directly raised now for the first time, although in the case of a young person contributing part of his earnings to the support of his parents it must not infrequently have occurred that his life was cut off at a time when the parents might reasonably have looked for a considerable increase of such wages and to an increased contribution. The case of an apprentice who was on the point of becoming a journeyman when he was accidentally killed, and who while an apprentice had contributed to his mother's support wages in excess of the amount necessary for his own keep, may be figured, and in the case of some boys between the ages of fourteen and twenty-one it is not improbable that the rate of wages paid to them would increase as they grew older. Now the only guide which the schedule affords to the arbitrator is to award an amount which he may determine to be reasonable and proportionate to the injury to the persons partially dependent on the workman's earnings. The fact of partial dependency being established compensation is due, but except that the second sub-section provides a maximum beyond which the compensation must not go, the words that I have quoted constitute the only direction to the arbitrator as to how he is to proceed.

In my opinion it is impossible to read into these words any implication that the assessment must be made on the basis of past earnings only and that possible future earnings are not to be considered. The problem after all is not so very complex. It is one which juries have constantly to solve as best they can in actions at common law for damages at the instance of a parent in consequence of the death through negligence of one of his children. In such cases, according to our law, solatium affords a competent element in the amount to be awarded, while I apprehend that such a claim would be excluded from the compensation payable under the Workmen's Compensation Act. But it appears to me that the extent of the injury that the partial dependants have suffered may depend not merely on the earnings which the deceased workman was making at the time of his death, but on the earnings which he might reasonably have been expected to make during the following years. It is the loss of such portion of these earnings as the deceased workman might be expected to contribute towards the maintenance of the family which is the measure of the compensation. On the other hand the arbitrator would have to keep in view (1) that as all such payments would be voluntary on the part of the deceased workman, he might demand or require to retain for his own maintenance an increasingly larger share of his earnings, and (2) in the case of a somewhat older youth the possibility of his marrying and being unable to contribute to his parents' support. I do not think therefore that the arbitrator was justified in holding that the evidence tendered was incompetent or could have no effect on his mind in dealing with the assessment of compensation. In some cases that I can conceive it might be an important element and one which might materially affect the arbitrator's award. In my opinion therefore we ought to answer the first question of law to the effect that the arbitrator ought to have admitted the evidence tendered and to have given it such weight as he thought proper in arriving at the amount of compensation which he found due.

LORD GUTHRIE concurred.

The Court refused to answer the questions of law as stated in the Case, recalled *in hoc statu* the determination of the Sheriff-Substitute and arbitrator, and remitted to him to reconsider his judgment and to proceed.

Counsel for the Appellants—Morton, K.C. —Scott. Agents—Ross & Ross, S.S.C.

Counsel for the Respondents—Moncrieff, K.C. — Gentles. Agents — Macpherson & Mackay, W.S.

HOUSE OF LORDS.

Friday, January 17, 1919.

(Before Lord Buckmaster, Lord Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

BAIKIE *v.* GLASGOW CORPORATION.

(In the Court of Session, November 15, 1917, 55 S.L.R. 71.)

Reparation — Negligence — Property—Stair — Lighting of Common Stair — Contributory Negligence—Relevancy.

An inmate of a house to which access was obtained by a common stair brought an action against a lighting authority for damages for personal injuries sustained by her in falling on the stair. She averred that on returning home at a time when the stair ought to have been lighted she found it unlighted, that she proceeded to mount the stair, which had no handrail, in the dark with the greatest caution, and that at a turn in it she strayed on to the narrow part of the steps, came against the stair wall, slipped and fell down the stair, sustaining injuries. She averred further that the accident was due to the negligence of the defenders in failing to light the stair. The First Division dismissed the action as irrelevant on the ground that the pursuer's averments disclosed a case of contributory negligence. *Held* (*rev.* judgment of the First Division) that while those averments might be evidence of contributory negligence which a judge or jury would be entitled to weigh, they did not *per se* establish a case of contributory negligence, and case *remitted* to the Court of Session with a direction to order issues.

Driscoll v. *Commissioners of Burgh of Partick*, 1900, 2 F. 368, 37 S.L.R. 274, *doubted per* Lord Shaw.

The case is reported *ante ut supra.*

The pursuer Mrs Helen Stewart or Baikie appealed to the House of Lords.

LORD BUCKMASTER—I am of opinion that this appeal should be allowed, and in those circumstances it is, I think, important that nothing should be said upon the merits of the case which could be used at the trial for the embarrassment either of the pursuer or of the defenders. It is, I think, therefore sufficient to say that in my opinion the pursuer's condescendence does not contain such a clear and unequivocal statement of negligence on her part as constrains your Lordships to hold that upon her own statement her case must fail.

There is no doubt it is possible for the circumstances of an accident to be so dealt with in the condescendence as that it is plain upon the face of the statements that the pursuer's own negligence contributed to the injury complained of. The only question is whether in this case the allegation bears that character. In my opinion it is impossible in this connection to improve upon the statement made in the judgment of Lord Skerrington which he delivered. He refers to the circumstances set out in the condescendence and to the way in which the accident arose, and he continues—"If in the course of mounting the staircase the pursuer made a mistake as to her exact position, it will be a question of circumstances whether that mistake should be regarded as a direct consequence of the defenders' breach of duty, or should be attributed to the pursuer's negligent conduct in failing to take effectual precautions for her own safety in the course of feeling her way up the dark staircase." That statement appears to me to be an apt application of the principle enunciated by Lord Robertson in the case which has been referred to, and which is reported in 1908 Session Cases at p. 29—*Toal* v. *North British Railway Company*, 1908 S.C. (H.L.) 29, 45 S.L.R. 683—a case before your Lordships' House where a similar matter was in discussion. Lord Robertson said this—"The mere fact that in what is probably an unnecessarily detailed averment of circumstances there is a dispute about facts is in no way decisive of the right to go to trial. If the defender can demonstrate that, assuming all the pursuer says, he has no case, then the Court has habitually and most rightly ended the litigation. This, however, is a delicate jurisdiction, because it depends in dubious cases on the language, very often obscure, applied to facts very often equivocal." For the reasons I have already given I refrain from an examination of the particular facts of this case. It is sufficient to say that without further information the facts stated in the condescendence do not relieve the respondents of the burden of establishing a defence of contributory negligence if the pursuer can prove against them the negligence on which her case depends.

In my opinion this case must go to trial, and the interlocutor appealed from should be reversed.

LORD FINLAY—I am of the same opinion. This action is brought upon the duty cast upon the Corporation by the 361st section of the Glasgow Police Act of 1866. That section after providing that the proprietor of every common stair shall provide the means of lighting upon it goes on to say that the Corporation "shall cause them to be supplied with gas and lighted during the same hours as the public street lamps." In a great many cases where duties have been imposed upon public authorities and an individual has sustained damage owing to the neglect of any such duty by a public authority, questions have been raised as to whether such an action was competent. Many of these cases relate to the question of repair of highways, and in England it has been held that no action lies by an individual for an injury sustained in consequence of non-repair of a highway. No such question as that is raised here; the question, and the only question, with which your Lordships have to deal is whether on the face of the allegations made on behalf of the pursuer it is shown that the case is one where the negligence of the pursuer herself contributed to the accident. There is a broad and a clear distinction between what is *evidence* of contributory negligence and what is *conclusive* as to there having been contributory negligence. The condescendence may show facts which would have to be left to the jury as evidence of contributory negligence, or if the facts were to be adjudicated upon by a judge instead of a jury, would support a finding of contributory negligence; that is one thing. It is another thing altogether if the pursuer's statement shows that there was contributory negligence—that the pursuer's own default led to the accident, in part at all events. In that case the statement made on behalf of the pursuer does not satisfy the requirement of law by showing that it was the default of the defenders which caused the injury to the pursuer. In the present case it appears to me clear that although there are facts on the condescendence which would be good enough evidence to go to the tribunal which has to decide on the facts as to the existence of contributory negligence, there is nothing which establishes that there was contributory negligence, and it is only on the latter view that the Court would be justified in saying that there was not a case to be tried.

The matter is dealt with in the appendix in the judgment of the Lord President, where he explains the way in which he regards the allegations in the condescendence. The law on this matter is really perfectly clear, and the only question in any case can be how the allegations of the pursuer are to be read—whether they are to be read as amounting merely to a statement of facts which would be evidence of contributory negligence, or as amounting to a statement of facts which establish contributory negligence. If the latter the case may be stopped and need not be sent to proof. Now the Lord President says this—"Now I do not pretend to understand precisely

how this accident actually befell her, nor can her counsel explain, but I do know that it was because she made a mistake as to her position on the step. She says she believed she was in the middle of the step, where she would have been in perfect safety, whereas she was near the right-hand side, where the step was narrow and she was in danger, and that this was the cause of her fall. But if she was as she says proceeding 'with the greatest caution' it is quite inexplicable how she made that mistake and how she lost touch with the wall on the left-hand side and thus got away from the broad part of the stair. If she was proceeding with the greatest caution it is inevitable that she would keep, or was bound to keep, in touch with the wall on the left-hand side. She offers no explanation of how she failed. Nor does she explain why it was that before resuming her journey upstairs she did not put out her right hand or her left hand by which means she could with perfect ease and certainty have ascertained her position. With her right hand she would have felt that she was close to the end of the stair. If she had put out her left hand she would have found that she had lost touch with the wall on her left hand, along which she might have passed upstairs with perfect safety. In short, the pursuer simply lost her way in the dark, but she could not possibly have lost her way had she been proceeding, as she expressly says she was proceeding, 'with the greatest caution.' She says that she took the risk of the darkness, and it was the darkness and the darkness only which caused her to believe that she was on a safe part of the stair when in point of fact she was on a dangerous part. Her own fault therefore on her own averment was the direct cause of the injuries which befell her."

Now it seems to me that that is really, when examined carefully, only a statement that there were facts appearing on her allegations which would be evidence of contributory negligence. I cannot read the condescendence as a condescendence which is bad in law as stating facts which are not consistent with anything else than the existence of contributory negligence, and for that reason it appears to me that there was a clear usurpation by the Court of the functions of the tribunal of fact.

A very similar question might arise in England if the practice of demurring to a statement of claim had been permitted to continue by the Judicature Act. On a demurrer to a declaration in the old days the facts as stated in the declaration were admitted—the question was whether it was good in point of law. Now suppose there were a demurrer to the allegations here, if the procedure admitted of that, would it be possible to say that the condescendence did not state what was good in law, if true, and subject to the opinion of the tribunal to judge of the fact as to whether the negligence of the defenders was established, whether there was contributory negligence on the part of the pursuer, or whether the accident and injury to the pursuer were the result of the negligence of the defenders? Under all the circumstances it appears to me that the course taken below was unjustifiable, and that this appeal ought to be allowed.

LORD DUNEDIN—I concur. As regards the question what averments of contributory negligence will turn a case out of Court, I have nothing to add to what I said in *Campbell* v. *The United Collieries Company*, 1912 S.C. 182, 49 S.L.R. 140. As regards the form of the judgment, if your Lordships are all of the opinions already expressed, I think that now that the reason for departing from the old practice of jury trial in enumerated causes, which is a statutory right, no longer exists, the proper course here will be to order issues.

LORD ATKINSON — I concur. It would appear to me that the view which has led the Court appealed from astray is that they have not clearly kept in view the difference between an act which may be, when all the circumstances are either averred or proved, evidence of negligence, and an act which, to use the language of Chief-Baron Palles, amounts *per se* to proof of an accident causing or materially contributing to injury. It may well be that when all the circumstances are proved, this woman was guilty of negligence which would establish the plea of contributory negligence, but it certainly appears to me that it is not clearly and unequivocally averred in condescendence 4 that the act which she actually did amounted *per se* to negligence causing or directly contributing to the injury which she received.

If the same question arose in this country, either upon a demurrer by a defendant or at the trial, in the one case the defendant would be entitled to judgment on the ground that the statement of claim, as it would be then, disclosed no cause of action, or if it went to trial, that the defendant would be entitled to have the case withdrawn from the jury on the ground that the injury claimed for was not proved. It would appear to me that if the averments of the fourth condescendence were proved in evidence upon the trial, no person could contend that the case should not have gone to the jury. I concur with the judgment suggested by my noble and learned friend.

LORD SHAW—I concur in the judgment on this appeal and in the recommendation to this House made by my noble and learned friend Lord Dunedin, that an issue should be framed in the ordinary way and the case tried by a jury.

The jurisdiction exercised by the Court of Session in the scrutiny of records is no doubt a delicate, but in my humble judgment, as I have said I am afraid more than once in this House, it is one of the most valuable parts of the jurisdiction of the Court of Session. By a wise exercise of that power of scrutiny of the record prepared by the pursuer it is sometimes possible for the Court to be so fully charged with the true merits of the legal situation as presented as to enable it there and then to make an end of the whole matter. The

parties are thus saved inordinate expense and waste of time, and in this way the jurisdiction exercised is of the greatest value.

In scrutinising a record, however, in order to ascertain whether relevant matter is contained in it, while that jurisdiction so exercised is delicate and valuable, in my opinion it ought always to be exercised with the most reasonable and ordinary construction of the words employed, and so as to avoid such an analysis as, pushed to an extreme, would evacuate simple and plain statements and tear their meaning to pieces. I therefore in that spirit examine this record, and I entirely agree with the judgment formed as to procedure by the Lord Ordinary and the Lord Probationer which favoured an inquiry. Upon the merits of the question submitted to us I further agree with the opinion pronounced in the First Division by the learned Lord Skerrington.

It is not usual, as your Lordships have observed, to make any remarks whatsoever upon the merits of a case which is ultimately to be tried, and I therefore make no suggestion whether in fact there was on the one hand either negligence on the part of the defenders, or on the other a case of contributory negligence on the part of the pursuer.

The case is truly and wholly one of fact. In such a case the citation of precedent is not of value. But as to the precedents cited I accept of course the view of the law laid down by Lord Robertson in *Toal's* case —1908 S.C. (H.L.) 29, 45 S.L.R. 683. But I wish in this House to go further and say that I think the judgment of my noble and learned friend Lord Dunedin, then President of the Court of Session, in *Campbell* v. *United Collieries Limited*, 1912 S.C. 182, 49 S.L.R. 140, is a judgment which is expressly applicable to the present case and cases such as the present. Dealing with the particular topic which is now before the House, he makes the following general proposition to which I desire to adhibit my assent. "If a pursuer," said his Lordship, "in his account of the accident tells such a story that he shows that according to his view the proximate cause of the accident was his own negligence, I do not doubt that in such circumstances the case cannot go on." That is a general proposition which I think is applicable in all these cases. But I cannot refrain from adding the two sentences which succeed it in the judgment to which I have referred, because they seem to me to be apt and appropriate to the present case—"When I look at the averments here I cannot say that I think they disclose such a situation. I think the pursuer's averments quite clearly disclose this, that there may be proved against him a case of contributory negligence, but they do not seem to me to be tantamount to saying that the deceased was guilty of contributory negligence."

I have referred to *Toal's* case and *Campbell's* case, and now one single word with regard to the case of *Driscoll*, 1900, 2 Fraser 368, 37 S.L.R. 274. I observe that that must have been cited before the First Division apparently as illustrative of some proposition which was relevant to the discussion of the present case. In my view *Driscoll's* case depended entirely on its own facts. But I also agree with Lord Skerrington's view which challenges the validity of *Driscoll's* decision as binding upon subsequent cases. He says of that case, "That the course adopted by the Court in withholding the case from a jury has been canvassed and its soundness has been doubted." I have examined *Driscoll's* case since it has been mentioned, and I think it right to say that in any future discussion of it the judgment of that most able and careful Judge, Lord Kincairney (the Lord Ordinary in that case), is worthy of most anxious and careful respect. In the Second Division of the Court of Session it will be noted that the two learned Judges, Lord Trayner and Lord Moncrieff, both treated the case as very narrow, and I must not be held as concurring in any respect with the general view laid down by the Lord Justice-Clerk in the case of *Driscoll*. It is necessary to go no further into that case, which may never again be heard of, but, if it is, I trust that the views of Lord Skerrington in this case will also, along with the views of Lord Kincairney in *Driscoll's* case, be very carefully considered by courts of law.

Their Lordships sustained the appeal, with expenses, and remitted the case to the Court of Session with a declaration that issues be ordered for trial of the cause.

Counsel for the Appellant—A. R. Brown. Agents—A. W. Lowe, Solicitor, Edinburgh —D. Graham Pole, S.S.C., London.

Counsel for the Respondents—Lord Advocate and Dean of Faculty (Clyde, K.C.) —M. P. Fraser. Agents—Campbell & Smith, S.S.C., Edinburgh—Sir John Lindsay, Town Clerk, Glasgow—Martin & Co., London.

COURT OF SESSION.

Saturday, December 21.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

DOBBIE *v.* COLTNESS IRON COMPANY, LIMITED.

Mines—Wages—Deductions—Payment by Weight of Mineral—Mode of Determining Deductions—"Mineral Contracted to be Gotten"—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 12 (1).

The Coal Mines Regulation Act 1887, section 12 (1), provides that if the owner and miners so agree deductions may be made from the gross weight of the mineral sent up in respect of "substances other than the mineral contracted to be gotten," and that these deductions may be determined (1) "in such special mode as may be agreed upon" between masters and