

At advising—

LORD PRESIDENT, delivering the opinion of the Court—We have considered this Case in consultation with the Judges of the Second Division, and the conclusion we have reached is that it is for the party at whose request the case is stated to select the Division of the Court to which it will be submitted. We consider that to be the plain meaning of section 25 (2) of the Small Landholders (Scotland) Act 1911. The case would of course be different if the Land Court *ex proprio motu* caused a case to be stated to this Court for its opinion.

Accordingly as we were informed by counsel that Sir Archibald Campbell, at whose instance this Case is stated, had selected the Second Division as the Court to which the Case should be submitted, we propose that it should be sent to the roll and thereafter transferred to the Second Division.

LORD SKERRINGTON was absent.

The Court transferred the Special Case to the Second Division.

Counsel for the Appellant—C. H. Brown.
Agents—Tait & Crichton, W.S.

Counsel for the Respondent—J. A. Christie.
Agents—Balfour & Manson, S.S.C.

Friday, July 19.

SECOND DIVISION.

[Lord Hunter, Ordinary.]

MILLIKEN v. GLASGOW CORPORATION AND OTHERS.

Reparation — Negligence — Collision of Vehicles—Injuries Sustained by Passenger Travelling in One of Vehicles—Res ipsa loquitur.

A passenger in a tramway car sustained injuries as the result of a collision between the tramway car and a lorry. The rear of the lorry which was being passed by the tramway car smashed the last pane of glass but one of the car. The driver of the tramway car was not proved guilty of negligence by driving at excessive speed. *Held* that there was a presumption of fault on the part of the driver of the lorry, which the owners were called on to rebut and which had not been rebutted, and consequently that they were liable in damages.

Mrs Alice Diamond or Milliken, *pursuer*, wife of James Milliken, steelworker, Cambuslang, with the consent and concurrence of her husband, raised an action against the Corporation of the City of Glasgow, and also against Chalmers & Butchart, coal merchants and removal contractors, Rutherglen, *defenders*, whereby she sought to recover the sum of £250 from the defenders jointly and severally, or severally, as damages in respect of injuries sustained by her through a collision between a tramway car

of the first defenders and a lorry of the second defenders.

Each of the defenders pleaded that the pursuer's injuries were not sustained through their fault.

The *facts* of the case will be found in the opinion (*infra*) of the Lord Ordinary (HUNTER), who, after a proof, decreed against the defenders Chalmers & Butchart, for payment of the sum of £75, and found the pursuer and the defenders the Corporation of Glasgow entitled to expenses against them.

Opinion.—"The pursuer in this action seeks to recover damages from the Corporation of Glasgow, and from Messrs Chalmers & Butchart, coal merchants and removal contractors, Rutherglen, or from one or other of them, in consequence of personal injuries sustained by her owing to a collision that occurred between a car belonging to the City of Glasgow and a lorry belonging to the other defenders and driven by one of their servants. The action is unusual in respect that the pursuer sustained no physical injury, in this sense that she was not knocked down and was not struck, but undoubtedly in consequence of the collision which caused a breakage of glass in the rear of the tramway car the pursuer sustained such a shock that upon the evidence it is clear that she is entitled to something in the shape of damages. On the medical evidence I think it may be taken that her premature confinement—she was pregnant at the time of the accident—is traceable to the shock which she then sustained. That at all events means that she has had impaired health since the accident, and for about ten months she has had to employ a charwoman to assist her, giving her 3s. a-week. The actual outlay is not much, but I should think a fair estimate of the damages to which she would be entitled would be the sum of £75.

"Neither of the two defenders in this case say that the accident was inevitable. That being so there must be liability on one or other or both of the two defenders, and all that I have got to do is to determine on which.

"The fault here I may say is of a very slight character, but I confess, upon the evidence, that my own view is quite clear. Against the Corporation it is said that the tramway car was being driven at a high speed down a slight decline of about 1 in 40 along the Farmeloan Road on the route from Rutherglen to Glasgow. It is averred that in consequence of the excessive speed at which the car was being driven the lorry was unable to get out of the way in time, and consequently the accident occurred. Now on the evidence as it has come out before me I am unable to affirm that fault against the tramway car in this case. The driver and also the conductor say that the car was going at an ordinary pace—it may have been anything up to eight, but not exceeding eight, miles an hour. At a distance of about a hundred yards the driver saw the lorry in front. He first whistled, and then he sounded his gong twice. The lorry did not seem to proceed to get out of

the way very quickly, but at all events it did proceed to get out of the way of the tramway car, and the tramway car came on. Three-fourths of the car had passed the lorry before the collision occurred. That is not a case of the tramway car running down an object which is in front of it. It is the case of an object which has got clear of the car coming into contact afterwards with the car, and the question is, How am I to find that that occurred?

“For the City of Glasgow it is maintained—and I think there is ground for the contention—that the only way in which the accident could reasonably be explained is that the man who was leading the lorry horse did not take the lorry sufficiently near to the pavement to allow the car to pass entirely in safety, and that owing to some unexplained movement of the lorry after the car had partially passed this collision occurred.

“That is the result of the evidence that is led for the defenders the City of Glasgow. It appears to me to be supported by the bulk of the evidence led by the pursuer, and if it is a correct inference it means, I think, that the defenders Chalmers & Butchart are responsible for the action, and I am prepared to so hold.

“They now say that the fault was the fault of the tramway car. The pleadings in this case are not satisfactory. When an accident of this sort has occurred, and a pursuer cannot tell which of two defenders is at fault and has to raise an action against both of them, each defender ought clearly and specifically to state his ground of complaint and his allegation of fault against the other. That is proper pleading. It is not right pleading in this case to adopt the policy that has been adopted, certainly by the defenders Chalmers & Butchart, and in a lesser sense perhaps by the City of Glasgow. So far as the defenders Chalmers & Butchart are concerned they say on record they are not in fault and offer no explanation, but adopt the allegation of fault made by the pursuer against the City of Glasgow. Now the only allegation that is made is that of excessive speed. My inference from the evidence is that that was not the real cause of the accident, and I am prepared to negative it. It is, however, now contended by these defenders that, covered by the allegation of excessive speed, is the theory that the real cause of the accident was oscillation of the car at the time it was passing the lorry. I entirely demur to the idea that the oscillation theory is covered by any such averment. Even if I had thought that there was substance in the evidence upon which this contention is based, I should not have given effect to it without at all events getting those defenders to amend their record in this case and giving the City of Glasgow an opportunity of meeting the evidence brought in reference to it. It is a perfectly distinct case. It seems to depend upon the theory that the lorry had drawn away from the car rail a sufficient distance to allow the tramway car to pass in safety, and then, because of the circumstances that the car as it was going down this slight decline was oscillat-

ing from side to side, the front part of the tramway car got free of the lorry, and, when three-fourths passed the lorry, by the movement caused by oscillation there was contact between the lorry and the car. I do not think that that can explain what occurred here. But if a case of that sort was going to be put forward it should have been distinctly stated, so that there could have been definite evidence led with reference to the theory of oscillation.

“Suggestions are made, no doubt, in the witness-box by gentlemen of considerable skill, but I can accept them as nothing more than mere conjecture. I cannot hold them as having any real connection with the facts of this case. I have the greatest difficulty in seeing how the theory of oscillation—supposing the car did oscillate, which is not proved—could explain what occurred, whereas I think some unexplained movement on the part of the lorry fully and adequately explains all that did occur. I therefore hold that the defenders Chalmers & Butchart are liable to the pursuer, and assess the damages payable at £75.”

The defenders Chalmers & Butchart reclaimed, and argued—No charge made against the reclaimers had been proved. According to the evidence the lorry did not draw nearer to the tramway car after the latter had begun to pass it. The driver of the tramcar being in charge of the overtaking vehicle was not justified in proceeding if the probable result of so doing would be to cause a collision—*M'Dermid v. Edinburgh Street Tramways Company, Limited*, (1884) 12 R. 15, 22 S.L.R. 13. The pursuer's action failed, as she had not succeeded in proving negligence against either of the defenders—*Milne v. Townsend*, (1892) 19 R. 830, 29 S.L.R. 747; *Smith v. Great Eastern Railway Company*, (1866) L.R., 2 C.P. 4; *Moffatt v. Bateman*, (1869) L.R., 3 P.C. 115. The Lord Ordinary had erred in assuming that there was a presumption of negligence in law. Counsel also referred to the case of *Taylor v. Dick*, (1897) 4 S.L.T. 297.

Argued for the pursuer—The accident was avoidable if proper care had been used, and the pursuer did not require to prove the specific cause of it—*Macaulay v. Buist & Company*, (1846) 9 D. 245. The maxim *res ipsa loquitur* was applicable, there being here no conflict of evidence as to the facts. Accordingly one or other of the defenders had been shown to be guilty of negligence. If one of the defenders succeeded in rebutting the charge of negligence, then the other was bound to be guilty of it. The following cases were cited:—*Taylor v. Dumbarton Burgh and County Tramway Company, Limited*, (1918) 55 S.L.R. 443; *Simpson v. Corporation of Glasgow*, 1916 S.C. 345, 53 S.L.R. 258; *Briggs v. Oliver*, (1866) 4 H. & C. 403.

Argued for defenders, the Corporation of Glasgow—The maxim *res ipsa loquitur* applied in the present case. The accident having been proved not to be due to negligence on the part of the tramcar-driver, nor to any oscillation of the tramcar, the inference necessarily arose that the driver of the lorry was to blame. There was, moreover,

evidence to the effect that the lorry-driver had made a negligent movement. The facts in *Taylor v. Dick (cit.)* were distinguishable from those of the present case, the collision of two vehicles there not having caused injury to a third party. In a case where there was more than one defender points brought out in the cross-examination of the pursuer's witnesses could be used for or against any of the other defenders—*Ayr Road Trustees v. Adams*, (1883) 11 R. 326, 21 S.L.R. 244. Counsel also cited *Macfarlane v. Thompson*, (1884) 12 R. 232, 22 S.L.R. 179; Pollock on Torts, p. 467; *Scott v. London Dock Company*, (1864) 3 H. & C. 596.

At advising—

LORD JUSTICE-CLERK—In this case the pursuer was travelling in a tramway car belonging to the Corporation of the City of Glasgow when a collision occurred between it and a horse-drawn lorry belonging to the reclaimers, Chalmers & Butchart, the result of which was that the pursuer was injured. She brought an action of damages in which she convened both the Corporation and the owners of the lorry, and concluded against them, jointly and severally, or severally, for the sum of £250.

I do not think the record was very skilfully framed so far as the pursuer was concerned but it was sufficient; proof was allowed, and after the proof was taken the Lord Ordinary found that the pursuer had suffered loss, injury, and damage through the default of the defenders Chalmers & Butchart, and assessed the damages at £75. He found the pursuer and the Corporation entitled to expenses against Chalmers & Butchart. This reclaiming note was then brought, and Mr Sandeman in opening the case for the reclaimers did not reclaim against the finding of expenses in the Lord Ordinary's judgment, but reclaimed against the award of damages on the merits, contending that the case against the defenders Chalmers & Butchart was not made out. In the course of the proof both defenders cross-examined the witnesses of each other, and the pursuer cross-examined both sets of defenders' witnesses.

The question argued before us was as to the liability of the lorry owners. I confess that at first I was very much impressed by the clever way in which the argument for the reclaimers was put, but on further consideration, and having regard to the authorities, some of which were cited to us, I have come to be of opinion that the Lord Ordinary's judgment is right. The accident quite clearly happened because the lorry came into collision with the tramway car. The tramway car being on the rails was of course unable to leave the rails, and the only kind of motion of which it was capable, as appears from the proof, was oscillation from side to side, which might have occurred if the tramway car had been proceeding at a high rate of speed. The pursuer in evidence not only did not prove that case, but it seems to me disproved it. She did not indeed attempt to make such a case, and while there was some evidence as to oscillation in the evidence led for the defenders

Chalmers & Butchart, I agree with the Lord Ordinary in thinking that there was not enough to establish any case of oscillation on the part of the tramway car sufficient to account for the accident. I think it right to say, moreover, that this suggestion of oscillation does not occur in the record either on the part of the pursuer or on the part of Chalmers & Butchart.

But then it was said, as the Lord Ordinary has found, that the accident was due to some movement on the part of the lorry, which the Lord Ordinary characterises as unexplained, both in a passage in his note and in the conclusion of his note, and it was suggested therefore that as there was no explanation of the movement of the lorry the pursuer's case necessarily failed. I think that contention is unsound. The general position of the law in this matter is, I think, correctly stated—I am content to accept it as correctly stated—in a passage occurring in Mr Glegg's work on Reparation at p. 417, where he deals with the class of cases where the maxim *res ipsa loquitur* has been considered, and refers to certain cases which to my mind substantially support the view he expresses.

I find also in the case of *Macaulay v. Buist & Company*, 9 D. 245—where a workman in descending a coal-pit was killed by the scaffolding machinery giving way, and his representatives raised an action against the owners of the pit for reparation—an opinion was expressed, as the rubric bears, "That the pursuers were not bound to prove the specific cause of the accident by showing the specific defect in the machinery or particular neglect in the management by which the wrong was occasioned."

In that case Lord Fullerton expressed himself thus—"I really see no objection to the conclusion come to by the jury. For I cannot adopt the principle which was evidently assumed in the able argument on the part of the defenders, viz., that the verdict must be held to be against evidence unless the pursuer proved the specific defect of the machine or specific negligence of the defenders which occasioned the accident. In the opinions already delivered your Lordships have minutely examined the proof in order to show that even on this view the verdict could not be said to be contrary to the evidence. But I am disposed to go further. I cannot admit the principle contended for on the part of the pursuer. It appears to me that in his argument there was overlooked the most important piece of evidence of all—I mean the fair inference from the fact of the evidence itself."

He goes into the evidence in detail and then he says—"In every analogous case the fair inference of defect in the machine, or neglect, must arise from the very fact of the accident itself"; and further on he says—"I think the verdict is an important one and which it would be most dangerous to interfere with. It cannot possibly be interfered with as against evidence except on the assumption that an accident of this kind is to be presumably ascribed to some latent and undiscoverable defect, unless the sufferer can prove the exact cause of

the accident—the specific defect of the machinery or neglect in the management by which it was occasioned. I think all the presumptions and probabilities lie the other way.”

In this case it seems to me that the accident here must have been brought about by a lateral motion either of the tramway car or of the lorry. The only lateral motion on the part of the tramway car that was suggested as possible was that due to oscillation; and that has been disproved, even if it had been averred. That leaves, therefore, the only possible alternative by which the accident could have been brought about, namely, by some lateral motion on the part of the lorry. I agree with the Lord Ordinary that such a motion is not explained. On the other hand no other suggestion was made of any other cause which would have brought about the accident except this lateral motion.

I therefore agree with the Lord Ordinary that such a motion must have taken place although he is unable to explain how or why it occurred. I think there was sufficient evidence of negligence adduced to warrant the Lord Ordinary in arriving at the conclusion which he did, and accordingly that the reclaiming note ought to be refused.

LORD DUNDAS—I have come to be of opinion that the interlocutor reclaimed against is right. I confess that my first impression was otherwise. I do not think that the Lord Ordinary has expressed his views with his customary care and lucidity. It seems at first sight paradoxical to affirm as his Lordship does that “Some unexplained movement on the part of the lorry fully and adequately explains all that did occur.” But on investigation I think the Lord Ordinary’s meaning is that the circumstances of the accident were such as to import negligence on the part of somebody; for if the tramcar was proceeding at reasonable speed on its rails and the lorry was advancing at a proper distance from the car—for which as the evidence shows there was a sufficiency, although not much more than a bare sufficiency of room—it is not in accordance with the ordinary and proper management of affairs that the two vehicles should have come into contact with one another; and that, if as he holds it is proved that the tramcar was not at fault, a presumption of negligence arises against the lorry which its owners have failed to rebut. This view of the case appears to me to be well founded in law and in fact.

As regards the tramcar, I think the Lord Ordinary is clearly right in holding that the pursuer’s averments are disproved, viz., that the driver recklessly drove his car forward at an unnecessary and dangerous speed without giving the lorry time to get clear of the car.

As regards the lorry, it is true that the only fault specifically averred on record is also disproved, viz., that the loading was negligent and faulty, but there remains the averment that the lorryman failed to drive it carefully and to keep clear of the car.

On the assumption that the tramcar’s speed was in no way blameworthy, it seems to me that from the fact that the two vehicles did come into contact a presumption of negligence on the part of the lorryman arises, which it lay upon him to rebut. Now the boy Glover does say that the lorry, after getting clear of the rails, proceeded straight on without altering its course; Neville, the driver of the tramcar, says that so far as he saw there was no sudden movement on the part of the lorry, which kept on its straight course; and Ashe, the lorryman, states that he was walking at the head of his horse, a very quiet beast, and when he heard the bell drew the horse still nearer in to the side. In cross-examination he says—“When I first got the warning from the boy I was going straight forward, clear of the rails, and when the car passed me I had drawn in. . . . I drew in as near to the kerb as I could.” Ashe is not pointedly examined or cross-examined as to whether there was any outward movement of any part of the lorry after the car had begun to pass him. But when asked how he thinks the accident took place he says—“The only thing I can say is the oscillation of the car. . . . It was the car that struck the hind part of my lorry. The only way I can look at it is that he swayed against me.” Now I agree with the Lord Ordinary in thinking that the theory that the accident was caused by a lateral oscillation of the car upon its rails is out of the case. It is not averred upon the record; it appears I think by way of afterthought, in sporadic passages in the evidence, but is not, as I think was admitted by counsel for Chalmers & Butchart, proved to have in fact taken place. Discarding oscillation—the only explanation of the accident suggested by Ashe—there seems to me to be no evidence to rebut the presumption, which I think arises from the fact that the vehicles collided, of negligence on the part of the lorryman. I apprehend that the Lord Ordinary, who had the advantage of seeing the witnesses, must have held the evidence of Ashe, Glover, and Neville, to which I have referred, to be insufficient for that purpose, and it seems to me to be so.

Accordingly I think that although the case is a narrow one, and the fault is, as the Lord Ordinary observes, “of a very slight character,” we cannot disturb his verdict against the defenders Chalmers & Butchart. The case seems to me to be one where the precise cause of the accident is unexplained, but the circumstances are such as to put it upon these defenders to rebut a presumption of negligence on the part of their lorryman arising from the known conditions attending the occurrence, and this in my judgment they have failed to do.

I am therefore for adhering to the interlocutor reclaimed against.

LORD SALVESEN—The pursuer in this case was a passenger in a Glasgow tramway car. While sitting in the car a collision occurred between the car and a lorry loaded with wood, which had the effect of breaking one of the panes of glass towards the rear of the car, and as the result of which the pursuer

sustained injuries for which the Lord Ordinary has awarded her the sum of £75 by way of compensation. There is of course no suggestion that the pursuer was in any way to blame for the accident.

Before the action was raised we were informed the pursuer intimated her claim against the defenders, both of whom denied liability. She accordingly called both in the present action.

In her pleadings the pursuer sets forth that the collision was the result of negligence on the part of both, or one or other, of the defenders. Her averments against the Corporation of Glasgow are to the effect that the car was proceeding at an excessive speed, and that the driver did not drive the car with reasonable care. Against the other defenders she alleges that it was the duty of the driver of the lorry to keep clear of the car, and that he failed to do so, and that the lorry was improperly loaded. Whatever the defenders may have done before the action was raised, each of them in their pleadings blames the other. Chalmers & Butchart expressly adopt the averments of fault as against the owners of the tramway car, while they, on the other hand, attribute the accident to the lorry, after the car had passed two-thirds of its length, having thereafter approached the car so as to bring its load of wood in contact with it. In the evidence both parties expand the attitude taken up on record. Chalmers & Butchart put in witnesses to prove that the car was proceeding at an excessive rate of speed, that in consequence it was rocking from side to side, and that the oscillations of the car were calculated to cause the two vehicles to come into contact, in the manner described, without the lorry having altered its position from that which it occupied relative to the line of rails on which the car was proceeding when the front part of the car successfully cleared it. Without some such evidence I do not see how the factor of speed could have had any connection with the accident, but if the car had just cleared the lorry it is conceivable that it might come in contact with the back portion of its load if there was a relatively considerable lateral oscillation.

All the evidence was led without objection, and every witness was subjected to cross-examination by the counsel representing the other two parties.

The admitted facts of the case are as follows:—The car and the lorry were proceeding in the same direction. When first sighted the lorry was on the rails, and the driver of the car first rang his bell and then sounded his gong so as to warn the lorry of his approach. The driver of the lorry, who was at his horse's head, was somewhat dilatory in attending to the signals, but he ultimately did take the lorry to the side so as to make it possible for the car to pass. The space available between the side of the car and the pavement was sufficient, if it had been fully utilised, to have provided a clearance of 1 foot 2 inches, the wood with which the lorry was loaded projecting on each side a distance of about 6 inches. The extent of the actual clearance is only spoken

to by one witness, the driver of the car, who puts it at 2 feet, which is considerably more than there could possibly have been unless the lorry load had projected over the pavement. About 25 feet of the car length of 30 feet had passed clear, and it was the second pane from the rear end of the car which was broken.

The Lord Ordinary has held on the facts that the driver of the car was not to blame in any of the respects stated in the pleadings or developed in the proof. He holds that the car was proceeding at a rate not exceeding eight miles, that at that rate the oscillations of the car were negligible, and could not have accounted for the collision. He thus negatives the case against the Corporation, and holds that they were not to blame for the collision. So holding he reaches the conclusion that the collision must be attributed to a movement on the part of the horse, which was being led by its driver, which brought the rear end of the lorry nearer the car than it was at the time when the front portion of the car passed it. He thus impliedly refuses to accept the statement of the driver of the lorry that no such movement occurred.

Neither of the defenders seeks to explain the accident except by attributing it to the other. There is no suggestion that the horse was not under perfect control. On the contrary, it is stated by its driver to be a quiet animal, and it was being led by the head. There is no direct evidence contradicting the carter that he did not lead his horse nearer the pavement while the car was passing, and as the whole affair happened in a couple of seconds that is not surprising. It is, however, common ground that if he did so direct the movement of the horse the general effect would be to swing the rear end of the lorry towards the car, and so to have caused the collision precisely in the manner in which it occurred.

In the debate before us counsel for Chalmers & Butchart maintained that there was no evidence of negligence on the part of the carter, and that accordingly his clients fell to be assolizied. I agree with the Lord Ordinary that there is no direct evidence of the actual fault which the carter committed, but, on the assumption on which he proceeds, that the collision was caused entirely through the movement of the lorry after the car had partially passed, I think he was amply justified in inferring negligence against the carter, for whom the defenders Chalmers & Butchart are responsible. It cannot be maintained that with reasonable care on the part of both vehicles they could not have successfully passed each other without a collision. Hundreds of cars must daily be passing vehicles in streets which are no broader than the one in question, and doing so successfully. If, therefore, a collision occurs attributable to the movement of one of them, I am of opinion that that raises a presumption of negligence against the owner of the vehicle so moving which infers responsibility, unless evidence is led conclusively establishing that the movement of the vehicle was not due to its management by the carter but to some

other cause for which he was not to blame. I can imagine such cases—as, for instance, if the horse had got startled, and notwithstanding his efforts to control it had turned towards the pavement, or if there had been such an inequality in the street as to jolt the side of the load against the car, although this contingency, being one that was obvious, ought probably to have been guarded against. No such case, however, is attempted to be set up in evidence, and accordingly one is driven to the conclusion that the movement of the lorry which caused the collision was, consciously or unconsciously, directed by the carter who was in charge of the horse. A little inadvertence on his part in leading the animal, or a failure to appreciate what every carter ought to know, and must be taken as knowing, that the direction of his horse's head towards the pavement would swing the back of the lorry nearer the centre of the street, is all that is necessary to account for the accident. Such inadvertence is not consistent with reasonable care, and, however slight the negligence may be, necessarily implies responsibility just as much as if a foot-passenger who is carrying an umbrella under his arm inadvertently shifts his position so that the point of the umbrella injures another foot-passenger who is following behind him. The degree of negligence is not material. It is sufficient if there was negligence which resulted in the collision.

For my own part I do not think that there is any law in the case which is at all new. The maxim *res ipsa loquitur* has frequently been applied in suitable cases, and this is a case, in my judgment, for its application. Once the conclusion in fact is reached that one of the vehicles that has come into collision is not to blame, it follows that the other must be presumed to be so unless its owners are able to establish affirmatively that the accident happened from some cause entirely beyond the control of the driver. The often-quoted dictum of Erle, C.J., in *Scott v. London Dock Co.*, 3 H. & C. 596, that "Where a thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care." Applying this dictum to the facts of this case, it is plain that the horse whose movement caused the accident was under the management of the servant of the defenders Chalmers & Butchart, and that a collision between two vehicles does not, in the ordinary sense of things, happen if those who have the management use proper care. It follows that there was reasonable evidence in the absence of explanation by those defenders that the accident in fact arose from the want of care of their servant. I am therefore of opinion that the Lord Ordinary was right, and I agree in the grounds on which he based his judgment.

LORD GUTHRIE—On record the defenders the Corporation of Glasgow were only blamed for excessive speed, and no evidence

worth consideration was led to support that case. As the result of the proof, however, a case was attempted to be made before the Lord Ordinary of oscillation arising from a rate of speed which, whether excessive or not, in view of passing traffic, was sufficient to produce oscillation. This has been negated by the Lord Ordinary and was not maintained before us by the pursuer or the defenders Chalmers & Butchart, although the pursuer would not agree that the attendance of the Corporation's counsel was unnecessary. As to the other defenders, the only specific case made by the pursuer against them on record was in connection with the faulty packing of the wood on their lorry, of which case it was admitted both in the Outer and Inner House that there was no evidence. In addition, however, the pursuer happened to have a vague general averment of failure to drive carefully and to avoid collision with the tramway car. As I rather think by a stretch of goodwill the pursuer has been allowed under that averment to maintain that these defenders' lorry-driver was in fault in altering the line of his lorry's progress by pulling his horse nearer the pavement after a considerable part of the tramway car had passed the lorry, and thus causing the back of the lorry to swing towards, and come into collision with, the rear part of the tramway car.

The pursuer admits that she has led no direct evidence that the lorry-driver pulled his horse nearer the pavement, or that, if he did so, this swung the rear part of the lorry towards and brought it into collision with the car. She maintains, however, in law that in the circumstances fault on her part being excluded, and fault on the part of the tramcar-driver having been negated, a presumption not only of movement but of negligent movement arises in law against the lorry-driver, which presumption he has failed to rebut in fact.

I think the pursuer is entitled to succeed both on the legal question of presumption and on the question of fact.

On the question of presumption the rule contended for by the pursuer is not necessarily a universal one. In all the cases quoted by her the operation in question was a familiar one which general experience in precisely similar circumstances had shown could be safely executed. The same presumption would not necessarily arise if the operation were an unfamiliar one, in regard to which there had been little or no experience. For instance, in connection with an aeroplane accident, the possible causes of accident are so numerous and as yet so obscure, there are so many unsolved problems and comparatively so little experience, that in the case of an accident to a passenger it may be that there would be no presumption of negligence either against the builder or the pilot, or if there had been a collision, against the other machine. In the present case I think the rule does apply, because with the same road space, similar cars, similar road vehicles, and similar roadway and weather conditions, the same operation had been performed countless times in safety.

On the question of fact rebutting the presumption the defenders Chalmers & Butchart maintained that the uncontradicted evidence of Ashe, Glover, and Neville, who were scarcely, if at all, cross-examined on this point, established that the lorry-driver had not altered the course of his horse or of his lorry after he drew in towards the pavement on hearing the car bell. Suppose these witnesses do deponé to that effect, that does not seem to me sufficient to rebut the presumption of negligence. I think Chalmers & Butchart were bound to prove that the cause of the accident was something beyond their control, and in order to do so they must first prove what the cause of the accident was, such as the condition of the roadway or the horse being suddenly startled. They attempted an explanation, namely, oscillation, by way of inference rather than evidence, and this, their only suggestion, has been negatived. But suppose I am wrong in this, and that it was not necessary for them to prove a specific cause, they were at least bound to prove that they took all reasonable and ordinary precautions. They admit that adherence to a line continuous with that occupied by the lorry when the car first began to pass the lorry was a reasonable and ordinary precaution. This continuance on the part of the lorry horse and the lorry they sought to establish by the evidence of Ashe, Glover, and Neville. It was open to the Lord Ordinary, who heard these witnesses, to reject their evidence, either because he disbelieved it or because he thought it inadequate to establish the point in question. He has evidently done either the one or the other, and I see no sufficient reason to doubt that he has done so correctly. I therefore agree with your Lordships that the Lord Ordinary's interlocutor should be affirmed.

The Court adhered.

Counsel for the Pursuer—Morton, K.C.—D. R. Scott. Agents—Ross & Ross, S.S.C.

Counsel for Defenders the Corporation of Glasgow—Wilson, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for Defenders Chalmers & Butchart—Sandeman, K.C.—Wilton. Agents—Laing & Motherwell, W.S.

Saturday, October 26.

SECOND DIVISION.

[Exchequer Cause.]

THOMSON v. INLAND REVENUE.

Revenue—Income Tax—“Residing in the United Kingdom”—*Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule D.*

The Income Tax Act 1853 (16 and 17 Vict. cap. 34) enacts (section 2, Schedule D) that income tax is to be payable “for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or

vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere. . . .”

A contract of employment between a trading company and its agent provided that the latter should continue in West Africa during his term of service, that he should not leave Africa or the service of the company without six months' previous notice, and that his remuneration should cease on the day he left Africa. During the year of assessment the agent maintained his wife and family in a house at Hawick, of which he was the rated owner, and he lived there himself for four months. *Held* that he was assessable to income tax under section 2, Schedule D, of the Income Tax Act 1853, in respect that he was residing in the United Kingdom during the year of assessment, on any salary remitted to his wife or himself in the United Kingdom.

The Income Tax Act 1853 (16 and 17 Vict. cap. 34), section 2, Schedule D, is quoted *supra in rubric*.

Robert Thomson, Hawick, *appellant*, being dissatisfied with a decision of the Commissioners for the General Purposes of the Income Tax Acts at Jedburgh confirming an assessment made upon him for the year 1911-12 on the sum of £300 in respect of his income as a mercantile agent, took a Case in which the Surveyor of Taxes was *respondent*.

The assessment was made under Case 2, or alternatively Case 6, Schedule D, section 100, of the Income Tax Act 1842 (5 and 6 Vict. cap. 35), and section 2, Schedule D, of the Income Tax Act 1853 (16 and 17 Vict. cap. 34).

The Case set forth—“The following facts were admitted or proved:—1. The appellant was and is employed by Miller Bros. (Liverpool) Limited as agent in Southern Nigeria. 2. In the year in question he was serving under a separate agreement with that company in respect of each journey to that country. A copy of said agreement, signed by the Commissioners, forms part of the case. 3. On the expiry of each agreement the appellant returned to this country. During the periods of his stay in this country he was not in the service of Messrs Miller Bros. and earned no income, the whole of his income whether by salary or commission being earned abroad. It was a condition of the appellant's earning salary or commission that he should remain in West Africa during the period of his agreement. 4. During the year in question he was the rated owner of a residence in Hawick, in which his wife and family resided, and he was personally present, there, and in this country during a portion of such year, *i.e.*, four months from 6th April 1911 until August 1911, when he left for Southern Nigeria. 5. Since then he has been in this country during a portion of each successive revenue year, and he owned the residence in question at the date of the hearing, 1st February 1916. 6. Sums of money were paid by his instructions to his wife in this country by the company during his absence abroad. 7. The balances of his earnings, less some small