

and transfer of ships then in force which differed materially from those of the Merchant Shipping Act which now governs the matter, and under which it seems to me writing is not necessary for such a contract. The sale of ship shares is distinguished from what is required for the transfer of the property in ships.

In the second place, an argument was submitted as to the soundness of the decision in *Dunn v. Pratt*, 25 R. 461. Your Lordships' view as to the import of the evidence takes the present case out of the purview of *Dunn v. Pratt*. But I think it right to say that as at present advised I see no sufficient reason to doubt the soundness of that decision.

The Court dismissed the appeal.

Counsel for Defender and Appellant—
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Counsel for Pursuer and Respondent—
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HOUSE OF LORDS.

Friday, April 26.

(Before the Lord Chancellor (Finlay),
Viscount Haldane, Lord Shaw, and Lord
Parnoor.)

TAYLOR v. DUMBARTON BURGH AND COUNTY TRAMWAYS COMPANY, LIMITED.

*Reparation — Negligence — Tramway —
Duties towards the Public — Children —
Possibility of Injury.*

*Reparation — Negligence — Contributory
Negligence — Conduct Forming Part of
History of Case.*

A repairing car of a tramway company stopped in a village to deal with a defective standard. Children collected about it. Having effected the repair one of the employees on the car looked along the north side on which the children apparently were, and seeing all clear gave the signal to move. He did not look along the south side of the car, and a small child who happened to be there was run over and injured.

Held (rev. judgment of the Second Division) that the company was liable in reparation because of negligence on the part of its servant.

Held that supposing it were negligence to allow a small child to play on the road unattended, such negligence was not contributory to the accident—*Davies v. Mann*, 10 Meeson & Welsby 546; *H. M. S. "Sans Pareil"*, [1900] P. 267; *Radley v. London and North-Western Railway Company*, (1876) L.R., 1 A.C. 754, *applied*. Question if in the circumstances it were negligence?

On February 24, 1916, Stewart Taylor, Old Kilpatrick, Dumbartonshire, as tutor and

administrator-in-law for his pupil son James Taylor, *pursuer*, brought an action against the Dumbarton Burgh and County Tramways Company, Limited, *defenders*, to recover £500 as damages for personal injury suffered by the said James Taylor.

He *averred*—“(Cond. 4) On the afternoon of said 27th January 1916 a tramway car belonging to defenders arrived at Old Kilpatrick. This car contained material and plant for the purpose of repairing the electric lights belonging to the defenders, which are placed on alternate tramway standards or poles on the north side of the said Dumbarton Road. Two employees of the defenders, an apprentice electrician named Walter Campbell and a car conductor named John O'Donnell, were in said car. It was Campbell's duty to drive the car and also to repair the said lights. While the work of repair was going on, the said car remained stationary on the tramway rails at the electric standard the light of which was under repair. About 3 p.m. on said date, while the defenders' said employees were engaged in repairing one of said electric lights, the said car stood on the car rails in Dumbarton Road, nearly opposite Gavinburn Place, for some time. It attracted a number of children, amongst whom were the said James Taylor and his brother and sister. Some of the children were standing near the car and others were playing round it. The defenders' servants saw the said children. The car was suddenly and unexpectedly put in motion down the gradient by O'Donnell, and it ran into and knocked down the said James Taylor. The front off-wheel of the car passed over his right hand. In consequence he was seriously injured as after mentioned. The said John O'Donnell gave no warning that he was about to start the said car. The defenders' explanations and averments are denied. (Cond. 5) The said injuries sustained by the said James Taylor were solely due to the fault of the said John O'Donnell, for whom the defenders are responsible. At the time of the occurrence the said car was suddenly and unexpectedly put in motion and driven onward by him in a reckless and negligent manner, although he knew that there were a number of children quite close to and in front of the said car. He gave no warning that the car was about to be started, and he did not keep a proper look-out to ascertain if any of them was at or near the front of the car or about to cross in front thereof and in a position of danger, and he did not maintain proper control over the car so as to enable it to be stopped when necessary. He set said car in motion without any regard for the safety of the children playing about the car and of the said James Taylor, who had no knowledge of any danger or that he ran any risk. It was the duty of the said John O'Donnell in the circumstances condescended on to give warning that the car was about to be started, to keep a proper look-out, to make certain that none of the children whom he saw were at or near the front of the car or about to cross in front thereof before putting the car in motion, and to maintain proper control over the car so as to be able to stop

same when necessary. He, however, culpably failed to fulfil these duties on the occasion in question, with the result that the said James Taylor was knocked down and injured as before contended on. The defenders' averments are denied."

The defenders pleaded—"2. The accident to the pursuer's child not being due to the fault of the defenders, or of any one for whom they are responsible, the defenders should be assoilzied. 3. The injuries to the pursuer's child being due to, or materially contributed to, by the negligence and want of proper attention of the pursuer, and of those to whom he entrusted the duty of attending to it, or otherwise of the child itself, the defenders should be assoilzied."

On May 30 1916, the Lord Ordinary (ANDERSON) pronounced an interlocutor allowing this issue—"Whether on or about the 27th day of January 1916 and in Dumbarton Road at Old Kilpatrick the pursuer's pupil son James Taylor was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer as tutor and administrator-in-law of his said son."

On a reclaiming note the Second Division on 24th June 1916, without delivering opinions, recalled this interlocutor and remitted to the Lord Ordinary to allow parties a proof.

The proof having been led, the Lord Ordinary on 8th December 1916 repelled the defenders' pleas, found that the pursuer's pupil son had been injured through the fault of the defenders' servants for whom they were responsible, and allowed the sum of £150 as damages with expenses.

Opinion.—"... The accident took place about three o'clock in the afternoon of 27th January of the present year, and the locus of the accident was the road which runs between Dumbarton and Glasgow, at a point on that road at the west end of the village of Old Kilpatrick in the county of Dumbarton. The place where the accident occurred is sparsely inhabited. There are some dwelling-houses and shops at that part of the village, on the south side of the Dumbarton Road, and there are no dwelling-houses on the north side. A single line of tramway rails for vehicles propelled by electricity is constructed towards the north side of the carriageway of the Dumbarton Road at that point, and it was proved that not much traffic takes place at the point where the boy was injured, and on the occasion in question there was no traffic on the road.

"The accident occurred in the following way. The defenders had sent a repairing tramway car for the purpose of repairing a standard, No. 218, and this car was in charge of two of their employees named Campbell and O'Donnell. These two men took turn about at driving the car; they were both qualified to drive it, and they were both qualified as electricians to repair the standards and wires. The car came to a stop just about the tramway standard 218, and as is almost invariable in circumstances of that sort the young children who lived in that part of Old Kilpatrick congregated round about the tramway car and the

standard and watched the workmen effecting the repairs. Most of the children were on the north side of the tramway car where the men were working, but unfortunately this young boy James Taylor had taken up his position on the south side of the tramway car.

"One witness speaks to having seen him in a stooping position just before the car started and the accident occurred. Apparently he was picking up pebbles or some other substances from the surface of the street, and he must have been at the time of the starting of the car in this stooping position close to the dashboard of the car and just in front of the front wheel, with his hand either actually in front of the wheel or in such a position at the moment of starting that he could thrust his hand forward and find it underneath the wheel. In that position he was probably not within the range of vision of O'Donnell when he went upon the platform to start the car, because his line of vision was affected first of all by the boy in his position being very slightly elevated above the level of the ground, secondly because the dashboard was between O'Donnell and the boy, and thirdly because O'Donnell was a shortish man, and standing about the middle of the platform he would in my judgment have been unable to see the boy from that position just when he was starting the car. The car started and the unfortunate boy either had or placed his right hand underneath the front wheel with the result that the wheel went over and took off two and a-half fingers of that hand. The car was almost immediately brought to a standstill, because the evidence shows that after the injury the little boy was picked up alongside the car midway between the two sets of wheels.

"The defenders take a plea, to wit, No. 3, which raises the question of contributory negligence on the part of the child or of those who are charged with the care of the child, and Mr Lippe for the pursuer addressed himself to the consideration of that topic. He maintained first of all that the child was too young to be guilty himself of contributory negligence, and I think that is perfectly plain. In the second place, Mr Lippe maintained that in the circumstances there was no negligence on the part of the parents. The street was a comparatively quiet street, and the mother of the boy on the day in question was engaged in washing, she had consigned the little boy to the care of two elder sisters, and she was not aware herself that he had gone into the dangerous proximity of this tramway car. On that second point Mr Lippe referred me to the following cases:—*Auld*, 8 R. 495, 18 S.L.R. 312; *Greer*, 9 R. 1069, 19 S.L.R. 887; *Martin*, 14 R. 814, 24 S.L.R. 536; *Haughton*, 20 R. 113, 30 S.L.R. 111; *Morrison*, 23 R. 564, 33 S.L.R. 384.

"The third point that Mr Lippe took on this branch of the case was that even if there were antecedent negligence on the part of the pursuer as the guardian of the child there was subsequent to that negligence on the part of the defenders' em-

ployees, which subsequent negligence was the proximate cause of the accident, and the well-known case of *Radley, 1876, L.R., 1 A.C. 754*, was cited in support of that last proposition. If I had to consider and decide that point I should have no difficulty in deciding it in favour of the pursuer, but I am absolved from doing so, because Mr Sandeman conceded that the case did not raise the question of contributory negligence, and he did not propose to maintain his third plea-in-law.

"Accordingly the only question left in the case is whether the pursuer has proved that there was negligence on the part of the defenders' employees which resulted in this unfortunate accident. I think that is a narrow and difficult question, but after considering it to the best of my ability I have come to be of opinion that the pursuer has proved such a case. It is obvious that the pursuer has entirely failed to prove most of the somewhat serious averments of fault which he sets forth upon the record. In condensation 5 these are set forth, and what is averred is that at the time of the occurrence the car was suddenly and unexpectedly put in motion and driven onwards by O'Donnell in a reckless manner, although he knew that there were a number of children quite close to and in front of the car. That seems to me to be not only entirely not proved but entirely disproved, because the evidence is unanimous on this point that there was no reckless and negligent driving and that there was no sudden and unexpected start. Accordingly the pursuer has entirely failed to prove that ground of fault.

"He next says that O'Donnell gave no warning that the car was about to be started. The only evidence on that point is the evidence of O'Donnell himself, and it is to the effect that he did sound his gong more than once by way of giving warning. Accordingly that ground of fault has failed.

"All that is left of cond. 5 is the averment which the pursuer makes that O'Donnell was in fault in failing to keep a proper lookout, to make certain that none of the children whom he saw were at or near the front of the car, or about to cross in front of it, before putting the car in motion. The question is whether there was a duty upon O'Donnell and Campbell to see before starting the car that none of the children were in its vicinity, and whether they failed in that duty and in consequence caused the accident. It is well settled and generally recognised by drivers of vehicles that there is a duty laid upon them to take reasonable precautions to avoid injury to members of the public lawfully using the public roads and streets, and that both when the vehicles are moving and when they are about to be started; and it is also settled that special precautions have to be taken with reference to those who have not the full use of their faculties, such as the blind, the deaf, the lame, and children of tender years.

"The defenders' servants who were examined yesterday admitted, as of course they had to admit, that they were well aware that a number of young children were in

the vicinity of this car, and apparently they recognised that they had a duty to take special precautions to avoid injury to any of those children; and Campbell, who was on the rear platform and was charged with the duty of seeing that everything was safe before he gave the signal to O'Donnell to start the car, recognised this duty which was incumbent upon him, and he discharged it so far as the north side of the car was concerned. Mr Lippe, for the pursuer, says that he only discharged the half of his duty, as it was equally incumbent upon him in the discharge of that duty to take a look at the south side of the car.

"Mr Sandeman rejoined that there was no such duty in the circumstances with reference to the south side of the car, because the children were all on the north side of the car watching what was being done on the electric standard. I am afraid that is not a sufficient excuse for the failure on the part of Campbell to look to the south side of the car. The movements of children are eccentric and incalculable; the dwelling-houses from which the children came were all on the south side of the street, that is, on the south side of the car, and the greater part of the carriageway was on that side.

"It seems to me, therefore, that Campbell ought to have directed his attention to that side of the car as well as to the other. To do so was a simple precaution. I think it was an obvious precaution, and I am of opinion that in the circumstances it was a reasonable precaution and was a precaution which ought to have been taken. Accordingly I reach the conclusion, although as I have said the point is narrow, that the defenders' servants or servant Campbell were or was negligent in not having taken this precaution of examining the south side of the car where the little boy was before the car was started. I am of opinion that had they done so they would, of course, have seen him and removed him, and that the accident was the direct consequence of this precaution not having been taken.

"The case which is nearest in circumstances to the present one is that of *Morrison v. Macara, 23 R. 564, 33 S.L.R. 334*. The circumstances of that case were these—A carter in Glasgow drew up his lorry on the street opposite a public-house door. The public-house was in the vicinity of a school, and at the time that the lorry was drawn up the children were coming out of the school, and the carter saw, or ought to have seen, that there were a number of young children playing in the vicinity of his lorry on the pavement and on the carriageway. He went into the public-house and had his drink and came out, and without looking underneath his lorry to see whether a child was there or not he mounted and drove off. As it happened there was a young child underneath the lorry, and he was caught by one of the wheels, with the result that one of his legs was badly smashed. The Court held that in the special circumstances of that case it was the duty of this carter before starting his horse to look under his lorry.

"It seems to me that the Court in that

case went much further than I propose to do in this case, because it seems to me that if there was a duty in circumstances such as these which the present circumstances resemble, actually to look under the vehicle, I think there was a duty to look on both sides of the vehicle to see that no children were in a position of danger. I accordingly hold that the pursuer has proved an act of negligence resulting in the accident and that in consequence the pursuer, as representing this little boy, is entitled to damages.

"In awarding damages I take nothing more into account than that the boy has lost two and a half fingers of his right hand. He is in the artisan rank of life, and that injury which he has suffered constitutes a serious permanent disfigurement and a permanent handicap to his earning a livelihood. I notice that in the case of *Morrison*, where the boy had his leg seriously injured, resulting in a permanent shortening of the limb, not to any great extent but to some extent, the Sheriffs gave £150 damages. The Court, although one of the Judges—the Lord Justice-Clerk—thought the damages were rather high, did not alter that sum. I think the injuries here are more serious and that the handicap is more serious, but I shall give the same sum in this case as was awarded in *Morrison v. Mucara*. I shall grant decree in favour of the pursuer and find him entitled to the sum of £150 and expenses.

"This money ought to be invested for the boy. It has been a very simple case, and the fund ought not to be diminished by any extrajudicial account."

The defenders reclaimed.

LORD JUSTICE-CLERK—The Lord Ordinary says that this is a narrow case even according to his view, and he points out that the great bulk of the averments of fault on the part of the pursuer are not only not proved but are disproved. He found that the defenders' servants were at fault in respect that they failed to keep a proper lookout, and his opinion was that while they warned away the children who had been collected on the north side of the car apparently watching the men working at the repair of the tramway standard, they did not observe this one child—who was much younger than the other children, and was probably so young that the operations carried on by the artisans would not attract him half as much as what he was engaged in—namely, picking up something off the middle of the street—and that failing to do that they were guilty of negligence.

As to how the accident happened, the Lord Ordinary twice says that he is not sure whether the hand of the child was actually in front of the wheel or in such a position at the moment of starting that it could thrust the hand forward and find it underneath the wheel. That is the truth. There is no evidence to show how this accident happened, and indeed Mr Lippe admitted, as I think he was bound to admit, that if the proof had closed with the pursuer's evidence there was no evidence at all upon which the judgment of the

Lord Ordinary could have been supported. I do not think that even eked out with what the two witnesses for the defenders said the evidence is sufficient to justify the judgment of the Lord Ordinary. No doubt the operations of the Tramway Company's men attracted children, but I think it is quite clear that so far as these operations were concerned the attraction brought the children to the north side and not to the south side of the car, and that the defenders' representatives were quite entitled to think that so far as they were concerned all the children who had been attracted there were on the north side, and that as they had warned them away the course was clear.

I am therefore of opinion that the pursuer has not succeeded in establishing fault against the defenders or any breach of duty on the part of their servants which would justify us in finding the defenders liable. If my opinion had been otherwise, I should not have seen any reason whatever to have interfered with the amount which the Lord Ordinary has awarded, because I think that a boy in this rank in life who has lost two and a half fingers of his right hand is undoubtedly seriously prejudiced. I do not, therefore, interfere with the amount of damages awarded but only deal with the wider question of liability.

LORD DUNDAS—From the evidence we really do not know how this accident happened. Nobody comes to say that he saw it, and on the whole I am disposed to think that the pursuer has failed to establish any case of fault. I am bound to say that I think the case is a very narrow one, but I am not prepared to differ from the conclusion at which your Lordship has arrived.

LORD SALVESEN—I am of the same opinion. I think the pursuer has completely failed in establishing any case of negligence. There were a number of people who gave evidence as to what they saw, but all it came to was that the child was picked up from between two of the wheels of a tramway car, and that when he was picked up two and a half of the fingers of his right hand were missing. How he came into that position nobody says, but the child was last seen by one of the witnesses picking something off the street some little distance from the side of the car. If he had remained there he would not have taken any injury, but the next observation of the child's movements was that he was lying flat on the ground, and that the wheel had passed over his fingers. That being the whole of the evidence for the pursuer I think he undoubtedly failed to show how the accident occurred or to establish that there was any fault on the part of the defenders' servants.

There may be cases where, if children are playing round about a car or any other vehicle which has been stopped for some time and hanging on to it, there may be a duty on the part of those in charge of the vehicle to see that the children are all clear of the vehicle before it is allowed to start, but we have no such case disclosed here. So far as the two men who were witnesses

for the defenders are concerned they say that they did not know that there was any child on the south side. They admit that they saw several children on the north side watching their operations, and they took care to warn them that they were going to start and to see that they were clear.

But according to the Lord Ordinary the driver could not see any child on the south side, because the child, if he were in the position that this child must have been in some little time before the accident—a mere matter of seconds—would be invisible to the driver. I cannot say that either of the men had any reason to expect that there was a child nine and a-half feet behind the dashboard in such a position that if it moved forward it might get its hand below the wheel.

It would be a very dangerous thing to lay down any general rule of duty arising in such circumstances. I think it must always be a question of circumstances, but there must be some circumstance that makes it the duty of the person who starts the vehicle to know that there is a possibility of injury being caused to others. In short, if the driver knows or ought to have known that there was a child in a position of danger his employers may have to answer for his failure to observe the precaution of clearing the child away, but if the man neither knows nor has any reason to believe that there is a child at a part which is invisible to him in a position that might involve danger to that child, I cannot affirm that there is any general duty on the driver or conductor to see that the line is clear before the car is put in motion.

LORD GUTHRIE—I have found this case very narrow. It is quite clear that if the proof had stopped with the evidence for the pursuer he could not possibly have succeeded, but the evidence of Campbell the driver introduces a very great difficulty. He admits that a car such as this car going to mend standards attracts children. He also seems to admit in two parts of his evidence that on this occasion there were children round the car. But taking the evidence as a whole I think two things are clear. The first is that it is not proved that this child was part of the group of children watching the car. If that is so, then the point about the car mending standards attracting children disappears, because it has no relation to this child; it was there for an entirely different purpose. The evidence indeed is that it was not watching the car but was gathering pebbles. In the second place, I think it also appears clearly that the children who were attracted to the car were all on the north side. If so, I think that Campbell did his duty in seeing that the children he saw were out of danger. Unless the other child was there it had no relation to the car at all. It is quite certain that Campbell did not see the child, and I do not see that he had any sufficient reason to believe that the child was there.

Their Lordships on 17th July 1917 recalled the Lord Ordinary's interlocutor and assoilzied the defenders with expenses.

The pursuer appealed to the House of Lords.

LORD CHANCELLOR—I do not think it is necessary to call upon counsel for the appellant to reply in this case, as it appears to me that the judgment of the Second Division ought to be reversed and the judgment of the Lord Ordinary restored.

The facts are extremely simple—There was a tramcar which carried two men who were engaged in repairing the standards carrying lamps in a street. The car from time to time stopped where the standard wanted repair or where a lamp on a standard wanted attention. Both men were expert drivers, and both men were expert mechanics. Sometimes one drove and sometimes the other, sometimes the one attended to the repairs and sometimes the other. In the village of Old Kilpatrick in Dumbartonshire they had stopped by a standard the lamps on which wanted repair. The car was there for some appreciable time. It is not stated exactly how long—I should gather some ten minutes—the time is really quite immaterial—at all events it was long enough for a certain number of children to gather in the neighbourhood of the car, as children always do gather, to see an object of that kind which is of interest to them. The expression used in the evidence is “children round about the car.” After the work was done, when the car was about to start, according to the evidence all the children with one exception were on the north side of the car, that is to say, on the near side, as the car was going eastward, and in the direction of Glasgow. On the other side in the event it appeared that there was a child of two years and some three months old playing about near the front wheel on the off side. The conductor, Campbell, looked along the north side of the car—that adjoining the pavement—and warned the children who were there off, he did not look at all at the other side of the car to see whether there were any children about there, and the poor little child who was playing about near the front wheel on the off side was not seen by anyone till too late. The car moved on, the driver had not looked out, and in this I think he was justified, because he relied, and I should think properly relied upon Campbell, the conductor, to see that all was clear before he gave the signal for the car to start; the child's hand was run over by the wheel, and the child lost two fingers and a portion of a third.

Under these circumstances Lord Anderson found that the tutor suing as pursuer was entitled to recover on behalf of the little boy on this ground. In the print Lord Anderson says this—“It is obvious that the pursuer has entirely failed to prove most of the somewhat serious averments of fault which he sets forth upon the record. In condescendence 5 these are set forth, and what is averred is that at the time of the occurrence the car was suddenly and unexpectedly put in motion and driven onwards by O'Donnell in a reckless manner although he knew that there were a number of chil-

dren quite close to and in front of the car. That seems to me to be not only entirely not proved but entirely disproved, because the evidence is unanimous on this point that there was no reckless and negligent driving and that there was no sudden and unexpected start. Accordingly the pursuer has entirely failed to prove that ground of fault." Then the Lord Ordinary deals with the allegation that no warning was given that the car was about to be started, and says that has failed too. Then he goes on—"All that is left of condescendence is the averment which the pursuer makes that O'Donnell was in fault in failing to keep a proper look-out, to make certain that none of the children whom he saw were at or near the front of the car, or about to cross in front of it, before putting the car in motion. The question is whether there was a duty upon O'Donnell"—that was the driver, the man who was driving at the time—"and Campbell," who was acting as conductor at the time, "to see before starting the car that none of the children were in its vicinity, and whether they failed in that duty and in consequence caused the accident. It is well settled and generally recognised by drivers of vehicles that there is a duty laid upon them to take reasonable precautions to avoid injury to members of the public lawfully using the public roads and streets, and that both when the vehicles are moving and when they are about to be started; and it is also settled that special precautions have to be taken with reference to those who have not the full use of their faculties, such as the blind, the deaf, the lame, and children of tender years." Then his Lordship went on to deal with what was done in the way of seeing whether the children were near the car so as to be in any danger, and he says this—"The defenders' servants who were examined yesterday admitted, as of course they had to admit, that they were well aware that a number of young children were in the vicinity of this car, and apparently they recognised that they had a duty to take special precautions to avoid injury to any of these children, and Campbell, who was on the rear platform and was charged with the duty of seeing that everything was safe before he gave the signal to O'Donnell to start the car, recognised this duty which was incumbent upon him, and he discharged it so far as the north side of the car was concerned." Then his Lordship sets out the contentions of counsel on both sides, and says this—"It seems to me therefore that Campbell ought to have directed his attention to that side of the car"—that is, the south side—"as well as to the other. To do so was a simple precaution. I think it was an obvious precaution, and I am of opinion that in the circumstances it was a reasonable precaution and was a precaution which ought to have been taken. Accordingly I reach the conclusion, although as I have said the point is narrow, that the defenders' servants or servant Campbell were or was negligent in not having taken this precaution of examining the south side of the car, where the little boy was, before the car was

started. I am of opinion that had they done so they would of course have seen him and removed him, and that the accident was the direct consequence of this precaution not having been taken."

Now under these circumstances it appears to me quite impossible to say that if the case had been tried by a jury it could have been withdrawn from the jury on the ground that there was no evidence to go to them of neglect on the part of the defenders' servant. There was a case fit to be left to the jury, so that it is impossible here to say as a matter of law that the Lord Ordinary was bound to decide that there was no case. It was for him to make up his mind upon the facts of this case, and speaking for myself I think that the conclusion that he reached was quite a reasonable one. There were children about. How could it be assumed that all the children were on the north side? The way in which Campbell gave his evidence on the point rather leads to the inference that he was a little careless, he did not look on the south side at all, and I infer that if he had looked there was nothing to prevent him from having seen this child. It would not have been necessary for him to have got off the car, or before he got on the car to walk round it; if he had looked from the platform where he was at the back of the car, and looked by the side of the car, I infer from the evidence that he would have seen this child. He did not do that, and it seems to me that it was not unreasonable for the Lord Ordinary to come to the conclusion that there was actionable negligence on the part of the defenders' servants.

The case went to the Second Division on appeal, and the Second Division came to the conclusion that the Lord Ordinary's decision was wrong and gave judgment for the defenders. The point on which their judgment turns is put very neatly, I think, by Lord Salvesen. He says this—"It would be a very dangerous thing to lay down any general rule of duty arising in such circumstances. I think it must always be a question of circumstances, but there must be some circumstance that makes it the duty of the person who starts the vehicle to know that there is a possibility of injury being caused to others. In short, if the driver knows or ought to have known that there was a child in a position of danger, his employers may have to answer for his failure to observe the precaution of clearing the child away; but if a man neither knows nor has any reason to believe that there is a child at a part which is invisible to him in a position that might involve danger to that child I cannot affirm that there is any general duty on the driver or conductor to see that the line is clear before the car is put in motion." In the first sentence of the passage which I have read it appears to me that what Lord Salvesen said is perfectly accurate—that is, that as to there being "some circumstance that makes it the duty of the person who starts the vehicle to know that there is a possibility of injury being caused to others." That is quite a different thing from saying that there is to be liability only if the man knows or ought

to have known that there was a child there. It is quite enough if he knew there *might* be a child there. That was quite enough to raise the duty of looking, and this he knew as he had seen children about.

Under those circumstances it appears to me that Lord Anderson came to a right conclusion. I very much deprecate deciding cases of this sort by reference to decisions in other cases in which there are like circumstances. One might as well in a case tried by a jury ask the jury to be guided by what another jury had done in another case which was supposed to be very much like the case before them. Each case must be decided upon its own circumstances, and the only principle of law in this case is that where there are children about it is a right and reasonable thing that the man in charge of the car before starting it should look to see whether there are any children in such a position that they are in danger of being injured. It is a question in each case whether the circumstances in the opinion of the judge or the opinion of the jury, as the case may be, show a want of ordinary and reasonable care, and I do not think that the decision of the Lord Ordinary in this case ought to have been disturbed, and I am in favour of restoring it.

Very little has been said on the subject of contributory negligence on the part of the parents of the child in allowing the child to play about in the street. Well, I think the course that was taken by the respondents' counsel on that matter was quite right. However it may stand as a matter of strict law—I do not desire to enter into that question—there always will be children playing about in the streets. It is absolutely impossible to prevent it, and when a mother has a good many children and has household duties to attend to, and is very likely in a position of life which does not enable her to get any servant to look after the children, the children must to a certain extent be allowed to be about in the streets. But even if you take it that there was some want of care in allowing so very young a child to be in the street, and apparently with no better guardianship than a sister aged six and a brother some two years younger than the sister, even if there was negligence in that, it appears to me that that would not interfere with the right to recover if you find—and I think the circumstances point to that—that the whole effective cause of the accident was the want of care of those in charge of the car.

This point has been a good deal considered in more than one case. I will take about the earliest, and I think very nearly the latest. In the case of *Davies v. Mann*, 10 Meeson and Welby 546, the plaintiff had left a donkey with his forefeet fettered in the highway. The defendant was driving along the highway, and he drove up at a smart pace without taking reasonable precautions to avoid the donkey and ran over the donkey. An action was brought against him for his negligence, and it was said, "Oh, it was a negligent thing on the part of the plaintiff to leave his ass on the highway." But the answer made to that was the very

simple one—No doubt there was some want of care in leaving the donkey fettered in that way on the highway. But then that does not exonerate the defendant if the defendant by reasonable care might have avoided the ass. Lord Abinger, when that point was taken on an application for a rule for a new trial, said—"The defendant has not denied that the ass was lawfully on the highway, and therefore we must assume it to have been lawfully there, but even were it otherwise it would have made no difference, for as the defendant might by proper care have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." Baron Parke, who also sat on that case, said this—"In the case of *Bridge v. Grand Junction Railway Company* there was a plea imputing negligence on both sides; here it is otherwise; and the judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action unless the donkey's being there was the immediate cause of the injury; and that if they were of opinion that it was caused by the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct, for although the ass may have been wrongly there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or of purpose running against a carriage going on the wrong side of the road." The principle is simply this, that in order to bar an action the contributory negligence must be in the transaction itself and not at an antecedent stage. The very same principle was applied in a case which in its circumstances is extremely different from "the donkey case," as *Davies v. Mann* is generally called. I refer to the case of His Majesty's ship "*Sans Pareil*," which is reported in the Law Reports for 1900, Probate Division, at p. 267. There the Channel Fleet was moving up the Channel under steam in several columns, and a tug with a tow threw herself across in front of the Channel Fleet. In the Court of Admiralty it was held that the fact that the Channel Fleet was manœuvring as a body gave it no greater right than if single vessels of the Channel Fleet had been manœuvring, and that there was no negligence on the part of the master of the tug in throwing himself across the line in which the Channel Fleet was proceeding. The case was taken to the Court of Appeal, and the Court of Appeal reversed that finding, and said they thought there was great negligence in a tug throwing herself across in front of the Channel Fleet proceeding up the Channel in columns, but they went on to hold that that did not prevent the owners of the tug from recovering damages for injury caused to the tug by the negligence of the navigation on board one of the warships which came into collision

with the tug. In the words of the head-note the proposition is stated in this way—“Held, by the Court of Appeal (Lord Justices A. L. Smith, Vaughan Williams, and Romer), on the advice of the nautical assessors, that it was improper navigation, as a matter of seamanship, for the tug and tow to attempt in the circumstances to pass across and ahead of the Fleet; but the Court dismissed the appeal” (the appeal was on behalf of the Admiralty against the award of damages for the collision) “on the ground that, under the common law doctrine of contributory negligence as applied in the ‘Margaret’ (*Cayzer v. Carron Company*), 1881, 9 App. Cas. 873, though the tug and tow had been guilty of negligence in keeping on, yet the defendant was not hampered by the other vessels of the Fleet, and might, by the exercise of ordinary care and diligence have avoided the collision.” That is exactly the principle of *Davies v. Munn* applied to the Channel Fleet and this tug which had thrown itself across the line. The point is dealt with in all the judgments, and I only refer to the observations made on this point by Lord Justice Romer at p. 290—“I think, as at present advised, that though some negligence on the part of one or more of the vessels of the fleet were proved, yet if the accident had really arisen from the formation of the fleet, the case should be dealt with as one of contributory negligence; but in the special facts of this case it appears to me that except remotely the accident had really nothing to do with that difficulty. It arose substantially by reason of the negligence of the navigating lieutenant on board the ‘Sans Pareil’ in not seeing or not properly interpreting the lights on the tug, and in not observing that there was a ship in tow. Had it not been for that negligence of the navigating lieutenant the accident could easily have been avoided. The ‘Sans Pareil’ could have been kept under the port helm a little longer and so avoided both tug and tow without difficulty or danger to the fleet either as a column or as individual ships in each column. The truth is that this accident was brought about by the negligence of the navigating lieutenant of the ‘Sans Pareil’ just as if that vessel had been by itself. The accident had nothing to do with the fleet, and resulted from the negligence of a particular ship, and so far as appears would have happened if that vessel had been steaming by itself. Under these circumstances it appears to me that the ‘Sans Pareil’ cannot avail itself of the initial error of the tug and tow and say the case is to be dealt with as one of joint or contributory negligence.”

The principle in the present case is exactly the same as it was in those two cases. Even granting that there was some negligence in leaving a child of such tender years in the street without more efficient guidance, yet that negligence was not part of the transaction itself in which the accident occurred. Historically it led up to it, but the accident was really, in my view of the facts (for I take Lord Anderson’s view),

entirely caused by the omission of those in charge of the car to look out to see whether there was any child about on the south side as well as on the north side of the car. They knew there were children about on the north side, and it seems to me to have been rather a rash assumption that there was no child on the other side—they might have looked

Under these circumstances I do not think it was proper to interfere with the finding of the Lord Ordinary, and I think that finding ought to be restored.

VISCOUNT HALDANE—I concur in the judgment which has been proposed by the Lord Chancellor.

The law casts upon those who are in charge of a tramway car which is about to be driven along tramway lines laid on a public highway a duty to be careful. That duty varies with circumstances, but it may be said to amount to this—to do what prudent and reasonable people would do in order to avoid injury to their neighbours in driving the tramway car.

That obligation may assume different proportions, and the standard by which the circumstances have to be judged in determining what proportion the obligation assumes may be so elastic as to be incapable of being adequately expressed in an abstract proposition of law. It may in a particular case be so completely relative to the surrounding circumstances as to require to be treated as in the main a question of fact, not for the jurist, but for the ordinary citizen of the world, who has to say what the answer should be as the majority of reasonable and prudent men would give it, obeying the dictates of what is called common sense in coming to their conclusion.

I am therefore far from saying that it is everybody who is injured by a tramway car which is being driven along the road who has a right to complain. If the car is going at a speed which is not unlawful, and somebody recklessly or stupidly runs in front of it, whether that person is a grown person or a child, that person cannot complain; it is his own negligence that has been the cause of the accident and not anything imprudent that was being done on the part of the person driving the car. Nor do I say that when in the ordinary course a tram car is being driven through a crowded town and stops for a moment to pick up a passenger and has to be started again without any delay, the driver or conductor is bound to search carefully to see that a child has not got under the car. It would be impossible to carry on the affairs of life if such an obligation were minutely insisted upon under all circumstances. You have to do what is compatible with your general duties, and the standard of prudence which is to be observed must take the general duty into account.

But when we come to the present case we have an illustration of the necessity of considering exactly what the circumstances are which are being dealt with. This was not an ordinary tram car being driven

along and stopping only for a moment to pick up passengers; it was a repairing car sent to effect repairs to a post which was out of order. The two men who were on the car were expert workmen as well as expert drivers, and they stopped the car and began the repairs, and not unnaturally, as the locality was not densely populated, but a village where there were few interests for the inhabitants, the children came out in some numbers to see the work that was going on, and when children come out the intelligent ones naturally take an interest in the work that is being done, but as naturally bring with them others younger who may not appreciate that work perhaps, but who have an interest in the car as it stands still. These little children assembled, and the car stopped, not for a short time, but for a considerable time, and the children remained there, and there was nothing to indicate in advance that the car would start at any particular time. When the work was finished and the two men got on to the car, one of them looked at the side where the children happened to be, and after doing so, he told the other to go and start the car and the other went and sounded his signal, looking only in front and starting the car on the assumption that all was right. His comrade had omitted to look along the other side of the car, and had not got down to see whether any young children from the crowd which had congregated had got near and within dangerous distance of the wheels. The car was started, this precaution not having been taken, and the result was that it ran over and injured the hand of a small child of between two and three years old who was lying down gathering pebbles close to the front wheel of the car on the side that was most remote from that where the other children had congregated. What was the duty of the two drivers under these circumstances? As the car had been stopped for an unusual time, and as children had congregated to a somewhat unusual extent, I think that prudent people would have gone round the car to see that it was clear of the children before starting it, and would have taken more care than is ordinarily taken when a car is stopped only for a moment in the course of an ordinary journey. That was not done. I think it was what prudent and reasonable people would have done, acting according to the standards which common sense tells us ought to be ours in taking care so to use our own things as not to injure our neighbours. I think they failed in the duty which arises from the obligation imposed by that standard, and I think that consequently the pursuer was entitled to succeed in this action.

No doubt there was negligence in those who were responsible for the child in letting it, unattended, lie about on the tramway line, but that negligence is of a sort which is very common among poor people and must be looked for because it cannot be altogether avoided, and I agree with what the Lord Chancellor has said upon the subject on the assumption even that what was done by those in charge of the child can be treated as contributory negligence.

It has been, I think, settled law ever since the decision in *Davies v. Mann*, illustrated by the case of the "*Sans Pareil*," to both of which the Lord Chancellor has alluded in his judgment, and I think it was finally settled by the decision of this House in *Radley v. The London and North-Western Railway Company*, reported in 1 Appeal Cases—a decision which was given I think in 1876—that in order that contributory negligence may be an answer to the plaintiff's action the negligence which has contributed must have been shown to be negligence which actually and directly led in itself to the accident; it must not be a negligence independent of the act which caused the accident. The question always is, which was the decisive and immediate cause, and if the decisive and immediate cause was the negligence of the defender, then it does not matter that there was negligence on the part of the pursuer, apart from which he would not have been in the position which brought about the injury by the accident.

For these reasons I have come to the conclusion that the judgment of the Inner House cannot be supported. The basis of that judgment is that there is not sufficient evidence to show how the accident occurred, and that the facts which are established are not sufficient to make the duty to be careful operative. But after carefully considering the evidence I think there was sufficient evidence to warrant the Lord Ordinary in coming to the conclusions of fact which he did, and having come to those conclusions of fact I think, for the reasons I have given, that his conclusions of law were the conclusions which he ought to have drawn, and I am therefore of opinion that the appeal ought to succeed.

LORD SHAW—I beg to express my entire concurrence with the judgment of my noble and learned friend on the woolsack.

The case is one of extreme simplicity. The duty which is alleged to have been neglected can be simply stated in this way, that when you have a tramcar or other vehicle stationery in the midst of a village and known to be an object of curiosity to children, it is the duty of the driver and conductor of that car before starting it to see that the way for it is clear. I think that is a simple proposition expressing a perfectly elementary duty. I know of no law against it; all principle of law is in favour of it.

I proceed to ask whether that duty was performed. It very plainly was not. The duty of driving was that of O'Donnell, and the duty of conducting was that of Campbell. These duties were adjusted for the occasion between them. O'Donnell performed his duty of seeing that the way was clear by looking in front, and in front only, not taking one single step which should carry the range of his vision beyond the angle of the guard which was between him and the ground either to the front or to the side. He looked at the front so far as his vision permitted and did not increase the range of his vision either laterally or in front. With regard to the left-hand side,

the near side of the car, Campbell performed his duty with regard to that; he saw that that side was clear. But neither O'Donnell nor Campbell looked at the, unfortunately, most important side of the car, namely, the off side, the side where the child was. That was left without any looking to at all. Campbell is asked about it, and he says this—"It would have been a wise precaution, but you would never get on if you had to go round the car every time before you started; it is not usual to look to the south side." I take that to be a complete confession of very unhappy carelessness on this occasion. If cars cannot get on without people looking to see whether they will injure limb or life by going on, then they must stop, and it is the duty of those in charge of cars not to proceed until it is seen that the way for traffic is clear.

Upon the merits accordingly of this case I take it as purely a question of fact; there was no question of law so far as I can see in the case whatsoever. The suggested question of law as to contributory negligence would not stand examination, and in the interesting and, if I may say so, perfectly candid argument presented on behalf of the respondents that was substantially acknowledged. Contributory negligence only operates in a case where it is the negligence of the victim of the accident by being participant to some extent in that which caused the accident, but there is no participation in the driving on of a car by a little child who is lying in the road, and it is out of the question to suggest that contributory negligence applies to such a situation. Nor although the parents had been, as I do not for a moment suggest they were, negligent in allowing the child to go upon the highways of this country in a village in the broad daylight, that parents' negligence in no way caused the car to run over the child. The responsibility for the running over of the child was upon the part of the servants of the company who were in charge of the vehicle.

And thereupon, so far as I am concerned, this case is at an end except that I must call the attention of this House to what I think appears to have been a serious defect in procedure in connection with it. Upon the 30th May 1916 the learned Lord Ordinary, Lord Anderson, appointed this case to be tried by a jury, and he proceeded to adjust the issues for trial by jury in the approved and excellent Scottish form. At that stage the case was taken by appeal to the Second Division; it was not taken by appeal by way of any motion to vary the form of issue, but it was taken manifestly by appeal to the Second Division in order to maintain that there was no relevant case and that the action should be dismissed. What, however, the Second Division did was, upon the 24th June 1916, to recal the Lord Ordinary's interlocutor, to disallow the issue proposed, although it is not suggested by anyone that that issue was not perfectly suitable and proper to the trial of the case, and to remit to the Lord Ordinary to allow the parties a proof.

I made inquiries as to how this could

possibly have occurred, and I did so of set purpose for this reason, that the law of the land seems to be quite clear on the subject. By the 6th George IV, chapter 120, section 28, an enumeration was given of causes which were suitable and proper and exclusively fitted for trial by jury, and in the forefront of that enumeration is contained this item—"All actions on account of injury to the person." When the Jury Courts were abolished the Court of Session Act of 1850 dealt with that subject, and it enacted that it should be competent for the "Court to allow proof on commission in any of such enumerated causes where the action is not an action for libel or for nuisance or properly and in substance an action of damages," that is to say, the Legislature in altering the procedure was careful to prevent any invasion into this important region of the range of jury cases.

So the law of Scotland stood until the Evidence Act of 1866 (29 and 30 Vict. chap. 112, section 4). By that Act this variation was made—"If both parties consent thereto, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section first hereof, . . . and the judgment to be pronounced by him upon such proof shall be subject to review. . . ."

The special cause shown must manifestly be a cause special to the particular case that is being tried; it is not general causes applicable to the situation of the country at large, or applicable to any views with regard to that situation which judges may entertain. Accordingly, the position in 1866 was that a special cause had to be established before it was in the power of any judge to withdraw the case from the tribunal of a jury set up by law. I made anxious inquiry to know what the special cause in this case was. The learned counsel who most properly assisted us to the best of his power informed the House that he argued that this was a case of injury to a child and that that was a special cause, and his suggestion was that the case of injury to a child is a special cause which sends an action for damages in respect of that injury away from the cognisance of a jury.

I need hardly say, and I think your Lordships will all agree, that that is no special cause whatsoever; therefore as I see there was no consent I express my great regret that we have no recorded reasons of the Second Division for the judgment at which they arrived. It can only have been pronounced of course as a matter of law and upon legal grounds. For nobody could contend for a moment that any amendment of the law however justifiable or the reverse, or any encroachment upon constitutional right however unjustifiable or the reverse, should be argued pro and contra in a law court or in any other place than in the Legislature of the country with a view to the repeal or modification of the law binding by statute.

The consequences in the present case have been deplorable. Your Lordships have now a case which might have been concluded by

a simple verdict of the jury, but which has been made the subject of an appeal and careful argument to one of the Divisions of the Court of Session, and it has now reached London, and we are engaged in trying a case which for aught yet seen upon the merits of it should never have been any otherwise disposed of than conclusively and finally by the verdict of a jury. The expense to both parties is regrettable, but it is one of the consequences of having varied the procedure, which so far as we have been instructed has not been justified by any legal element in the case now before us.

I have thought it right to indicate my view upon that question, because this House has not been slow upon subjects of that kind to indicate its very strong favour for complete affirmation of the statutory law of the country in the procedure of the courts. In the year 1860 the case of *Bickett v. Morris* reached this House. I do not trouble your Lordships with the details of the case, which had reference to interferences with the channel of a river, and which is a leading case upon the subject of the rights of riparian owners. The case was not a case for damages, but it was a case falling within the enumeration of the Statute of George IV to which I have referred. The Lord Chancellor in that case said this—"It was contended by the appellant that there being no claim for damages in the pursuer's summons it was a case not within the 28th section of the Judicature Act, but," said his Lordship, "it seems to me that this section is not confined to cases where damages are demanded, but that it extends to all the enumerated causes of action where a question of fact is to be tried proper for the determination of a jury." And his Lordship concludes that part of his judgment by saying "the cause ought therefor in regular course to have been remitted to the jury court." It would be presumptuous in me to say that I agree in that expression of opinion. It is standing law, and it applies very particularly to a simple plain question of fact like the present, without so far as I can see any justification for the suggestion that a special cause existed, the simple broad fact being that a case constitutionally and legally to be tried by one tribunal, a jury, has been tried by another with inordinate consequent expense, for which I see no legal justification.

LORD PARMOOR—I concur in the conclusions which have been arrived at and expressed by the noble Lords who have already addressed the House. I think, however, that there is a danger in cases of this character in attempting too great particularity in the statement of the principle. I adopt the statement of the principle which was laid down by Lord Penzance in the *Radley* case, to which reference has been made, and which was accepted, I think, in terms by all the other noble Lords who took part in the decision of that case. The question in a case of this sort is whether, apart from contributory negligence or not, the respondents could by the exercise of ordinary care and diligence have avoided the

mischief which happened. There is one other point I should like to mention as regards contributory negligence which was referred to by the noble Viscount opposite. Antecedent negligence which does not immediately or directly contribute to the actual transaction from which the mischief has arisen is really no more than a step in the history of the case, and does not directly affect the question of liability.

I think it is quite clear in this case that if the trial had been held before a jury there was evidence which not only might have been left to a jury, but which must have been left to them; and I go further, and say that if any jury had found against the respondents there would have been an end of the case. There would have been no possibility of interfering with a verdict of that character. I do not desire to say any word which can specially relate to Scotch practice, but I do agree entirely with what my noble and learned friend Lord Shaw has stated, that if there is a statutory right to trial by jury, in whatever form it is given, that statutory right ought not to be taken away in any way by a mere executive order. The question therefore to be considered is whether your Lordships agree with the conclusions of the Lord Ordinary. For my part I am certainly not prepared to differ from him in any particular which affects his decision on the finding of negligence. The car had stopped for repairs; it is not a question of the ordinary running of a car in the street. The children had gathered round the car. I think myself a great deal too much importance has been attached to whether they were on the north or the south side; they were gathered round the car. There was a duty to see that the children were not in a position of danger when the car was started. This duty was recognised by both Campbell and O'Donnell, and it was in fact carried out as regards the north side of the car and as to the front of the car, but for some reason, which I am totally unable to appreciate, no care was taken as to the south side of the car. I am not aware of any law which makes it less necessary to look on the south side of a car than to look on the north side or in front of the car. Campbell did not as a fact look to the south side of the car. I think it would be unfair to put too great weight on the reason Campbell gave for his action, where he says he did not act in a spirit of wise precaution but on the ground merely of convenience. I think a particular answer of that kind ought not to be pressed as against the defenders in a case of this sort. O'Donnell claimed that it was merely his duty to look in front. I do not know whether it was his only duty to look on the front, but it was the duty of those in charge of the car to look upon the south side as well as on the north side and in front of the car.

I quite agree that each case must be determined on its special circumstances, but there is one further feature in this case to which I should like to call your Lordships' attention. I think the argument of Mr Sandeman was very justly presented to this House as regards the question either of contributory

negligence or of the position of the children on the street at the time in question. I do not think that anyone would agree that you are entitled to be negligent because a man is a trespasser, or because he is somewhere where he ought not to be. I am not entitled, because a man is a trespasser, through want of the exercise of due care to run him down and injure him in driving a motor car. At the outside it may be said that because the man is a trespasser the driver had no reason to think he was likely to be in a position of danger. That is a different matter altogether and it does not arise in the present case. I agree with what the noble Viscount opposite said, that as regards children there is reason for special care, and that as regards children playing in the street, if they are in fact playing there—which is quite sufficient apart from any right to be there—it is the duty of the driver of a car or the man in charge to exercise due care and diligence in avoiding damage to any of those children. In my opinion ordinary care and diligence in avoiding damage were not exercised in the present case, and the defenders, the respondents, are liable in damages. I agree that the appeal should be allowed.

Their Lordships sustained the appeal, with expenses, and restored the judgment of the Lord Ordinary.

Counsel for the Appellant—Haydon. Agents—T. M. Pole, Solicitor, Leith—John Cuthbert, London.

Counsel for the Respondents—Sandeman, K.C.—A. M. Mackay. Agents—Manson & Turner Macfarlane, W.S., Edinburgh—Grant M'Lean, London.

COURT OF SESSION.

Thursday, March 28.

WHOLE COURT.

MASON AND ANOTHER v. RITCHIE'S TRUSTEES.

Superior and Vassal—Casualties—Composition—Lands Subfeued for Less than their Annual Value—Feudal Casualties (Scotland) Act 1914 (4 and 5 Geo. V, cap. 48).

Lands were subfeued in 1847 for a subfeud-duty of £1 per annum. The rental of the lands at that date and at the date when the vassal took entry was very greatly in excess of £1 per annum, and continued so to be. In an action for redemption of the casualties of the feu under the Feudal Casualties Act 1914, held by the Whole Court (*dis.* Lord Johnston, Lord Dundas, Lord Salvesen, Lord Skerrington, Lord Cullen, and Lord Sands) that the composition exigible by the over-superior from the mid-superior was limited to the subfeud-duty of £1 payable to the mid-superior. *Opinion (per* Lord Johnston, Lord Dundas,

Lord Salvesen, and Lord Sands) that the amount of composition was the annual value of the lands in 1847, when they were subfeued. *Opinion (per* Lord Skerrington and Lord Cullen) that the amount of the composition was the annual value of the land at the time of the entry in respect of which the casualties were claimed.

Authorities examined.

John Mason and another, immediate superiors of the lands of Kirktonhall, West Kilbride, *pursuers*, brought an action against Robert Gibb and others, the testamentary trustees of the late Dr Francis Caldwell Ritchie of Kirktonhall, vassals of the pursuers in the lands of Kirktonhall, *defenders*, concluding for decree of declarator that the defenders were bound as at 19th July 1915 to redeem the casualties incident to the pursuers' estate of superiority, exigible in respect of the defenders' estate held off the pursuers, and that the amount of compensation payable as redemption of the casualties was £1299, 14s. 1d., with executive conclusions.

The *holograph settlement*, dated 26th November 1833, of Francis Caldwell Ritchie (a predecessor in title of the defenders) directed his eldest son Francis Ritchie to implement various conditions as to the disposal of his property, which conditions included, *inter alia*—“To my son John Ritchie I hereby make over in tack or lease for nine hundred and ninety-nine years, from and after the first term of Whitsunday or Martinmas after my decease, and my successor is hereby bound to give legal and valid tack-right to that portion of the lands of Kirktonhall—[*then followed a description of the lands of Seamill*]. The said John Ritchie or his heirs on their part to pay to the foresaid Francis Ritchie or his heirs the sum of twenty shillings sterling at the term of Martinmas yearly in name of rent or tack-duty, and to go to the mill of Kilbride with all his grindable grain, and to pay the multures payable by the lands of Kirktonhall, double rent payable at the entry of heirs.”

A *feu-right*, dated 5th October 1847, was thereafter granted by Francis Ritchie in implement of the foregoing condition, which feu-right provided—“I, Francis Ritchie of Kirktonhall, physician in West Kilbride, eldest son and heir of the deceased Francis Caldwell Ritchie of Kirktonhall, in obedience to the directions of my said father contained in the holograph settlement executed by him on the twenty-sixth day of November Eighteen hundred and thirty-three, do hereby sell, alienate, and dispoise to John Ritchie, my brother, presently in London, and his heirs and assignees whomsoever, heritably and irredeemably, all and whole—[*then followed a description of the lands and other clauses*]—to be holden of and under me and my heirs and successors in feu-farm, fee, and heritage for ever for payment to us of the sum of twenty shillings in name of feu-duty, and that at the term of Martinmas yearly, beginning the first payment thereof at the term of Martinmas Eighteen hundred and forty-eight for the