

affected by the reduction of capital, which only changed their destination—*Strong & Company, Limited v. Woodfield*, [1906] A.C. 448, 44 S.L.R. 624; *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309; *Granite Supply Association, Limited v. Inland Revenue*, 1905, 8 F. 55, 43 S.L.R. 65; *Anglo-Continental Guano Works v. Bell*, 1894, 3 T.C. 239, 70 L.T. 670; *Texas Land and Mortgage Company v. Holtham*, 1894, 63 L.J., Q.B. 496; *Vallambrosa Rubber Company, Limited v. Inland Revenue*, 1910 S.C. 519, 47 S.L.R. 488; *Coltress Iron Company v. Inland Revenue*, 1881, 8 R. (H.L.) 67, 18 S.L.R. 466. The deduction claimed in the present case had nothing to do with the trade which the company was carrying on.

LORD JUSTICE-CLERK—The point in this case is a very short one, but the findings put forward in the case seem to me to be almost conclusive in the matter. I refer to the third finding, which is—"The object of the reduction was to enable the company to resume the payment of dividends out of the balance of each year's trading, which would otherwise have fallen to be applied in reducing the debit balance in the profit and loss account until it was extinguished." That as the other facts show means this, that the company, from circumstances which we need not consider, found that its capital had seriously diminished and there was a debit balance of nearly £9000 on its profit and loss account, so that however successful the trading was in each year up to a certain limit, which seems never to have been passed, the whole profit on the trading account was swallowed up by the necessity of meeting the charge of this debit balance of £9000, and the company thought it would be good finance to take the necessary steps to have its capital reduced so that it could get rid of that debit burden which had lain so long upon it. Accordingly it adopted the necessary procedure by which it reduced its capital and wiped out that debit balance. "The object of the reduction was to enable the company to resume the payment of dividends" (I interpolate here "out of profits") "of each year's trading which would otherwise have fallen to be applied in reducing the debit balance in the profit and loss account until it was extinguished." This expenditure incurred in carrying out the reduction, while it was quite proper expenditure and was properly made in the interests of the company, was made, not for the purposes of the trade but for the purpose of distributing more advantageously the results of that trade, namely, the profit which on a trading account balance would have been available for distribution among the shareholders had it not been for the debit balance to which I have already referred. I do not think that is, in a proper sense of the term, a disbursement made for the purposes of the trade. It is made for the purpose of dealing with the results of that trade after these results have been realised—that is to say, it was made for the purpose of distributing the balance of profit and loss among the shareholders instead of using it to wipe out this debit balance.

I think the sole ground upon which this was said to be a proper deduction fails in respect that it is not a deduction made for the purposes of the trade of this company, but for the purposes of distributing the profits of its trade after these profits have been earned. Accordingly the contention of the appellants fails and the judgment of the Commissioners is right.

LORD DUNDAS—I agree that this appeal fails for the reasons stated by your Lordship in the chair.

LORD SALVESEN—I am of the same opinion.

LORD GUTHRIE concurred.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—Constable, K.C.—W. T. Watson. Agents—Whigham & MacLeod, S.S.C.

Counsel for the Respondent—Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Thursday, January 16.

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

CRAIG v. CORPORATION OF GLASGOW.

Reparation—Negligence—Proof—Sufficiency of Evidence—Incuria Dans Locum Injurie.

A farmer brought an action of damages against a corporation for personal injuries alleged to have been caused by the negligent driving of an electrically propelled tramcar belonging to them. He averred that while driving home two cows along a public road about five o'clock on a January afternoon he was run into by the car. It was proved that the car struck the foremost cow, that immediately thereafter and before the car stopped the driver felt a bump, and that the farmer was found lying unconscious on the ground to the rear of the car on the near side. The driver admitted that the car was travelling at the rate of about nine miles an hour, and it was proved that the night though cloudy was not dark, it being within two days of full moon. The farmer was unable to give any evidence as to how the accident happened, having lost his memory in consequence of the injury, and no further evidence was available. In an action of damages at his instance against the tramway company, held (rev. judgment of the Second Division) that the evidence justified the inference that the pursuer's injuries were due to the fault of the defenders.

Metropolitan Railway Company v.

Jackson, 1877, 3 A.C. 193, and *Wakelin v. London and North-Western Railway Company*, 1886, 12 A.C. 41, distinguished.

Robert Craig, farmer, Giffnock, pursuer, brought an action in the Sheriff Court at Glasgow against the Corporation of the City of Glasgow, defenders, for £500 damages for personal injuries.

On 6th July 1916 the Sheriff-Substitute (LYELL) allowed a proof. The defenders appealed to the Sheriff, and on 15th November 1916 the Sheriff (MILLAR) adhered. The pursuer thereupon required the cause to be remitted to the Court of Session for trial by jury. The pursuer subsequently lodged an issue, and on 8th February 1917 the Second Division disallowed the proposed issue and of new before answer allowed parties a proof and remitted the cause to Lord Ormisdale, Ordinary, to take the proof.

On 5th July 1917 the Lord Ordinary after proof found the defenders liable to the pursuer in £150 damages.

Opinion, from which the facts of the case appear:—"There is little direct evidence as to how the pursuer came to be struck by the car, for the pursuer was unable to describe his movements after passing the Rouken Glen east gate. He reached that point well before five o'clock, the light being good. After that his memory is a blank until he found himself, several days later, in bed at his farm of Eastwood Mains recovering from a severe concussion of the brain. The concussion was due to his being struck by the defenders' car No. 832. The evidence of the motorman makes that reasonably certain. According to the motorman Cameron, he was proceeding from the Eastwood Toll westwards at a speed of nine miles anyway, when he was confronted by a cow angling on to the rails, and seen by him for the first time when three yards off. He at once applied his magnetic brake, and brought his car to a stop in ten yards. Before he did so he had struck two objects—the first being the cow as it angled off the rails again, and the second, as it afterwards appeared, being the pursuer, whom he had never seen at all. Having brought his car to a stop, as he says, within ten yards, he got off the car and found the pursuer lying in the roadway to the rear of his car on the near side. With the aid of the conductress Alice Little he removed the pursuer, who was quite unconscious, to the wall by the side of the footpath which borders the road at the place of the accident. The exact locus is not in dispute. It was opposite Woodend House, close to a 'stop if required' car stopping-post. A car coming eastwards towards Eastwood Toll drew up. The pursuer was carried by the two motormen and placed in that car, which proceeded on its way as far as a chemist's shop, where the injured man received treatment, being afterwards carried to the Victoria Infirmary. Three days later he was taken home.

"The question to be answered is whether the defenders are to blame for the injury done to the pursuer. They say that the accident was in no way due to any fault of theirs, but entirely to the fault of the pursuer, and alternatively that even if they

were in fault, the pursuer through his own fault materially contributed to the accident.

"The fault attributed to the defenders—that is, to their servant the driver of the car—was driving at an excessive rate of speed, failing to keep a proper look-out, and failing to have his car under proper control.

"The *onus* is on the pursuer to bring that fault, or these faults, home to the driver of the car.

"The fault alleged against the pursuer is thus stated by the defenders on record—'Explained that any accident sustained by pursuer was entirely caused, or at any rate materially contributed to, by his own fault in getting on or too near the rails upon which said tramway car was travelling at a time and in a manner which rendered an accident unavoidable. The pursuer's failure to take proper precautions for his own safety was the proximate cause of the accident averred by pursuer.'

"It is for them to prove contributory negligence on the part of the pursuer.

"The first two points to be considered are the amount of light there was, and the speed at which the car was being driven. . . .

[*After an examination of the evidence bearing on the amount of light his Lordship continued*].—The weight of the evidence is entirely in favour of the pursuer's contention that these cows and man might have been seen a considerable distance ahead if the motorman had been keeping a good look-out.

* [His Lordship then dealt with the evidence as to the speed of the car, from which he drew the conclusion that the car was going at considerably over ten miles an hour.]—Such being the state of the light, and such being the speed of the car, I draw the inference that Cameron's failure to see the pursuer and the cows was due to his not keeping a proper look-out. He says himself that if it had been a clear night he would have had no difficulty in seeing a man with two cows. He ought to have seen them, and if he did it was his duty to keep his car under such control as to avoid running into them or any of them. If necessary he should have stopped his car until they had passed him.

"The pursuer has therefore in my judgment brought home fault to the defenders.

"The question of whether the pursuer was guilty of contributory negligence is more difficult of solution. It was for the defenders to prove that he was so guilty. It is at once their misfortune and their fault that the pursuer is unable to state precisely what occurred just immediately prior to his being knocked over. That he had got to some extent in the way of the car is of course undoubted. If he had not he would not have been struck by it. But that fact is not of itself in my opinion sufficient evidence of contributory negligence. He must no doubt have seen the advancing car, for it was well lighted, but he was entitled to assume that he and his cows were also seen by the driver of the car, and that the latter would have his car so under control as to avoid running into him if he

should for a moment have passed on to the car track in order to drive his cows off it. He was not taking an obvious and palpable risk. He was doing what he was reasonably entitled to assume, that the car-driver would be on the look-out for his doing, and would expect him to do, viz., to help to clear the car-rails. It is not necessary in my judgment to decide any general question of law as to the right of a man to imperil his safety in the endeavour to rescue property without his doing so being considered a fault. The defenders have not proved that the pursuer was bound to know that he was incurring any risk at all. In my opinion if the driver of the car had kept a good look-out, as the pursuer was entitled to assume he was doing, the manoeuvre which he himself was engaged in, so far as we know it, could have been executed free altogether from risk. The proximate and only cause of the accident was therefore the fault of the defenders through their servant Cameron.

"The damages I assess at £150.

The defenders reclaimed, and on 31st January 1918 the Second Division recalled the interlocutor of the Lord Ordinary and assoiled the defenders from the conclusions of the action.

LORD JUSTICE-CLERK—This case originated in the Sheriff Court, and the Sheriff-Substitute, affirmed by the Sheriff, having allowed parties a proof of their averments, the case was remitted to this Division. We heard a very full argument upon the relevancy of the averments and the course to be taken as to the trial of the case, and as the result on 8th February of last year, issues having been lodged in the interval, we disallowed the issues and before answer of new allowed the parties a proof of their respective averments. A proof has now been taken before the Lord Ordinary, and he has given judgment in favour of the pursuer for the sum of £150.

The most material set of averments was that contained in condensation 4, and so far as they are concerned the proof turns out to be practically very nearly blank, because the unfortunate pursuer, when he recovered sufficiently to be examined as a witness, admitted that from a date five or ten minutes anterior to the accident until some weeks or months afterwards he could remember nothing, and therefore he was not able to give any account of how the accident happened. And while there were several witnesses examined for the pursuer, who spoke of the events on the road very shortly before the accident, none of them, so far as their evidence goes, actually saw what took place at the moment of, or immediately prior to, the accident. Accordingly we have no account of these events at all, and the pursuer was really in the end driven to rely mainly if not altogether for his case upon the evidence given by Cameron, the conductor of the tramway car in question.

The Lord Ordinary in his judgment has found that there was fault on the part of the defenders, that fault apparently con-

sisting of the car having gone, while not at an extravagant rate of speed, faster than it ought to have gone, and the conductor not having kept a sufficient look-out. Having found that fault the Lord Ordinary apparently, so far as I can read his note, thought that finding was sufficient to justify a judgment for the pursuer unless the defenders had established contributory negligence. Proceeding to consider the latter question he arrives at the view that the defenders have not established contributory negligence.

It seems to me, however, that one cardinal blot on the Lord Ordinary's reasoning is that the mere finding of fault on the part of the defenders is not enough to justify a judgment for the pursuer, because fault must be brought into relation with the accident as a materially contributing cause which brought about the accident. Accordingly in the argument before us the case stated for the defenders was this, assuming that fault has been proved on the part of the defenders as the Lord Ordinary has found, they say there is a total want of evidence by which the fault could be so correlated with the accident that happened as to be held to be the inducing cause, or one of the main inducing causes, so as to result in liability on the part of the defenders.

I am inclined to think that that view as presented by the defenders is, on the authorities, right. The two main cases which seem to me to require to be considered in this respect are the cases of the *Metropolitan Railway Company v. Jackson*, 1877, 3 A.C. 193, and *Wakelin v. London and North-Western Railway Company*, 1886, 12 A.C. 41, to which we have been referred.

The case of *Jackson* had a somewhat checkered career, but ultimately after an equal division in the Court of Appeal, in which Lord Chief-Justice Cockburn and Mr Justice Amphlett were of opinion that the pursuers were entitled to retain their judgment, and Lord Chief-Baron Kelly and Lord Justice of Appeal Bramwell dissented, the case came before the House of Lords in 3 A.C., where the view taken by the dissenting Judges was affirmed and the judgment was that the plaintiff should be non-suited. In the course of his judgment Baron Bramwell says this—"Supposing the evidence to be consistent with negligence, i.e., that negligence may have caused the matters, it is equally consistent with no negligence, i.e., that the matters proved may have been caused otherwise than by negligence, and it is an elementary rule that where the evidence is consistent as much with one state of facts as with another it proves neither." Then he goes on—"As to the other question, did these matters, or any of them, cause the accident, let us examine the train of causation." He follows that through in some six propositions, and then he says—"Mr Justice Grove says it is not easy to lay down a rule in such a matter, but does any rule, any definition ever yet attempted, include such a case? Is what happened in any sense the natural consequence of its alleged cause? Was it *causa proxima* or *remotissima*?" And he

reached the conclusion, therefore, that the appeal against the judgment sustaining the verdict ought to have been allowed.

In the House of Lords Lord Cairns says this—"In the present case I am bound to say that I do not find any evidence from which in my opinion negligence could reasonably be inferred. The negligence must in some way connect itself, or be connected by evidence, with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *in curia dans locum injuriæ*. In the present case there was, no doubt, negligence in the company's servants"—it may have been in two respects which he refers to—"but there is nothing in my opinion in this negligence which connects itself with the accident that took place." And Lord Blackburn in the same case says—"In all cases of actions to recover damages for a personal injury against railway companies the plaintiff has to prove first that there was on the part of the defenders a neglect of that duty cast upon them under the circumstances, and second that the damage he has sustained was the consequence of that neglect of duty."

In the case of *Wakelin* the same view was emphasised, as I think still more pointedly, by the judgments given in the House of Lords. Lord Halsbury there began his judgment by saying—"It is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition *ei qui affirmat non ei qui negat incumbat probatio*. . . . If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, it is not proved that it was caused by the defendants' negligence. She may, indeed, establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because *in pari delicto potior est conditio defendentis*. It is true that the *onus* of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, *i.e.*, in this case the negligent act done, has discharged herself of that burden. I am of opinion that the plaintiff does not do this unless she proves that the defendants have caused the injury in the sense which I have explained. In this case I am unable to see any evidence of how this unfortunate

calamity occurred. One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level-crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train? If there are two moving bodies which come in contact, whether ships, or carriages, or even persons, it is not uncommon to hear the person complaining of the injury describe it as having been caused by his ship, or his carriage, or himself, having been run into, or run down, or run upon; but if a man ran across an approaching train so close that he was struck by it, is it more true to say that the engine ran down the man, or that the man ran against the engine? Neither man nor engine were intended to come in contact, but each advanced to such a point that contact was established."

Lord Watson in the same case, says—"It does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute"—that is to say, that there was negligence on the part of the defenders. "Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury." And at the close of his judgment he says—"In the present case I think the appellant must fail, because no attempt has been made to bring evidence in support of her allegations up to the point at which the question of contributory negligence becomes material. The evidence appears to me to show that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned."

I think these views are applicable to the present case and leave the case just where the Lord Ordinary found it, at its very best for the pursuer, namely, that assuming there was fault proved on the part of the defenders, it has not been proved that that fault contributed mainly or materially to the accident which happened. The result, therefore, in my judgment, is that the pursuer here has failed to prove his case, that the Lord Ordinary's judgment should be recalled, and that the defenders should be assozied.

LORD DUNDAS—The condition of the proof here is owing to the unfortunate inability of the pursuer to recollect what happened, just in the position as if the pursuer had been killed. In that respect the case is *in pari casu* with that of *Wakelin*. It seems to me that here, as there, there is no evidence upon which we can connect any negligence on the part of the defenders with the occurrence of the accident. I think that if one simply adopts, *mutatis mutandis*, the last sentence of the opinion of Lord Watson in that case, one has the position here. It would then run—"The evidence appears to me to show that the injuries which caused the death of the pursuer were occasioned by contact with a tramway car belonging to the defenders, and I am willing to assume, although I am not by any means satisfied, that it is also proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned."

I need add nothing more, for I agree entirely in all that your Lordship has so fully explained.

LORD SALVESEN—I am of the same opinion. Where a collision occurs between a foot-passenger and a tramway car by which the foot-passenger is injured, there is no presumption that the injury was caused by the fault of those in charge of the car rather than by the fault of the foot-passenger who came into contact with the car. Accordingly the mere fact that a person strikes a tramway car, whether just in front of it or at the side of it, and sustains an injury, does not tend to show that there must have been fault on the part of the driver of the tramway car. Nor is it enough for the pursuer to show that the car was being driven too fast, or that the driver was not keeping a careful look-out. He must show that if the driver had been doing his duty in driving slowly and in keeping a careful look-out the accident would have been avoided, because an accident of this kind may occur through the foot-passenger getting in the way of the car which is being driven carefully—in the sense of not being driven too quickly—and yet when he gets in the way of it no precaution on the part of the driver could have prevented the accident.

Now realising, as I think, these elementary propositions, the pursuer here on record sets forth a most detailed account of how the accident happened. He was driving cows up this road in the direction of his farm. The cows were troublesome, and he had difficulty in keeping them from getting in front of the approaching tramway car. But when it was approaching the cows got in front of the car, and he rushed forward with a view of putting them off the lines upon which the car was going. Then he goes on to say that he depended upon the defenders' driver reducing the speed and enabling him to perform that operation safely by giving him more time.

Well now, all that turns out to be unsupported by any evidence whatever. The pursuer's recollection on the subject is an entire blank. There is no eye-witness that supports any of the averments that he makes. The only eye-witness who may be called such of the occurrence is the driver, and he says that he did not see the pursuer at all before the accident happened. He saw a cow cross a very short time before, and he put on the brakes and bumped against the cow. Shortly after that something else bumped against the car, which I can assume was the pursuer. But the fact that he did not see the pursuer is equally consistent with two circumstances—either that he was keeping a bad look-out, the pursuer being visible on the line or in front of the vehicle, or that the pursuer came from the side suddenly and came against the vehicle.

Now in that state of the facts, the theory of the pursuer being entirely unsupported by any evidence—unless the fact that the pursuer and his cows were going in an opposite direction to the car, which, as I think, does not advance his case at all—we are left to conjecture whether this accident happened in the way the pursuer suggested on record, or because the pursuer suddenly crossed in front of the car and came in contact with it. I do not think that the probability in favour of the pursuer's theory is any higher than the probability that he came in contact with the car because he was not paying attention to his own safety.

In that state of the evidence I am quite unable to affirm that the pursuer has discharged the *onus* that is undoubtedly upon him of showing that the accident occurred through the fault of the defenders—that is to say, showing not merely that they were to blame in some way which might conceivably be connected with the accident, or might indeed probably be connected with the accident, but that the accident in fact resulted from that negligence. And I must say that when we have here no account at all by any witness to the circumstances that preceded the accident, it is very difficult to infer a dependence such as the pursuer avers on record on somebody else doing his duty so as to excuse the pursuer for not getting out of the way of the car, it being a pure assumption that for any appreciable period of time he was on the rails in a position in which his person was endangered by the approaching car.

On these grounds I agree with your Lordship that the Lord Ordinary, assuming all that he says as regards the facts to be well founded, has failed to notice that there is no necessary or probable connection between these facts and the accident itself, and that therefore we have no materials upon which we can hold that the accident was occasioned by the fault of the defenders.

LORD GUTHRIE—This is an unusual case because the Lord Ordinary who heard the witnesses and who decided in favour of the pursuer begins his opinion by saying—"There is little direct evidence as to how the pursuer came to be struck by the car." It is even more remarkable than that,

because it is the fact that there is no direct evidence whatever as to how the accident happened.

But the pursuer's case is simplified by the defenders' admission before us that they were guilty of the two faults alleged by the pursuer, namely, excessive speed and want of look-out. The Lord Ordinary has gone on the footing, as I read his judgment, that in these circumstances only one question remains—the question of contributory negligence. If that were so, then the pursuer would be entitled to succeed, because the defenders do not say, and cannot say, that they have proved contributory negligence on the part of the pursuer, in regard to whose conduct before the accident the evidence is a total blank.

But excluding contributory negligence and assuming fault on the defenders' part, the question still remains whether that fault had any direct connection with the accident. This is not a case where the defenders can say they have proved that their fault had no connection with the accident. It seems to me clear that if that were necessary for their success they must still fail. Both faults might well have caused the accident. The question, however, remains, has it been proved that one or both did so? Now that is for the pursuer to prove. I think the evidence comes very near it. He might have done so even by his own evidence as, for instance, if he had been able to say that before the accident he was driving the cows in the middle of the road, he being between the tramway lines, or if his witnesses who saw him and the cows before the accident had been able to depone to the effect I have just stated. But that question was not put to any of them. Nor does the doctor aid the pursuer by deponing that his injury was consistent with his theory of the accident.

But the pursuer in the absence of any direct evidence maintains his case upon inference, and I notice the Lord Ordinary goes so far as to say in the second last paragraph of his judgment that the pursuer must have seen the advancing car for it was well lighted. I cannot see that in the state of the evidence it is possible to come to any such conclusion. The pursuer cannot say that, in his view of the evidence, his view can be arrived at—a view of necessary inference. But he does say, and says with some force, that it can be reached with some reasonable inference. I concur with your Lordships in thinking that while the pursuer's theory may be correct in fact, and while his failure to succeed may well be due to the misfortune of the effect of the accident upon his memory, he has not proved that his theory is any more probable than the view of the accident put forward by the defenders, namely, that the pursuer's fault was in truth the proximate cause of the accident.

The pursuer appealed to the House of Lords.

LORD BUCKMASTER—This is an appeal from the Second Division of the Court of Session, who have set aside an interlocutor

of the Lord Ordinary which awarded in favour of the appellant a sum of £150 as compensation for personal injuries alleged to have been caused by the negligent driving of one of the tramcars owned and run by the respondents. It is a common and familiar principle that in an action seeking such relief it is incumbent upon the pursuer to prove both that the defendants were guilty of negligence and that such negligence caused or materially contributed to the injuries received. It is said on behalf of the respondents that the appellant has failed to establish the second of these conditions. In other words, while the respondents no longer dispute the negligence, they assert that no connection has been shown between that negligence and the accident. In order to test the value of this contention it is necessary to examine the facts of the case. The pursuer is a farmer. On the 17th January 1916 he bought two cows at Paisley Market, and at five o'clock in the afternoon, the hour when he met with the accident, he was driving them home. His route lay along a road which appears to have been imperfectly lit. There is evidence that on one side there were lamps, but there does not appear to have been any regular and effective system of street lighting. The evening was not dark although it was cloudy, and at the time when the accident occurred it was perfectly possible, according to the evidence of several witnesses whose testimony was accepted by the Lord Ordinary, to see a fair distance—indeed, one witness said he could have seen the pursuer a hundred yards away. The moon was within two days of being full, but as the sky was overcast there was probably little or no moonlight upon the road. We find from the evidence of the pursuer that the two cows were nervous and affected by the traffic, that he was conscious he would have difficulty with them if anything big and lighted like a tramcar were met by the way, he was anxious to get them home, and he was pushing on, driving carefully. That is all the evidence that the pursuer can give, because as the result of the accident his memory has failed and, as not infrequently happens in the case of severe injuries to the head, he is unable to remember the incidents which immediately preceded the accident—indeed his memory seems to stop at about a quarter of a mile from the spot where the accident occurred. The remaining material evidence is furnished by the man who drove the car. He admits that the car was going at the rate of about nine miles an hour. The road along which it was travelling was a straight level road roughly running from east to west. The car was proceeding in this direction and the pursuer was approaching in an opposite course. The driver says that he would have been proceeding more slowly had he seen the man with the cows, but that he did not see them, and not seeing them the first thing that he noticed was that suddenly about three yards in front of him the head and shoulders of a cow on the offside loomed out of the gloom; he thought it was attracted by the light; he applied his brake as quickly as possible, but the car hit

the hind quarters of the cow and glanced off, apparently doing the cow no material injury. After collision with the cow and before the car had stopped, but after the brake had been put on, he felt a bump at a distance about three yards from the spot where it struck the cow. It is of course quite obvious that in attempting to fix this period by the distance he is merely telling what he believed would have been the distance travelled in the short time that must have elapsed between the blow to the cow and the blow to the other object. He then pulls up. The car stops almost immediately afterwards, and the pursuer is found unconscious and injured on the near side of the car. In these circumstances the Lord Advocate, on behalf of the respondents, while admitting that the driver was negligent in not keeping a better look-out, contends that there is nothing to show either that the car struck the man at all, or that if it did strike him it was due to the admitted negligence of the driver.

It is perfectly true that in this case there is no evidence given by any person who actually witnessed the accident; it is a case where it is necessary to rely upon admitted and proved facts in lack of the evidence of people who have seen the occurrence and can record their impressions. But this affords no difficulty in the present instance if in your Lordships' opinion the facts fairly permit of the inference that the man was knocked down by the car, and that the explanation of why he was knocked down was the fact that the driver, was not keeping a proper look-out. Such is the inference which the learned Lord Ordinary, who in this case exercises the functions of a jury, has found to be true, and the only question is, was it an inference legally permissible. The Lord Advocate's contention is that it is not, because according to his view the facts are absolutely equivocal and are equally consistent with a series of other hypothetical possibilities, anyone of which would have produced the result and need not have been associated with the negligence of the defendants. If this be correct the appeal must fail, for if a set of circumstances are equally consistent with a number of varying hypotheses no one can be selected as the one that is true.

I cannot, however, accept the contention that the facts bear this neutral aspect. With regard to the first point, namely, whether the car struck the man at all, it appears to me impossible to avoid the conclusion formed by the driver of the car himself at the moment of the accident that directly after the car had struck the cow it also struck and felled the man. The bump immediately followed the glancing of the car from the hind quarters of the cow. The driver finds the man unconscious immediately afterwards. The only thing that can possibly be suggested as an alternative to the car having struck the man is that the other cow had by some wholly inexplicable means been brought into violent collision with the car, and that the bump was due to an injury which has never been disclosed and which exists only in the realm of

imagination. This argument does not command my assent.

If a man is known to have been walking in a direction opposite to that of a moving vehicle, if a bump is felt and the man is found injured immediately on the spot, the inference that his injury has been due to contact with the vehicle is something that I should have thought was irresistible. The Lord Advocate further says that even on that assumption the matter is not concluded against him unless it can be shown that the blow was received in such a manner that the absence of a careful look-out was the real explanation why it occurred. I do not think it necessary to inquire into the consideration of the question as to whether the man struck the car or the car struck the man. The matter that impresses me most upon this part of the case is the statement made by the driver when he said that if he had seen the man or the cows he would have been going slower, coupled with the evidence of witnesses who speak to having seen the man, not actually at the moment of the accident, but at a time which preceded it by only a few minutes, witnesses who say that they found no difficulty whatever in seeing the man and the cows, and I think in two cases witnesses even noticed the number that was found upon the cow's shoulder showing the lot mark under which it had been sold. Making all allowance for the dim and rapidly fading light this evidence certainly renders possible the inference that a careful reasonable look-out must have disclosed the presence of the man and the cows at such a distance, that having regard to the power of the brakes the accident would never have occurred.

These considerations take the case wholly outside the well-known authority *Wakelin v. London and North-Western Railway*, 1886, 12 A.C. p. 41. In that case a man was found dead upon the railway by a level-crossing and there was no evidence to show how he had met with his death though it was accepted as due to collision with the train. There appears to have been no watchman at the gate, and the train had not whistled as it approached the crossing. It was decided by your Lordships' House that those circumstances left the accident unexplained, that there was no sufficient accepted fact from which an inference could fairly be deduced establishing that negligence on the part of the railway company had caused the accident. That is far away indeed from the present case, where the circumstances connect closely the negligence which has been accepted with the accident that has occurred. For the reasons I have placed before your Lordships I think that the learned Lord Ordinary was quite right in the view that he took, and for these reasons, in my opinion, the appeal should be allowed.

LORD FINLAY—I am of the same opinion. A great deal of attention was devoted in the judgments of the Second Division and in the argument at your Lordships' bar to two cases, the one decided in 1877, *Jackson's case*, and the other decided in 1886,

Wakelin's case. These cases are valuable only for the propositions of law which they may contain. In *Jackson's* case the question before this House was whether the improper conduct of the railway company in allowing the carriage to be overcrowded was the cause of the injury to the plaintiff, and this House decided that it was not. Lord Cairns stated in the clearest terms the very familiar proposition that negligence on the part of the defendant is utterly immaterial unless it was the cause of the accident; its only bearing on the case can be if it caused the damage to the pursuer of which he complains. In that case the carriage had been overcrowded by the fault, it is assumed, of the railway company, and the train moves on, the porter shuts the door, and the plaintiff who is standing up to protest against the entrance of more passengers into the carriage gets his hand injured by its being squeezed on the shutting of the door at the hinges. Under these circumstances it was held, and it is impossible to see how any other conclusion could have been arrived at, that the negligence of the company in allowing the overcrowding really was not in any sense the efficient cause of the accident. As a matter of history it led up to what did cause the accident, but it was not the cause itself.

The case of *Wakelin* is a case in which two propositions were laid down, the one by Lord Halsbury and the other by Lord Watson. Lord Halsbury points out what of course is as familiar as the proposition to which I have referred, as enunciated by Lord Cairns in *Jackson's* case that the *incuria* must be *incuria dans locum injurie*. Lord Halsbury in *Wakelin* laid down that if all that the plaintiff proved was a state of facts equally consistent with the wrong of which she complained having been caused by her husband's own negligence as with its having been caused by the negligence of the defendants, she would not prove that it was caused by the defendants' negligence. Of that of course there can be no doubt whatever, and what the House was concerned with in *Wakelin's* case was the application of that undoubted proposition of law to the special facts of the case there.

The other proposition in *Wakelin's* case was laid down by Lord Watson, at page 47 of the report in 12 A.C., where he says—"I am of opinion that the *onus* of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour." That proposition again is undoubted and has not been contested in argument in the present case.

Now, of course, unless the proper inference from the evidence here is that the negligence of the defendants caused the injury to the pursuer, the judgment of the Lord Ordinary in his favour could not stand. It has been contended by the Lord Advocate that that is the true result of a consideration of the case for two reasons. In the

first place, he says that it is not proved in this case that the injury was the result of the car knocking the pursuer down at all; in the second place, he says that assuming that the car knocked the pursuer down the circumstances are equally consistent with its being the pursuer's own fault, so it comes within one of the propositions of law to which I have just been referring. It seems to me impossible to suppose that it was not the car which caused the injury to the pursuer. It is of course within the bounds of possibility that the pursuer had a fit and fell and injured his head upon the rail. It is within the bounds of possibility, as was suggested as a hypothesis—not I think that it was put as a very likely hypothesis—that he was knocked down by one of these cows. But what is the reasonable inference? That is what we have to deal with. Well, here we have got the finding of the Lord Ordinary in express terms—"The concussion was due to his being struck by the defenders' car, No. 832. The evidence of the motorman makes that reasonably certain." That conclusion of fact is not questioned in any one of the judgments in the Inner House. The Lord Justice-Clerk discusses the question without saying anything to intimate that he would have quarrelled with that finding. Lord Dundas deals with the case on this footing in a slightly altered version of Lord Watson's language in the case of *Wakelin*—"The evidence appears to me to show that the injuries which caused the death of the pursuer were occasioned by contact with a tramway-car belonging to the defenders, and I am willing to assume, although I am not by any means satisfied, that it is also proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned." Lord Salvesen deals with the case really on the same basis, and so does Lord Guthrie. I believe it would be impossible to find any jury or any judge who would have the slightest doubt that in this case the injury was caused by contact with the car, and in face of the statement, proved to have been made by the driver at the time, that he had knocked the man down, and the report which he made after the accident to his employers in which under the head of "Nature of the accident" he said "Knocked man down," the contention that there is any doubt about it appears to me to be absolutely extravagant.

But of course that is not enough. The question comes to be whether the circumstances show that the injury by the contact of the car with the pursuer was the result of the defendants' negligence, and it is said that even assuming that there was contact with the car, that was not shown to be the result of negligence of the defendants. It was argued that the evidence was quite consistent with the pursuer having himself run into the car, starting it was sug-

gested from the riser, as it was called, the raised pathway, on the south side of the road, and that therefore there was no fault on the part of the driver of the car. Well, of course with regard to that there is no evidence that the man was walking upon the riser at all; it is not proved, and the question was never put to him. Then it is said that the other circumstances of the case are not sufficient to show that the negligence which the Lord Ordinary found, and which was that the car was not keeping a sufficient look-out, and was proceeding at too great a rate of speed, is sufficient to cast liability upon the defendants when the evidence is looked at as a whole. I cannot agree. Some criticism has been directed to the point whether it is right to say that the car was going at too great a rate of speed, or whether the only fault was the absence of look-out. The two propositions seem to me to run very much into one another, because if a man is not keeping a proper look-out he is bound to go at an uncommonly slow rate. Everything is relative, and it is unnecessary to waste time in discussing how it should be described; it might be described in either way. I treat it as being absence of proper look-out. The car grazes one of the cows, knocks the pursuer down and most seriously injures him. The question is under these circumstances what is the reasonable inference? You may of course have direct evidence; a person says, "I saw something." Here we have very little direct evidence indeed with regard to the accident itself because the pursuer was made insensible at once by the very severe concussion he sustained, and does not pretend to recollect anything about it. He says—"I recollect nothing at all, I can tell you nothing more" than he stated as to his progress to a certain point, and then his state when he recovered consciousness some time afterwards.

But circumstantial evidence may be just as valuable as direct evidence. It may vary very much in degree. I remember on one occasion Chief-Justice Cockburn, speaking of a case where there was no direct evidence of negligence, but where it was argued that the facts led to an inference of negligence, said this—"The facts in the present case speak, in a whisper it is true, but still audibly." In the present case the facts to my mind do not speak in a whisper, they speak very distinctly indeed, and the only conclusion which I can draw under these circumstances is that the accident was directly caused by the car running into the pursuer owing to the absence of a proper look-out on the part of the driver of the car.

I am not going to compare the facts of *Jackson's* case or the facts of *Wakelin's* case with the facts of the present case; it seems to me that no inquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together. The use of cases is for the proposition of law, and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case. Authorities

so used would really very much encumber the administration of justice. Applying the principles of law which are well established, and which were recognised in *Jackson's* case and in *Wakelin's* case, it appears to me that the true inference was drawn by the Lord Ordinary and that the Lord Ordinary's judgment ought to be restored.

LORD DUNEDIN—In judging the facts of this case I am sitting here as a jurymen, and the first question I have to put to myself is, how was this man injured? I find that the car in its progress came into proximity with a group consisting of two cows and a man. One cow was admittedly hit; another bump was felt; a man was immediately found stretched senseless on the ground with an injury in his head which might have been caused by the bump. I draw the inference that this man was run down by the car, an inference which by the way was at the moment drawn by the driver of the car himself.

I next ask myself was there negligence in so running him down? I say yes, because the driver's admission that he did not see the cow until he was within three yards of it, taken together with the facts spoken to by others as to the state of the light, is proof of negligence.

Great reliance was placed by the Lord Advocate on *Wakelin's* case, and in particular it was said that in *Wakelin's* case negligence was found and yet no liability. The reason was that the negligence there found or assumed was in no way shown to have been connected with the accident. But here the negligence is shown to be the cause of the accident, for without the negligence the car would not have run into the group.

There is all the difference between the case of a man run into on a railway and that of one run into on the road. In the latter case the man has an absolute right to be there, and it is the duty of the drivers of vehicles not to run him down. On a railway he has no right to be on the railway, and if he crosses it at a level crossing he has only a right to cross with such care as will ensure his own safety. There is no absolute duty on the driver of an engine to so drive his engine as to avoid hitting anything; there must, in order to make liability, be what I might call particular negligence leading to the accident. The negligence found in *Wakelin's* case was not of that sort.

I am clearly of opinion that *Wakelin's* case has no application to the facts of this case, that the Lord Ordinary was entitled to come to the conclusion he did, and that his judgment ought to be restored.

LORD ATKINSON—I do not wish to repeat anything which has been already said. In my opinion if this case had been tried by a jury, and the jury had found the verdict which the Lord Ordinary has found, it would be absolutely impossible to disturb that verdict on the ground that there was no evidence upon which the jury could legitimately have come to the conclusion at which they arrived. I think, with all respect, that

the Court appealed from has been led astray by not giving adequate consideration to the cumulative force of two or three facts in this case, and not distinguishing its principle from the principle in *Wakelin's* case. Now, starting from the beginning, here you find a man driving two cows on the road at the very spot—because the evidence brings it to the very spot—where the accident occurs, and you find a man driving a tram-car round the corner at a lower speed, but coming up to where these are at a speed of nine miles an hour when he admits that he cannot see at the best more than seven yards ahead of him, and in fact did not see more than three yards ahead of him. Now that that is excessive speed under those conditions I think is clear, and it is a bad look-out, but whether one or the other, whether the accident was the result of omission to keep a good look-out, or of neglect in proceeding at a high speed, is of course equally immaterial.

Now into this group of three, a man and two cows, this driver runs—there is no doubt about that—and he strikes the leading member of the group a side blow. Instantly there is felt a bump. What caused the bump? There has not been a suggestion or particle of evidence to show what caused the bump. It immediately happened after the cow cleared. The man was found by the side of the car, and it is to be remembered that the driver admits that after the bump he forged ahead three yards, which would account perfectly well for the body of this unfortunate man being found near the extremity of the car. It would appear to me that the only rational conclusion that any human being can draw is that the man was struck by the tramcar at the same time or in a moment after the cow was struck, and that he was struck because the driver of the car did not keep a proper look-out for them and was coming at too high a speed.

A number of suggestions have been made to the effect that the pursuer may have been injured by walking up against this tramcar in the manner suggested in *Wakelin's* case. In order to establish any similarity between this case and *Wakelin's* case you must ignore the cow, you must ignore the bump, and if you find this man lying by the side of the tramcar and the tramcar there, then you would have an analogy between this case and *Wakelin's*; but as things stand the two facts I have mentioned—the fact that the cow was struck, and the fact that the bump was felt immediately and the body found after the bump was felt—absolutely distinguish this case from *Wakelin's*.

I have not the slightest doubt in my mind that the Lord Ordinary came to a right conclusion, and it was perfectly legitimate for him to come to that conclusion from the facts established in the evidence before him.

LORD SHAW—In the language of my noble and learned friend who has preceded me, I think the conclusion reached by the Lord Ordinary on a consideration of the facts, and reached also by the man at the time who was the chief actor in this unhappy event, namely the driver of the car, was

the only rational conclusion, namely, that the car, recklessly driven, ran down this unfortunate farmer, who was on a public road in discharge of the duties of his occupation, and with a perfect right to be where he was. But I do not detain your Lordships on a clear case of this kind, and I should desire to express my entire concurrence with the judgment which has just been delivered to your Lordships' House by my noble and learned friend Lord Finlay.

Their Lordships reversed the interlocutor appealed from, with costs.

Counsel for the Appellant—Sandeman, K.C.—A. M. Mackay. Agents—Manson & Turner Macfarlane, W.S., Edinburgh—Theodore Goddard & Company, London.

Counsel for the Respondents—Lord Advocate and Dean of Faculty (Clyde, K.C.)—Gentles. Agents—Campbell & Smith, S.S.C., Edinburgh—Martin & Company, London.

COURT OF SESSION.

Thursday, December 19.

FIRST DIVISION.

[Lord Hunter, Ordinary.

CLADDAGH STEAMSHIP COMPANY LIMITED (OWNERS OF S.S. "CLADDAGH" AND S.S. "FACTOR") v. THOMAS C. STEVEN & COMPANY.

Contract—Sale—Ship—Delivery—Ship Requisitioned by Government before Delivery—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 28.

Contract—Interdependence of Contracts—Separate Written Contracts of Sale—Delivery Impossible in One Contract—Buyers' Right to Refuse Implement of Both Contracts.

A firm of shipowners agreed verbally to purchase from another firm which was giving up business their two ships, the "Claddagh" and the "Factor," of which the latter was under Government requisition, and was in the knowledge of the owners included by the purchasers in the transaction simply because the owners would not sell the "Claddagh" alone. A lumpsum was accepted for both ships, but this was afterwards at the instance of the purchasers' brokers apportioned between the two ships, and two separate contracts were signed applicable to each ship. The agreement as to the "Claddagh" bore that the price was to be paid and delivery made on a legal bill of sale free from incumbrances within seven days after approval of bottom and parts under water, the ship being at purchasers' risk prior to payment. Before that date she was requisitioned by the Government and in consequence the purchasers refused to take delivery of either ship, contending that they were not bound to take the "Factor" unless they got the "Claddagh" free of