidents. I am of opinion that this verdict cannot stand, and that we should enter up the verdict for the defenders.

LORD DUNDAS—I have reached the same conclusion as your Lordships. Upon the evidence the jury were not in my opinion entitled to return this verdict. Assuming that some degree of fault was established against the defenders, it seems to me that the evidence as regards contributory negligence is all one way and plainly establishes the negligence of the pursuer. I was not present in Court when your Lordships granted a new trial on the last occasion, but I understand from your Lordships that

the evidence led in the second trial differs in no material respect from that led in the first, or at all events differs in no respect favourable to the pursuer. In my opinion this verdict cannot stand.

LORD GUTHRIE—The pursuer had two courses open to him, the one he took, which involved a difficult calculation, the risk of the accuracy of which he accepted, and the other, simple, obvious, and necessarily effective. But further, the course he took not only involved a difficult calculation, it involved a calculation in which the necessary elements were unknown to him, namely, first, when the stationary car was going to start; second, the distance between him and the uncertain place where he was going to cross the north and south tramway line; and third, the speed at which the car would come, a speed dependent on many circumstances, such, for instance, as whether the car was up to time or behind time. It seems to me that his choice involved the same element of fault directly causing the accident as arose in *M'Allester's* case, 54 S.L.R. 401, and I would refer to my opinion in that case. Indeed, this case in its circumstances involves graver fault on the part of the pursuer than in *M'Allester's* case. In that case the motor car-driver, just before the accident, was not talking, as the pursuer was doing here; and the driver looked, but could not see what was coming along the street, owing to the construction of his car, whereas the pursuer here could easily have seen the approaching car if he had looked about him before stepping on the car lines.

The Court set aside the verdict and entered judgment for the defenders.

Counsel for the Pursuer—Macquisten. Agent—Allan M'Neill, S.S.C.

Counsel for the Defenders—M'Clure, K.C. —M. P. Fraser. Agents—Simpson & Marwick, W.S.

Friday, July 20.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CRUMPTON'S EXECUTOR *v.* CRUMPTON'S JUDICIAL FACTOR AND OTHERS.

Succession — Conditional Institution and Substitution—Liferent and Fee--Absolute Gift Followed by Words of Limitation.

A testatrix who had absolute powers of appointment over a sum of £10,000 appointed and bequeathed £8000 and the whole of the residue of her means and estate to her nephew, "his heirs, executors, and administrators absolutely, provided always . . . that in case my nephew shall die without issue" the estate left to him should go one-half to establishing a charity in London and the other half to Dr Barnardo's Homes. The testatrix then gave the interest of £1000 to a Mrs Edgehill, provided that "if my nephew . . . survives Mrs Edgehill he is to receive it, or rather it is to be put in trust for him, the principal, and paying him the interest only," and if he did not survive Mrs Edgehill it was to go to her issue. The testatrix then gave Alice Thompson, a former servant, "the interest of Five hundred pounds for her life, and if my nephew survives me the principal sum of Five hundred (is to be placed in trust for him) he receiving the interest only, and this also applies to the Eight thousand pounds left to him as above." At the date of the will the nephew was confined in a lunatic asylum and his affairs were being managed by a *curator bonis*. The testatrix was survived by her nephew and Mrs Edgehill; Alice Thompson predeceased her. After her nephew's death his curator was appointed judicial factor on his estate. *Held* (*rev.* Lord Hunter), in a competition between the nephew's judicial factor and Dr Barnardo's Homes with reference to the estate left by the testatrix other than the legacy to Mrs Edgehill and her issue, (1) that the testatrix did not intend the interest taken by her nephew under her will to be restricted to a liferent, and (2) that the charities were not substituted in the fee of the estate left to the nephew but were called as conditional institutes only.

Thomas Bennet Clark, as executor-dative of Sarah Elizabeth Crumpton, *pursuer*, raised an action of multiplepoinding against himself as judicial factor on the estate of William Thomas Crumpton, nephew of Sarah Elizabeth Crumpton, and Dr Barnardo's Homes, London, *defenders*. Claims were lodged by Charlotte Augusta Crone and others, cousins once removed and next-of-kin of William Thomas Crumpton, by the pursuer as judicial factor on William Thomas Crumpton's estate and also as executor of Sarah Elizabeth Crumpton, and by Dr Barnardo's Homes, London.

The *holograph will* of Miss Sarah Elizabeth Crumpton was in the following terms:—"The last will and testament of Sarah Elizabeth Crumpton. Now in exercise of the said power and of every other power now or at the time of my decease thereto enabling me, I appoint the said sum of Ten thousand pounds and the residue of my father's estate in manner following, to my nephew William Thomas Crumpton *all* the principal *and* sum of Eight thousand pounds, and the residue of my father's estate and all interest due in respect thereof at the time of my death, and also all the rest, residue, and remainder of my estate, real and personal. I appoint, devise, and bequeath the same unto my nephew William Thomas Crumpton, his heirs, executors, and administrators absolutely, provided always nevertheless that in case my nephew shall die without issue I appoint the said sum of Eight thousand pounds and the residue of my said father's estate, and I give, devise and bequeath all my estate which I shall die possessed of to be equally divided