and unambiguously acquaint purchasers not only with the fact but also with the character of the prejudice they are asked to accept. Ambiguous or equivocal notices will not do. Nor will it do to adopt a form of notice which yields its meaning and intent only to study and reflection which it is unreasonable to expect from the ordinary customers of a shop. The notice must be such as, in the place and circumstances in which it is exhibited, will convey a clear and unambiguous intimation. Now if that be so, it is plain that a notice that the spirituous liquors which are on sale in a public-house are diluted will not do. Dilution is a question of degree. And a notice is made no better by adding that the strength of those spirituous liquors is not guaranteed. Genuine "whiskies" are of various strengths.

Accordingly it seems to me that in the case of *Brander* v. *Kinnear*—the case first argued—we ought to answer the question put to us in the negative, and that in the two other cases we should answer the questions put to us in the affirmative.

LORD CULLEN—I have come to the same conclusion. I think that the Act requires notice to be given to the purchaser which is clear and unambiguous, and where the notice is of the kind we have here, namely, a placard stuck up on the wall of the bar of the public-house, I think its terms must be such as clearly to inform the mind of a customer at the bar who gives it the kind of reading and degree of attention which may be expected from him there.

The article ordered by the purchaser in each of these cases was whisky. The Statute of 1921 makes it lawful for a vendor to supply as whisky, without complaint of prejudice on the part of the customer, whisky not adulterated otherwise than by admixture of water, if such admixture or dilution does not reduce the strength of the spirit more than 35 degrees below proof. Now the notice displayed at the bar in each of these cases said, in the first place, that all spirits sold in the establishment were diluted. I do not think this gave clear notice to a purchaser that the degree of dilution in the case of the fluid which he was about to receive in response to his order had been carried so far as to reduce the strength of the spirit more than 35 degrees under proof. It merely spoke of dilution in general terms. Then the notice went on to say "No strength guaranteed." That was consistent in itself with the strength being any particular strength at or above 35 degrees under proof. We are asked to give the words this meaning in the mind of a customer at the bar reading the notice, that on giving an order for whisky the order might be duly fulfilled if he was given whisky diluted with water to any extent. Thus, if he ordered a glass of whisky, and received a glass of fluid containing some very small proportion of whisky, say, half-a-teaspoonful, the rest being water, he would be bound to regard his order as having been duly fulfilled and would have no ground for complaint. I am unable to read this notice as conveying such a notification to the purchaser. It is, of course, not in itself unlawful to sell whisky so diluted with water as to reduce the strength of the spirit more than 35 degrees under proof. But if the article is to be sold as whisky, then, in my opinion, to avoid prejudice to the purchaser and to comply with the Act, the seller is bound to give perfectly clear and specific notice of the character of the article which is being supplied to the purchaser. Such notice, in my opinion, was not given in the three cases before us, and accordingly I agree that they should be disposed of as your Lordship proposes.

LORD SANDS—I agree with your Lordship that in view of the terms and the policy of the Acts in question any notice of disclaimer in regard to the nature or purity of the commodity sold must be clear and unambiguous. In the present case I think it was necessary that the notice should make it clear to any ordinary purchaser that what was tendered to him in response to his request for whisky was a liquid which under the statute could not be sold as whisky unless the purchaser agreed to take it as such. I am of opinion that the notice in question did not satisfy this requirement. In particular, in view of the nature of the commodity here in question which always contains a large quantity of water, the word "diluted" is ambiguous and therefore unsuitable.

The Court answered the question of law in the first case in the negative, and in the second and third cases in the affirmative.

Counsel for the Appellant Brander and the Respondent Soutar—Robertson, K.C.—Cooper. Agents—Wallace, Begg, & Company, W.S.

Counsel for the Appellants Kelso and Williamson and the Respondent Kinnear—Gentles, K.C. — Keith. Agents for the Appellants Kelso and Williamson—Purves, Neilson, & Oliver, S.S.C., and for the Respondent Kinnear — John S. Morton, W.S.

COURT OF SESSION.

Tuesday, March 20.

SECOND DIVISION.

[Lord Constable and a Jury.

MITCHELL *v.* SAMUEL M'HARG & SON.

Process—Jury Trial—Withdrawal of Case from Jury—Direction in Law—Challenge of Direction—Whether by Bill of Exceptions or Motion for New Trial—Necessity for Contemporaneous Record of Objection—Jury Trials (Scotland) Act 1815 (55 *Geo. III, cap.* 42), *secs.* 6 *and* 7—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 34.

In a trial by jury of an action of damages by a mother for the death of her child who was run down by a motor lorry, the presiding Judge at the conclusion of the evidence for the pursuer,

on the motion of the defenders, withdrew the case from the jury and directed them to return a verdict for the defenders on the ground that the evidence led disclosed a clear case of contributory negligence on the part of the child. No record was kept of these proceedings except the verdict. The pursuer having moved for a rule on the ground that the verdict was contrary to the evidence, and the Court having granted the rule, the defenders at the hearing on the rule maintained that the procedure adopted by the pursuer was incompetent inasmuch as she had proceeded by way of a motion for a rule instead of by way of a bill of exceptions. The Court expressed the *opinion* that if a party desired to challenge a direction in law given by a judge presiding at a jury trial, he must (*a*) *at the time* object to the direction and ask the judge to note his objection, and (*b*) follow up the objection so taken, as circumstances may dictate, either by bill of exceptions or by a motion for a new trial.

Circumstances in which the Court, in view of the uncertain state of the law and practice, and being of opinion that the Judge had erred in withdrawing the case from the jury, *set aside* the verdict and *granted* a new trial.

Process—Jury Trial—Withdrawal of Case from Jury—Contributory Negligence—Circumstances in which Competent to Withdraw Case from Jury.

Reparation — Negligence — Contributory Negligence.

In a trial by jury of an action of damages for the death of a child who was run down by a motor lorry, the presiding Judge at the conclusion of the evidence for the pursuer withdrew the case from the jury and directed them to return a verdict for the defenders on the ground that the evidence led disclosed a clear case of contributory negligence on the part of the child. The pursuer having obtained a rule on the ground that the verdict was contrary to the evidence, the Court after the hearing *set aside* the verdict and *granted* a new trial, *holding* (*a*) that the evidence led was not conclusive as to contributory negligence, and (*b*) that the question of contributory negligence, primarily a question of fact, was one appropriate for the arbitrament of a jury.

Opinion (*per* Lord Constable) that it was inexpedient to withdraw a case from a jury "except in such circumstances as those involved in *Tully* v. *North British Railway Company*, (1907) 46 S.L.R. 715, where the accident was described by the pursuer on record in a way which was inconsistent with the facts brought out in evidence."

Authorities on question of contributory negligence *considered*.

Mrs Violet Gregor or Mitchell, widow, Shettleston, Glasgow, *pursuer*, brought an action of damages against Samuel M'Harg & Son, warehousemen and general contractors, Glasgow, *defenders*, for £150 damages for the death of her daughter Mary Guthrie Mitchell, aged eight years, who was struck and knocked down in Shettleston Road, Shettleston, Glasgow, by a motor lorry belonging to the defenders and in charge of a servant in their employment.

The following *narrative* is taken from the opinion of Lord Constable *infra*:—"The *facts* of the case are simple. A heavily laden motor lorry with trailer attached was proceeding on its proper side along Shettleston Road, Glasgow, when a girl who had been standing on the pavement on the other side of the street proceeded to run across the street with her head over her shoulder looking in the direction opposite to that from which the lorry was coming. The roadway of the street is 34 feet in width with two tramway lines in the centre; and the girl continued to run without turning her head, until about a couple of feet past the most distant line of rails she came in contact with the advancing lorry, and was run over. The precise part of the lorry with which she came in contact is not quite clearly proved. A girl who was standing on the pavement with her and remained there because she was afraid of the lorry says that the point of contact was below the glass screen at the driver's side; but she also says that her companion was run over by the front wheel, which would make the point of contact a little further forward. The material point is that the girl who was crossing did not get in front of the lorry but struck the side thereof at or near the front. There was no traffic on the roadway at the time except the lorry and the girl who crossed. There was evidence upon which I think the jury might reasonably have held that the driver did not sound his horn before the accident and was otherwise guilty of negligence. There was also evidence, consisting partly of statements made by the lorry-driver immediately after the accident, and partly of wheel marks on the street showing deviation, upon which in my opinion the jury might reasonably have held that the lorry-driver saw the girl in time to have enabled him to pull up and avoid the accident."

The defenders pleaded, *inter alia*—"4. The death of the deceased Mary Guthrie Mitchell having been caused or materially contributed to by her own fault or negligence, the defenders should be assoilzied."

The action was tried before Lord Constable and a jury on 19th December 1922. At the conclusion of the evidence for the pursuer counsel for the defenders moved the presiding Judge to withdraw the case from the jury on the ground that the evidence led disclosed a clear case of contributory negligence on the part of the pursuer's child, whereupon his Lordship, being of opinion that the evidence did clearly establish contributory negligence, withdrew the case and directed the jury to return a verdict for the defenders, which they did. There was no record made of these proceedings except the verdict which was ultimately returned.

The pursuer moved for a new trial on the

ground that the verdict was contrary to the evidence, and a rule was granted upon the pursuers to show cause why a new trial should not be allowed.

At the hearing the defenders argued—1. The procedure adopted by the pursuer was incompetent. She should have proceeded by way of a bill of exceptions instead of a motion for a rule. By withdrawing the case from the jury and directing them that there was evidence of contributory negligence the presiding judge decided a question of law, and his decision could only be challenged by a bill of exceptions after exception had been duly taken at the trial—*Gibson* v. *Nimmo & Company*, (1895) 22 R. 491, 32 S.L.R. 411; *M'Caffery* v. *Lanarkshire Tramways Company*, 1910 S.C. 797, 47 S.L.R. 691, *per* Lord President (Dunedin) at 1910 S.C. 799, 47 S.L.R. 692; *Ritchie & Son* v. *Barton*, (1883) 10 R. 813, 20 S.L.R. 530, *per* Lord President (Inglis) at 10 R. 815, 20 S.L.R. 532; *M'Clelland* v. *Rodger & Company*, (1842) 4 D. 646, *per* Lord Justice-Clerk (Hope) at 652; *Campbell* v. *Campbell*, (1834) 12 S. 870; Maclaren's Practice, pp. 619-620; Mackay's Manual, p. 357; Macfarlane's Practice, pp. 262-266; Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), section 6. The withdrawal of the case from the jury was entirely within the option of the judge—*Keney* v. *Stewart*, 1909 S.C. 754, 46 S.L.R. 546, *per* Lord President (Dunedin) at 1909 S.C. 757, 46 S.L.R. 548. 2. It was competent for the presiding judge to withdraw the case from the jury where there was clear evidence of contributory negligence, and the evidence led justified the presiding judge in doing so—*Watson* v. *Glasgow Corporation*, 1917, 2 S.L.T. 112, *per* Lord Salvesen at 113; *Macleod* v. *Edinburgh and District Tramways Company, Limited*, 1913 S.C. 624, 50 S.L.R. 418; *Gibb* v. *Edinburgh and District Tramways Company, Limited*, 1913 S.C. 541, 50 S.L.R. 347, *per* Lord President (Dunedin) at 1913 S.C. 544, 50 S.L.R. 348; *Cass* v. *Edinburgh and District Tramways Company, Limited*, 1909 S.C. 1068, 46 S.L.R. 734; *Mitchell* v. *Caledonian Railway Company*, 1909 S.C. 746, 46 S.L.R. 517, *per* Lord President (Dunedin) at 1909 S.C. 748, 46 S.L.R. 518; *Tully* v. *North British Railway Company*, (1907) 46 S.L.R. 715, *per* Lord President (Dunedin) at 718; *Admiralty Commissioners* v. "*Volute*" (*Owners of*), [1922] 1 A.C. 129; *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery*, (1878) L.R. 3 A.C. 1155, *per* Lord Chancellor (Cairns) at 1166. [The cases of *Mitchell* v. *Caledonian Railway Company*, 1910 S.C. 546, 47 S.L.R. 456, *per* Lord Johnston at 1910 S.C. 548, 47 S.L.R. 457; and *British Columbia Electric Railway Company, Limited* v. *Loach*, [1916] 1 A.C. 719, were referred to by Lord Constable.]

Argued for the pursuer—1. Section 6 of the Jury Trials (Scotland) Act 1815 gave the pursuer the right to apply by motion for a rule on the ground of misdirection by the Judge. Section 7 merely gave an alternative remedy. There was no case showing that the right given by section 6 had been taken away by practice. The case of *Woods* v. *Caledonian Railway Company*, (1886) 13 R. 1118, 23 S.L.R. 798, was an authority to the opposite effect. 2. It was not competent for the presiding Judge to withdraw the case from the jury by directing them that there was clear evidence of contributory negligence, and in any event the evidence led did not justify the Judge in doing so—*Taylor* v. *Glasgow Corporation*, 1922 S.C. (H.L.) 1, 59 S.L.R. 14, *per* Lord Sumner at 1922 S.C. (H.L.) 14, 59 S.L.R. 21. The pursuer was entitled to ask a jury whether the "measure of care" referred to by Lord Sumner was duly observed. The defenders' negligence was the cause of the accident—*Ellerman Lines, Limited* v. *H. & G. Grayson, Limited*, [1919] 2 K.B. 514, *per* Atkin, L.J., at p. 537, *affd.* [1920] A.C. 466, *per* Lord Parmoor at p. 478; *British Columbia Electric Company, Limited* v. *Loach*, [1916] 1 A.C. 719, *per* Lord Sumner at p. 724; *Radley* v. *London and North-Western Railway Company*, (1876) L.R., 1 A.C. 754, *per* Lord Penzance at p. 759; Salmond on Torts (5th ed.), p. 46. *Macleod* v. *Edinburgh and District Tramways Company, Limited* (*cit.*) was distinguishable. The facts were different from those in the present case—see Lord President (Dunedin) at 1913 S.C. 627, 50 S.L.R. 419. *Gibb* v. *Edinburgh and District Tramways Company, Limited* (*cit.*) had no bearing on the present case—see Lord Johnston at 1913 S.C. 547, 50 S.L.R. 349. *Cass* v. *Edinburgh and District Tramways Company, Limited* (*cit*), was not in *pari casu* with the present case. It arose on a reclaiming note from the interlocutor of a Lord Ordinary, and the facts were different—see Lord Ordinary (Guthrie) at 1909 S.C. 1073, 46 S.L.R. 736. *Mitchell* v. *Caledonian Railway Company* (*cit.*) was distinguishable. The facts were different from those in the present case—see narrative of report at 1909 S.C. 747, and Lord President (Dunedin) at 1909 S.C. 749, 46 S.L.R. 519. *Admiralty Commissioners* v. "*Volute*" (*Owners of*) (*cit.*) was distinguishable. It did not arise out of a jury trial—see also Lord Chancellor (Viscount Birkenhead) at 139 and 144.

At advising—

LORD JUSTICE-CLERK—This is an action of damages by the mother of a little girl who was run over and killed in a Glasgow street by a motor lorry belonging to the defenders and driven by one of their servants. The usual grounds of fault are alleged against the defenders, viz., undue speed, failure to keep a proper look-out, and careless driving. These allegations are denied by the defenders, who aver, moreover, that the pursuer's daughter without looking where she was going ran right into the trailer attached to the lorry, and that accordingly she materially contributed by her negligence to the accident which occurred.

The case was tried by Lord Constable and a jury. At the end of the evidence for the pursuer the defenders' counsel moved his Lordship to withdraw the case from the jury and to direct them to return a verdict for the defenders. There is no record of the proceedings which took place except the verdict which was ultimately returned, but I understand that the ground on which the

motion was made was that the evidence given by the pursuer's witnesses established the case of contributory negligence which the defenders maintained on record. Lord Constable acceded to the request made to him, and the jury returned a verdict which bears that he withdrew the case from them and directed them to find for the defenders, which they did. The pursuer moved for a rule upon the defenders to show cause why the verdict should not be set aside as being contrary to the evidence, and that rule was granted by this Division. At the hearing on the rule counsel for the defenders maintained two propositions—(1) that the procedure followed by the pursuer was incompetent, and that inasmuch as her counsel had proceeded by way of a motion for a rule instead of by way of a bill of exceptions the Court could afford him no remedy, and alternatively, (2) that the verdict returned was on the merits a proper one.

(1) As regards the first contention, which was not, I may say, mooted by the defenders' counsel when the rule was granted, it is obviously a technical one, and I should be slow to give effect to it unless constrained by statute or by decision or by practice to do so. The proposition which the defenders' counsel must establish in order to succeed is that the only competent course for a pursuer to take when a judge, contrary to his submission, withdraws a case from the jury is to proceed by way of bill of exceptions. Now no support for this view can, I think, be found in the Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), which establishes procedure by way of motion for a new trial and by way of bill of exceptions. These remedies are dealt with in sections 6 and 7 of the Act, and they are ushered in in each case by the words "it shall be competent." There is no provision to the effect that when objection is taken to a direction in law given by a judge it must be pursued by way of bill of exceptions. In short, the statute appears to afford alternative remedies. Its provisions therefore do not avail the defenders.

The terms of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 34, are important in this connection. That section enjoins that a note of any exception at the trial must be taken by the judge, and it proceeds —"Such exception may be made the ground of an application to set aside the verdict, either by motion for a new trial or by bill of exceptions." Again the remedy prescribed would appear to be alternative.

The defenders are, moreover, unable to cite any decision of the Court in which their contention has been sustained. True, they referred us to the case of *M'Caffery* (1910 S.C. 797), but I do not regard it as illuminating in this connection. The defenders fastened upon an expression in Lord Dunedin's opinion, delivered not in the Division, but in setting out in presence of the jury his reasons for withdrawing the pursuer's case from their consideration. His Lordship, dealing with an opinion of Lord Young in *Gibson* v. *Gibson* (22 R. 491) which had been cited to him, uses these words—"I have no hesitation whatever in saying that that was not law, and I am not bound by it. If the learned counsel thinks that Lord Young's opinion was right he can *take exception* to the course now being followed and see what fate it will have before another tribunal." I should *prima facie* be disposed to think that his Lordship was there using the words "take exception" in their popular sense—that, in short, he employed a neutral phrase capable of covering both a bill of exceptions and a motion for a new trial, and that he did not use the word "exception" in its technical sense. I certainly decline to regard what Lord Dunedin there says as a considered opinion on the question now before us. He does not for a moment profess to lay down the proposition that a bill of exceptions is the only competent remedy in a case such as that with which he was there concerned and with which we are concerned now.

On the other hand, the rubric in *Woods* v. *Caledonian Railway Company* (13 R. 1118), *inter alia*, bears—"Held . . . that it was competent for the Court under the Act 55 Geo. III, cap. 42, sec. 6, to review a judge's direction in point of law without an exception having been taken, if that course was essential to the justice of the case." In the course of the argument for the pursuer Lord Young is reported as saying—"It is quite settled practice that the Court, under the 6th section of the Act 55 Geo. IV, cap. 42, may review the judge's direction in point of law without any bill of exceptions and in order to do justice in the cause; only without a bill of exceptions you may not be able to find out what the direction was, and you cannot go to the House of Lords." Moreover, in giving judgment Lord Young added (at p. 1126)—"Now upon the motion for a new trial I should overcome any mere formal difficulty in the way of the exception being taken to the judge's directions in point of law in order to do justice in the case." This case supports the pursuer's contention, and is certainly inconsistent with that of the defenders.

As regards practice, we were informed that it has varied, and that perhaps is not in the circumstances surprising.

I cannot therefore hold that either statute, decision, or practice decree that in a case such as the present a bill of exceptions is indispensable, and that a motion for a rule is incompetent.

But that does not exhaust the matter. There is a question in the background which was not referred to by the defenders, but which, it appears to me, is of the first importance. That question is, where objection is taken to a direction in law given by a judge in the course of a jury trial, must that objection have been taken *at the time* by the party who proposes subsequently to impeach the soundness of the law laid down by the judge? Be the subsequent procedure what it may, be it by motion for a rule or by bill of exceptions, must there be a record of contemporaneous objection taken by the objector to the direction of the judge? That question on the authorities appears to me to admit of only one

answer—an answer in the affirmative. For a time the practice seems to have varied. But in *Campbell* v. *Campbell* (12 S. 870) a motion for a new trial was refused inasmuch as no exception had been taken at the trial. And that case was followed in *M'Clelland* v. *Rodger*, 4 D. 646. There a motion for a new trial was held incompetent, inasmuch as neither exception nor objection had been taken at the trial. The judgment of the Court was an elaborate one, and it followed upon a full review of all the authorities. It would therefore appear that if the pursuer in such a case as this proposes to object to the judge's direction in law to the jury he must (1) object to that direction, else he is bound by it, (2) ask the judge to note his objection. In any event there must be a record in some shape or form of the fact that the direction was objected to.

Now in this case there is, as I have said, no written record of what transpired at the trial apart from the verdict itself. But having regard to the somewhat chaotic condition of the law and practice in the matter I am not disposed to advise your Lordships to throw out the pursuer's motion as incompetent. In order, however, that procedure in future should be uniform I venture to lay down these propositions—(*a*) If a party desires subsequently to challenge a direction in law given by the judge who presides at a jury trial he must *at the time* object to the direction, and ask the judge to note his objection; (*b*) the objection or exception taken should be followed up, as circumstances may dictate, by a bill of exceptions or by a motion for a new trial.

(2) The defenders maintain that the verdict was a proper one and should not therefore be set aside. Now the right of a judge to withdraw a pursuer's case from the jury at the end of the evidence led on his behalf is, I think, unquestionable, but in my opinion it is a right which should be sparingly exercised. Questions of fault and contributory fault have always been regarded, and I think properly regarded, as pre-eminently questions for a jury to consider and decide. In this case the judge himself determined the question of contributory negligence, and excluded the jury from consideration of it. I cannot recollect an exact precedent for that course. But assuming it to be theoretically competent, I am opinion that it should not have been taken here. In the first place there was evidence which I think the jury were entitled to consider, to the effect that the defenders' driver omitted to sound his horn after he saw the pursuer's daughter leave the pavement in order to cross the street. *Non constat* that if the horn had been sounded she would not have stopped, and the accident would have been averted. I think the jury should not have been denied an opportunity of considering that view. Again, there is evidence to the effect that the defenders' driver, afer the accident, admitted that he saw the pursuer's daughter before she left the pavement "as if she was going to run," that "she took a run across the road," and that she "kept looking the other way until he was up to her." Now it is at least arguable that if the defenders' driver saw all that he ought to have stopped his lorry or at any rate should have slackened speed, and that if he had done so, then even though the pursuer's daughter was negligent he had a later opportunity than she of avoiding the accident, and was responsible for its occurrence. This argument gains considerable force from the case of *Barty* (1922 S.C. 67), which was not cited to us in argument, but which seems to me exactly to fit this case. Reference may also be made in this connection to the *British Columbia Electric Railway Company* ([1916] 1 A.C. 719) and *Grayson*, [1919] 2 K.B. 154, [1920] A.C. 468. Without for a moment deciding that these cases apply to and govern the decision in this case, I am clearly of opinion that a question was raised by the evidence led by the pursuer which was not only appropriate for the arbitrament of a jury but which they had a right to consider and determine. Inasmuch as they were denied this opportunity, I am of opinion that the verdict of the jury cannot stand, and that accordingly there must be a new trial.

LORD ORMIDALE—Mrs Mitchell, the pursuer in the present action, seeks to recover damages on the ground that her child Mary, eight years of age, while crossing a street in Glasgow, was run over and killed through the fault of the driver of a motor lorry belonging to the defenders. The defenders deny that their driver was in any way to blame, and aver that the accident occurred through the fault of the deceased child. They say—"She suddenly and unexpectedly ran out from behind a . . . tramway car, and without looking where she was going ran right into the trailer attached to the motor lorry. The defenders' driver did all in his power to avert an accident." They plead, *inter alia*, that the child's death was caused or materially contributed to by her own fault. At the trial, on the conclusion of the proof led for the pursuer, the defenders' counsel moved the Lord Ordinary to direct the jury to return a verdict for the defenders on the ground that by the evidence led by the pursuer it was conclusively established that the child was guilty of contributory negligence. The Lord Ordinary granted the motion, and as the verdict bears withdrew the case from the jury and directed them to return a verdict for the defenders, which they accordingly did. No exception to the Judge's direction was either taken or noted.

Thereafter the pursuer moved for a rule on the defenders to show cause why a new trial should not be granted. The grounds of the motion as explained to us were that the Lord Ordinary had misdirected the jury in law, and that on a correct view of the law applicable to the facts the verdict was contrary to the evidence. No objection was taken by the defenders to the competency of the application for a new trial when the case was in the Single Bills or when a rule was asked for and the Court granted the rule. At the hearing on the rule, however, the defenders' counsel, before proceeding to discuss the merits, contended that as the

pursuer desired to challenge a direction in law the course followed by the pursuer was incompetent, and that instead of applying for a new trial in the way he had done he should have proceeded by way of a bill of exceptions. I am not prepared to assent to this proposition thus broadly and baldly stated. In the case of a misdirection by the judge in a matter of law, it is not incompetent to proceed by way of a motion for a new trial provided that certain particulars of procedure are duly observed and noted.

The Jury Trials Act of 1815 (55 Geo. III. cap. 42) provides in terms that an application for a new trial may be made on the ground (1) of the verdict being contrary to the evidence, (2) of misdirection on the part of the judge, (3) of undue admission or rejection of evidence, (4) of excess of damages, (5) of *res noviter veniens ad notitiam*, or (6) for such other cause as is essential to the justice of the case. The statute is silent as to the necessity of making any of these grounds matter of exception at the trial. They are all treated alike, and it is obvious that some of them could not be made matter of exception at the trial. Under section 7 in the case of, *inter alia*, misdirection, it is open to the party dissatisfied to take exception to the ruling of the judge, and provision is also made in the section itself and by the Act of Sederunt, 11th July 1828, section 32, which regulated the procedure down to the Court of Session Act 1868, for a note of any exception taken to points of law laid down by the judge being handed in and certified by the judge before the jury is enclosed to consider their verdict. Under the statute, therefore, two courses are open to the party dissatisfied. The practice that followed was not uniform, but while there are some illustrations to be found of a new trial being applied for under section 6 on the ground of misdirection without exception having been taken thereto at the trial (Macfarlane, Jury Practice, 262 *et seq.*), it was not only very early recognised that the better practice was to proceed by way of bill of exceptions, but further—and this is a matter of vital importance in dealing with the present defenders' contention—it was made plain that if the party dissatisfied elected to proceed by way of application for a new trial and not by way of bill of exceptions, it was none the less necessary for him formally to except to the direction complained of and have his exception noted. In this way the Court dealing with the application for a new trial might know precisely the particular ruling in law that was objected to at the trial. This appears to have been at the root of the decision in *Campbell* (12 S. 870), but the report is brief and somewhat obscure. In *M'Clelland* v. *Rodger & Company* (4 D. 646), however, the question was fully investigated, and it was finally determined by a very weighty decision that while admittedly the section of the Act of 1815 authorising a new trial on the ground of misdirection does not provide that the point of misdirection must be stated and noted at the trial, nevertheless it is not competent to move for a new trial on the ground of misdirection by the judge in a matter of law when no exception or objection thereanent has been taken and recorded at the trial. The provisions of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 34, and relative Act of Sederunt (C.A.S. F. iii, 5, 6) are in perfect harmony with the rule laid down in *M'Clelland* v. *Rodger & Company*, and while leaving it still open to the party dissatisfied to proceed by either alternative course, if not expressly, still by clear implication, made it a condition that when he applies for a new trial on the ground of misdirection he must at the trial have taken a formal exception and had it duly certified and noted. It seems strange that after any doubts as to the proper and necessary procedure had been conclusively removed by *M'Clelland* v. *Rodger & Company* (see Mackay's Manual, p. 357, and Maclaren, p. 619), as in my opinion they were, the practice should not have been perfectly uniform and consistent. Apparently it has not been so. The rubric in the case of *Woods* v. *The Caledonian Railway Company* (13 R. 1118) was cited by Mr Morton in support of his contention. The rubric bears that it was held "that it was competent for the Court under the Act 55 Geo. III, cap. 42, sec. 6, to review a judge's decision in point of law without an exception having been taken, if that course was essential to the justice of the case." That, however, was not really matter of decision by the Court. It was founded on an observation of Lord Young in the course of the argument—in the true sense an *obiter dictum*—and in direct association with and dependent on another ground on which a new trial may be granted, namely, where it is essential to the justice of the case. In my opinion, therefore, it is incompetent for the Court to entertain a motion for a new trial on the ground of misdirection unless the judge's ruling has been formally excepted to at the trial and the exception noted.

I agree, however, with your Lordship that in the present case that rule should not be enforced. Apparently some dubiety has still existed as to the proper procedure to be followed, and the misleading rubric in *Wood's* case (13 R. 1118) appears to some extent not only to illustrate but to justify it.

Holding that we are justified in the circumstances in entertaining the exception taken at our bar to the direction given by the Lord Ordinary to the jury, namely, that the evidence adduced by the pursuer conclusively and necessarily established contributory negligence on the part of the child, I agree in thinking that the Lord Ordinary was in error. Contributory negligence is primarily a question of fact, and therefore a question for the jury. But it cannot be disputed that it may be a mixed question of fact and law. The better course, I respectfully think, is to allow the facts to go to the jury with directions as to what is the law on the matter according to the view that may be taken of the facts. In the present case there was on the evidence adduced a distinct question of fact for the jury to determine. The pursuer's child was negligent in not looking both to her right hand and to her left before attempting, and

in the course of attempting, to cross the street. On the other hand the defenders' driver had the little girl in view before she left the pavement to cross the street; he continued to have her in view the whole time she was crossing; the story told on record of the tramcar is not true; the driver had clearly in his mind the possibility, or rather certainty, of an accident if the child did not observe him; he was well aware that she did not observe him; he did nothing to attract her attention, not even sounding his horn; it was perfectly easy for him to stop; if he had stopped there would have been no accident; he elected to go on on the chance of clearing her by swerving his lorry to the side, but failed to do so and ran over and killed her. It seems to me that it was for the jury to say on a consideration of these facts whether the failure of the driver to stop was or was not in the circumstances the true cause of the accident, and that the case should not have been withdrawn from them. In coming to this conclusion the only hesitation I feel is due to the fact that the Judge presiding at the trial came to a contrary result. But on the best consideration I can give to the facts and to the law which I conceive to be applicable to them, I think he was in error. The case most strongly relied on by the defenders' counsel was *Macleod* v. *The Edinburgh Tramway Company* (1913 S.C. 624), but it has little bearing, for on the assumption that the defenders in that case were in fault in not ringing the bell that failure in duty in no way contributed to the accident. Nothing that they could have done but omitted to do, it was held, would have arrested the fatal step forward of the pursuer. On the other hand it might quite well be maintained that the principle of *Radley* v. *London and North-Western Railway* ((1876) L.R., 1 App. Cas. 754) applied, and that the observations of Lord Sumner in *British Columbia Electric Railway Company* v. *Loach* ([1916] 1 A.C. 719) were directly in point. I would refer also to the cases of *Barty* v. *Harper & Sons* (1922 S.C. 67) and *Tuff* v. *Warman*, ((1858) 5 C.B. (N.S.) 573).

I agree, therefore, with your Lordship that the verdict must be set aside and a new trial granted.

Lord Anderson—In this hearing on a rule the defenders' counsel took the point *in limine* that the pursuer's motion for a new trial was incompetent in respect that no exception had been taken at the trial to the direction in law which was given to the jury by the presiding Judge. That his direction to return a verdict for the defenders was a direction in law is undoubted. It proceeded on a consideration of the evidence by the Judge and an opinion as to its legal effect formed by him. This was a decision of a point of law which made the consequent direction one of law. It was urged for the defenders that, this being so, it should have been excepted to, when made, in a form similar to that suggested in Maclaren's Court of Session Practice, at p. 609.

To ascertain what is the appropriate procedure in cases like the present it is necessary to make a chronological reference to the statutes and decisions which deal with jury trials. Jury trial in civil cases was established in Scotland by the Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42). By section 6 of that Act a new trial may be applied for on the grounds, *inter alia*, of misdirection of the judge and of the undue admission and rejection of evidence. Nothing is said in this section as to taking exception to a judge's ruling, and appeal to the House of Lords is specifically excluded. By section 7 it is provided that exception may be taken to the judge's direction on matter of law, the exception to be put in writing by counsel and signed by the judge. Nothing is said in this section as to a bill of exceptions, the procedure contemplated apparently being that the exception as noted should be heard and disposed of by the Division having cognisance of the cause. Any interlocutor of the Division pronounced on the matter of the exception was declared to be appealable to the House of Lords. Next, the Jury Trials (Scotland) Act 1819 (59 Geo. III, cap. 35), section 17, provided that if the motion for setting aside the verdict be founded on the misdirection of the judge at the trial in matter of law, or on the undue admission or rejection of evidence, a bill of exceptions may be tendered. The case of *Campbell* (12 S. 870) falls next to be noted. In this case, on a motion for a new trial based upon a legal ground, it was held that as no exception had been taken at the trial the motion was incompetent. The Act of Sederent of 16th February 1841 prescribes certain procedure to be followed when a challenge of the judge's direction in law is to be made. In the case of *M'Clelland*, 4 D. 646, it was decided that it is not competent to move for a new trial on the ground of misdirection of the judge in point of law or omission to state law unless objection or exception thereanent has been taken at the trial. In the case of *Barles*, 22 D. 851, at p. 869, Lord Justice-Clerk (Inglis) made this observation—"I hold it to be contrary to all practice in the conduct of jury trial in our Courts to allow a party to maintain a point of law on a motion for a new trial adverse to a direction given by the judge at the trial, to which at the trial he took no exception."

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), provides by section 34 that an exception taken and noted at the trial may be made the ground of an application to set aside the verdict either by motion for a new trial or by bill of exceptions, and section 35 prescribes the form which a bill of exceptions (if this mode of review is chosen) ought to take. The result of all this would seem to be that the proper practice, where the law laid down by the presiding judge was challenged, was to take an exception thereto at the trial and maintain the exception thereafter before the Division either on a motion for a new trial or in a bill of exceptions, and as no exception had been taken by the pursuer he would seem to be debarred from pressing his motion for a new trial. The pursuer's

counsel, however, founded on the case of *Woods*, 13 R. 1118, in which, as the case is rubricked, it was decided that it was competent for the Court, under the Act 55 Geo. III, cap. 42, section 6, to review a judge's direction in point of law without an exception having been taken if that course was essential to the justice of the case. The only basis for this part of the rubric which the report of the case discloses is an observation made by Lord Young during the course of the argument and set forth at p. 1122. It is difficult to reconcile this decision with the other authorities I have referred to, but in face of it I agree with your Lordship in holding that we are bound to consider the pursuer's motion for a new trial on its merits.

I further agree that in order to uniformity of practice in the future we should state what in our judgment is the proper practice in reference to a case like the present in which the direction of a judge to a jury on a matter of law is being challenged. These points seem to be settled—(1) If a ruling or direction in law is to be challenged exception must be taken at the time. (2) This exception must be duly noted either by the shorthand writer in the notes of evidence or by the judge on a separate paper. As to the procedure in the Court of review the Act of 1868, section 34, plainly gives a choice of alternative remedies—(*a*) a motion for a new trial at which a note of the exceptions must be presented, or (*b*) a bill of exceptions wherein the exceptions taken will be embodied.

I do not think that by judicial determination we can confine a dissatisfied litigant to one or other of these alternative remedies, for a practical consequence of moment may depend on the remedy chosen. I refer to the right of appeal to the House of Lords. There is no doubt that this right of appeal exists if procedure by way of bill of exceptions is chosen. But if the other alternative is adopted, *quid juris?* A motion for a new trial is not appealable, a "matter of exceptions" is. When these two are combined which is to predominate and so determine the right of appeal? This question may at some future time have to be determined, but as it does not arise in the present case I express no opinion upon it.

As to what I may call the merits of this application, that is, the question whether or not the direction of the presiding Judge was a misdirection, the pursuer's counsel submitted two contentions—(1) It was suggested, although the contention was but faintly urged, that it was incompetent for the presiding Judge to give the direction complained of on the ground upon which said direction was based. I understand that the learned Judge proceeded on the view that there was evidence on which the jury might find that the motorman was in fault, but that it was also by the evidence conclusively established that there had been contributory negligence on the part of the deceased. I am against the pursuer on this point for these reasons—(*a*) An action may competently be dismissed as irrelevant on the ground that contributory negligence is disclosed by a consideration of the pursuer's averments. In the case of *M'Sherry* (1917 S.C. 156) this course was followed by the Court. It follows and indeed is *a fortiori* that the same course may competently be taken where the pursuer's case has proceeded beyond averment to proof. (*b*) There is judicial authority to justify the course taken by the Lord Ordinary in what was said in the cases of *Tully*, 46 S.L.R. 715; *Mitchell*, 1910 S.C. 546; and *M'Caffery*, 1910 S.C. 797. (2) The pursuer's counsel maintained as his second contention that the Judge erred in directing the jury as he did.

While it was doubtless competent for the presiding Judge to do what he did, it is obvious that such a step should only be taken in most exceptional circumstances. The Judge ought to be clearly satisfied that the proof of contributory negligence is quite conclusive, that no reasonable jury in view of the evidence could return a verdict for the pursuer, and that if such verdict were returned, a court of review would inevitably grant a new trial or enter a verdict for the defender under the Act of 1910. I am not satisfied that the evidence was of this conclusive character. The question of contributory negligence is one of fact, and it is for the jury and not the Judge to decide matters of fact. Again, this question depends on a consideration of *all* the facts in the case, and it is in general advisable to have all the facts ascertained before deciding it. It is also to be kept in mind that the burden of proof is on a defender as to this matter. This makes it more difficult to reach a confident conclusion to the effect that the pursuer has proved this part of the defenders' case. It is much easier to reach a conclusion with reference to the other ground on which a case may be withdrawn from a jury, to wit, that the pursuer has failed to prove fault on the part of the defender, the burden of proof as to this matter being on the pursuer.

In the present case I have reached the conclusion that the point decided by the Judge should have been left to the jury. There was admittedly evidence supporting the pursuer's allegations of negligence against the motorman upon which the pursuer was entitled to have the jury's verdict. On the matter of contributory negligence I am of opinion that the evidence disclosed circumstances to which the rule of *Radley's* case (1 App. Cas. 754) might be held to apply, and that it should have been left to the jury to say whether or not the motorman had time and opportunity by proper handling of his lorry to counteract the negligence of the young girl.

Crucial facts in the case are that the girl never appeared to have observed the lorry, and that the motorman seems to have had the girl under observance from the time when she left the pavement. If each had seen the other all the time the case would have been different, because the girl would then have been under as stringent obligation as the motorman to stop and avert a collision. But it is just because she

was unconscious of the impending danger, while he ought to have seen that it was likely, that there is room for the application for the rule of *Radley*.

I therefore am of opinion that a new trial must be granted.

LORD CONSTABLE—On the question of the proper procedure to be followed by a party who desires to challenge a direction given by the Judge who presides over a jury trial I concur in the opinion expressed by your Lordship in the chair.

At the conclusion of the evidence for the pursuer in this case counsel for the defenders moved that I should withdraw the case from the jury on the ground that the evidence led disclosed a clear case of contributory negligence on the part of the pursuer's child. It appeared to me that the evidence did clearly establish contributory negligence, and I accordingly withdrew the case and directed the jury to return a verdict for the defenders, which they did. The general competency of such a course was expressly affirmed by Lord Dunedin in *Tully* v. *North British Railway Company* (46 S.L.R. 715) and by Lord Johnston in *Mitchell* v. *Caledonian Railway Company* (1910 S.C. 546), and was admitted by counsel for the pursuer in the present case. But I desire to say on reconsideration that I think such a course is inexpedient except in such circumstances as those involved in *Tully* v. *North British Railway Company*, where the accident was described by the pursuer on record in a way which was inconsistent with the facts brought out in evidence. If without such exceptional circumstances the defender thinks when the pursuer has closed his case that he is entitled to a verdict on the ground of contributory negligence he can curtail the proceedings by leading no evidence and requesting the judge to charge the jury in the appropriate terms. This course was adopted in *Buchanan* v. *Glasgow Corporation* (1921 S.C. 658), and if my attention had been called to it at the time I should have insisted on it being followed as the alternative to allowing the case to proceed.

On the merits of the question now before the Court I see no reason after hearing the arguments for the parties to alter the view which I took at the trial. That view was, that even if the pursuer obtained a verdict in her favour, the Court would be bound on motion for a new trial to overturn it on the ground of contributory negligence. I think that is the test which must be applied to the direction which I gave, and if it stands that test the pursuer cannot complain that she did not get an opportunity to put her case before the jury. [*His Lordship then narrated the circumstances of the accident ut supra.*]

There can, I think, be no doubt, and indeed it was not disputed, that the unfortunate girl was negligent. The question is whether her negligence so contributed to the accident as to bar her or those in her right from recovering damages. The pursuer relies on the rule in *Radley* v. *London and North-Western Railway Company* (1 App. Cas. 754), which, as stated by Lord Penzance (at p. 759), excludes the plea of contributory negligence "if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened." The defenders maintain that the rule in question does not apply, because the accident was the result of the converging movements of the girl on the one hand and the driver with his lorry on the other, and that but for negligence which persisted up to the moment of collision the girl could have avoided the accident just as much as, and indeed up to a later point of time than, the driver.

It is obvious that the rule in *Radley* v. *London and North-Western Railway Company* must be subject to some limitation, otherwise in a case of mutual injury arising from mutual negligence followed by mutual actions of damages verdicts might be obtained by both parties. As Lord Dunedin observed with regard to *Radley's* case in *Mitchell* v. *Caledonian Railway Company* (1909 S.C. 746, at p. 749)—"The negligence of the defender there referred to must be a second negligence following upon the pursuer's contributory negligence; it cannot be the original act of negligence or there would never be such a plea as contributory negligence at all"; and he added—"In order to bring a case under the rule in *Radley* there must be (1) negligence, (2) contributory negligence, (3) an ensuing act of negligence, without which the accident would not have happened." The difficulty in each case is to determine whether the negligence which immediately precedes and causes the accident is a "subsequent" act of negligence on the part either of the pursuer or the defender, or whether the negligence of both is truly concurrent. The difficulty is illustrated by three of the most recent and authoritative decisions cited in the debate—*British Columbia Electric Railway Company* v. *Loach* ([1916] 1 A.C. 719), *Grayson* v. *Ellerman Line* ([1919] 2 K.B. 514 [1920] A.C. 466), and *Admiralty Commissioners* v. *s.s. "Volute,"* [1922] 1 A.C. 129. In *British Columbia Electric Railway Company* v. *Loach*, where an electric car negligently ran into a road waggon which had been negligently driven on to the car track, the Privy Council found a solution in the fact that after the waggon got on to the track it could not get off in time to avoid the accident, whereas the electric car if properly braked could still have pulled up. In *Grayson* v. *Ellerman Line*, where ship repairers had negligently set fire to a cargo by allowing a red-hot rivet to drop through an open hatchway, it was ultimately held that the owners were not negligent at all; but on the assumption that they were to blame for leaving the hatchway open, it was held by a majority of the Court of Appeal that such negligence would not bar them from recovering damages, Atkin, L.J., whose opinion received the express approval of the House of Lords, pointing out ([1919] 2 K.B. p. 536) that the chief officer "did nothing active, he left things as they were," and that the case was not distinguishable from *Radley's* case. In *Admiralty*

Commissioners v. *s.s.* "*Volute*" it was held that while the negligence of the Admiralty vessel was subsequent in time to that of the "Volute," which negligently failed to give a signal, the acts of negligence were so related that both vessels must be held to blame for the collision. The circumstances of the recent Scots case of *Barty* v. *Harper & Sons* ([1922] S.C. 67) seems to me to be substantially similar to those in *Loach's* case. A dogcart was to blame for approaching a blind corner on the wrong side of the road. It could not get off the wrong side in time to avoid a motor car coming from the other direction but the latter had time to pull up. The conduct of the motor driver in endeavouring to pass the dog-cart was thus a negligence subsequent to that of the driver of the dogcart.

The difficulties inherent in these and many other cases which were quoted seem scarcely to arise in the present case where the accident resulted from the converging movements of the vehicle and foot-passenger and the movements of both continued to be negligently made until the moment of impact. But the driver of the vehicle must be assumed to have seen the passenger, whereas the passenger did not see the vehicle. And the real question in the case seems to me to be whether that fact constitutes such a difference in the quality of the negligence as to let in the rule in *Radley*. Abstractly considered I should have thought that the negligence which consists in failure to look out for and see a danger is at any rate no less than that which consists in failure to avoid a seen danger which may be no more than an error of judgment. So far as Scots authority goes I cannot find that in the discussion of the doctrine of contributory negligence any such distinction has been taken. On the contrary, there are at least two recent cases in which, as I read them, it was rejected. In *Watson* v. *Corporation of Glasgow* ([1917] 54 S.L.R. 593) the Second Division overturned, on the ground of contributory negligence, a verdict in favour of a pursuer who had been injured by a tramway car, into the front part of which he had walked while crossing a street without keeping a look-out. It was maintained for the pursuer that the car might have avoided the pursuer by pulling up, and that the doctrine of *Radley* v. *London and North-Western Railway Company* and *Davies* v. *Mann* ([1842] 10 M. & W. 546) accordingly applied; but the argument was rejected by the Court, Lord Salvesen observing that "these cases appear to me to have absolutely no application to a case such as the present, where the accident was the joint result of two separate movements by two moving bodies." And again in *M'Allister* v. *Corporation of Glasgow* (1917 S.C. 430) the same Division (Lord Anderson dissenting) overturned on the same ground a verdict in favour of the driver of a taxi-cab who crossed a street at a slant so that he failed to see an approaching car which ran into his taxi-cab. None of the English authorities quoted by the pursuer directly touched the question. But I find that the circumstances in *Tuff* v. *Warman* ([1858] 5 C.B. (N.S.) 573) came very near to raising it. The case arose out of a collision between a sailing vessel and a steamer which approached one another in a direct line. The sailing vessel had no look-out while the steamer had. In an action at the instance of the sailing vessel against the pilot of the steamer, a jury, sitting under Willes J., returned a verdict for the plaintiff, the judge, according to the report, directing the jury that "if the parties on one vessel had a look-out and still persisted in a course which would inflict an injury, then they were liable even if there was no look-out on the other vessel, for that would not be the direct cause of the injury," and he referred to the case of *Davies* v. *Mann* by way of illustration. On an appeal for new trial the Exchequer Chamber approved of this direction — Wightman, J., who delivered the judgment of the Court, repeating the language of the direction and adding to the final words of it "For that neglect of the plaintiffs would not be the direct cause of the injury," the following explanation, "That is to say, would not be a cause without which the injury would not have happened." The case is certainly an authority for the proposition that the principle of *Davies* v. *Mann* and *Radley's* case may apply though both the colliding bodies continue in motion under the direction of responsible controlling agents until the collision occurs. The material distinction from the present case is that in *Tuff* v. *Warman* the ship charged with contributory negligence was always on the line of the other vessel's approach. The accident would therefore still have happened if it had not continued to advance. The final movement just before the collision occurred was not therefore a cause without which the accident would not have happened, whereas in the present case it was the last step of the girl which brought her on to the line of the approaching lorry. In her case the injury would not have happened but for the last step. The negligence of both parties was not only concurrent and actively operative up to the last moment, but without the concurrent and actively operative negligence of each no accident would have occurred. In these circumstances I think it is impossible to avoid the conclusion that the negligence of each of the parties was a direct and proximate cause of the accident.

The Court made the rule absolute, set aside the verdict of the jury, granted a new trial, and remitted to Lord Blackburn, Ordinary, to proceed in the cause as accords.

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Counsel for the Defenders—MacRobert, K.C.—Gillies. Agents—Robson, M'Lean, & Paterson, W.S.