accident had any direct effect whatever as producing any change at the place where the man got the injury—no increase or change in the very strong current of air which led ultimately to pneumonia and death. In the end the necessary element of accident was attempted to be found in the fact that he was unexpectedly at this place and for an abnormal period. Now it seems to me that such connection is not as direct as to bring the case within the scope of what Lord Macnaghten expressed when he said you must find the elements of something unexpected and untoward; it rather comes under the category of an event fairly incident to his employment.

It is admitted that if the man had gone to the shaft in ordinary course, and had stood an hour and a half, in consequence of an order from one of his superiors, there would be no claim whatever, but it is said that if that superior, having given an order that he should go to this particular place intending at once to relieve him, had forgotten that he gave the order, in consequence of which the man had remained there for an hour and a half, there would have been an accident. It seems to me that would be extending the result of the *Drylie* decision very considerably, and I think your Lordships are all of opinion that the Court in that case went about as far as it would be inclined to go. It seems to me in the case of *Drylie* you had two elements wanting in the present case—the element of the place itself being in an abnormal condition, and also the element of the accident to the pump having been the direct cause of producing the abnormal condition in the place where the man stood and received the injury which led to his death.

I concur in thinking that this case is not within the rule of *Drylie*, and that the arbiter has come to a wrong decision.

The Court answered the question of law in the negative and recalled the award of the arbitrator.

Counsel for Appellants—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Keith. Agents—Simpson & Marwick, W.S.

Friday, February 7.

FIRST DIVISION.

[Lord Hunter and a Jury.

MACLEOD *v.* EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Reparation—Negligence—Tramway—Contributory Negligence—Passenger Alighting from Car and Crossing Street.

A passenger who had alighted from a north-going tramway car which was travelling on the left set of rails, being in a hurry to get to the east side of the street, rushed round behind the car from which she had just descended, and came in contact with another car which was travelling southwards on the other set of rails, and was injured. In an action at her instance against the tramway company the pursuer admitted that in her hurry to cross the street she had not looked to see if any car was approaching, but had relied on the driver of the oncoming car sounding his bell—as he was admittedly bound to do—but which, according to the pursuer's evidence, he had failed to sound.

The jury having found for the pursuer, the Court set aside the verdict and assoilzied the defenders, *holding* that, even assuming the driver of the south-going car had failed to sound his bell, the accident was due to the pursuer's negligence, in respect (1) that she had never looked to see if any car was approaching, and (2) that the oncoming car was so close upon her when she stepped into the danger zone that nothing could have saved her except that precaution which every pedestrian crossing a street is bound to take for his own safety.

Process—Jury Trial—Verdict for Pursuer Set Aside and Judgment Entered for Defenders — Jury Trials Amendment (Scotland) Act 1910 (10 *Edw. VII and* 1 *Geo. V, cap.* 31) *sec.* 2.

The Jury Trials Amendment (Scotland) Act 1910, section 2, enacts—"If, after hearing parties upon . . . a rule to show cause why a new trial should not be granted . . . on the ground that the verdict is contrary to evidence . . . the Court are unanimously of opinion that the verdict under review is contrary to evidence, and further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict, and, in place of granting a new trial, to enter judgment for the party unsuccessful at the trial."

Circumstances in which the Court set aside a verdict for the pursuer, and, in place of granting a new trial, *assoilzied* the defenders.

On 30th June 1911 Marion Macleod, domestic servant, 14 Edina Place, Edinburgh, *pursuer*, brought an action against the Edinburgh and District Tramways Company, Limited, *defenders*, in which she claimed £1000 as damages for personal injury sustained, as she alleged, through the fault of the defenders.

The *facts* as stated by the LORD PRESIDENT were—"The history of the accident is simple enough. The young lady was a passenger in a tramway car which was going north. In this country tramway rails are laid in accordance with the rule that cars pass one another to the left of the other rail, and the cars are so arranged that the only exit for passengers

is at the rear of the car and at the left side, the side next the pavement of the street. The pursuer's object was to go to a church which was situated almost directly opposite a tramway stopping-place. Accordingly she descended from the tramway car at that stopping-place. There was a controversy as to whether she descended before the car had actually stopped or not; but, as I have already said, I am taking the case entirely upon her own evidence and not upon the evidence on the other side, and accordingly I take it as proved that the car had stopped before she alighted. In order to get to her church she had to cross the street—that is, after getting out of the car she had to go across behind the rear of her own car, then cross the space between the two sets of tramway rails which is called the four-foot way, and then cross the other tramway line and finally get over to the pavement on the other side. She proceeded to do so without stopping at all, and was knocked down by another car going in the opposite direction the moment that she arrived at the side of the rail upon which that car was travelling. Unfortunately her foot went under the car and she sustained a very serious injury.

The defenders pleaded, *inter alia*—"(3) The accident to the pursuer having been caused, or materially contributed to, by her own fault or negligence, the defenders are entitled to absolvitor."

The case was tried before LORD HUNTER and a jury on the following issue:—"Whether, on or about 26th February 1911, in Lothian Road, Edinburgh, the pursuer was injured in her person through the fault of the defenders, to her loss, injury, and damage? Damages laid at £1000."

The jury unanimously found for the pursuer and assessed the damages at £350.

On 19th July 1912 the Court granted a rule to show cause why the verdict should not be set aside and a new trial granted.

At the hearing on the rule, argued for pursuer—The evidence showed that the driver of the south-going car had neither slowed down nor sounded his bell—the latter of which he was admittedly bound to do—while passing the car from which the pursuer alighted. The pursuer was entitled to rely on the bell being sounded, and that being so she had not been guilty of contributory negligence. As to what amounted to contributory negligence, reference was made to *Ramsay* v. *Thomson & Sons*, November 17, 1881, 9 R. 140, 19 S.L.R. 125; *Frasers* v. *Edinburgh Street Tramways Company*, December 2, 1882, 10 R. 264, 20 S.L.R. 192; *Jardine* v. *Stonefield Laundry Company*, June 24, 1887, 14 R. 839, 24 S.L.R. 599; *Cass* v. *Edinburgh and District Tramways Company, Limited*, 1909 S.C. 1068. 46 S.L.R. 734; *Campbell* v. *Train*, 1910 S.C. 556, 47 S.L.R. 475. [The LORD PRESIDENT referred to *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (1878), L.R., 3 A.C. 1155, at p. 1166.] The question whether the pursuer had been guilty of contributory negligence was one for the jury, and on the evidence they were entitled to find as they did.

Argued for defenders—The pursuer's own evidence disclosed contributory negligence on her part, and that being so it was immaterial whether the driver of the south-going car had failed to slow down or to sound his bell—*Frasers* (*cit. sup.*), at 10 R. p. 266, foot; *Grant* v. *Caledonian Railway Company*, December 10, 1870, 9 Macph. 258, 8 S.L.R. 192; *Barnett* v. *Glasgow and South-Western Railway Company*, January 22, 1891, 28 S.L.R. 339; *Watson* v. *North British Railway Company*, December 6, 1904, 7 F. 220, 42 S.L.R. 165. It was the duty of pedestrians to exercise reasonable precautions for their own safety—*Jardine* (*cit. sup.*), *per* the Lord President at 14 R. p. 840. This the pursuer had failed to do, and the defenders therefore ought to be assoilzied. The Court had power to do so—Jury Trials Amendment (Scotland) Act 1910 (10 Edw. VII and 1 Geo. V, cap. 31), section 2.

At advising—

LORD PRESIDENT—I have come to the conclusion that this verdict cannot be allowed to stand, and I have come to that conclusion entirely upon the case made by the pursuer herself. . . . [*Narrative ut sup.*] . . .

In one sense I regret the conclusion to which I have come. By that I mean that I think the pursuer was perfectly honest and frank, and indeed it is upon her own evidence that I think she loses her case. But, on the other hand, while one has that feeling of sympathy with the pursuer, the fact remains that it is not just to mulct the Tramway Company shareholders in damages where there is no legal ground for doing so.

Now the reason that I have come to this conclusion is that I think it is clear upon her own evidence that it was the pursuer's own negligence that led to the accident. The only negligence that is alleged against the Tramway Company is that the passing car did not ring its bell as it ought to have done and did not slow down. There is, however, conflicting evidence about the bell, and therefore, although I for myself would have come to the conclusion that the evidence that the bell was rung was better than the evidence that it was not rung, still I do not go upon that, because the jury were perfectly entitled to come to the conclusion that the bell was not rung. I also think they were entitled to come to the conclusion that the car was going at the ordinary pace of the cable. Of course with the cable car it is not possible to have an unduly increased pace as it is with motors and other vehicles, because naturally the car cannot go faster than the one uniform pace of the cable. But be that as it may, and taking it that the car was passing at the ordinary rate and that the bell did not ring, I think it is quite clear that this accident could not possibly have happened if it had not been for the carelessness of the pursuer herself. And I come to that conclusion from these facts—first, that upon her own showing she passed out from the rear of her own car

over the little space which may be called the four-foot way and into the danger zone without ever looking at all; and second, that she was knocked down at such a place as proves conclusively that the approaching car must have been so close to her when she stepped into the danger zone that no bell or anything else would have had the slightest effect.

If the case had been that she had nearly got across the track of the approaching car, then I should have come to the conclusion that, whatever I thought myself, the jury at least were entitled to say that if the car had not been going at its ordinary pace, but had been going at a slower pace as it ought to have been, the accident might not have happened, and that therefore the true cause of the accident was the negligence of the defenders. But, hit as she is the moment she gets upon the other track, it is perfectly clear that the car must have been so close upon her that nothing could have saved her except that precaution which every pedestrian is bound to take when he steps from behind one car and goes into what he knows is the track of another in broad daylight—the precaution of looking whether anything is coming. There is not the slightest difficulty in doing that. It is not as if this accident had been one with a carriage, because a carriage may go anywhere, and there is no place of absolute safety against a carriage or a motor, but against a tramway car there is a place of safety; you cannot be run over by a tramway car unless you put yourself on the rails on which that car runs, or, to be perfectly accurate, within a few inches that the tramway car projects over the rails.

Now that this is the state of the evidence is perfectly clear from what the lady herself said. She said that she walked across—I need not read that; I have already described it. And then she is asked, "And you did not look for it?"—that is, for the traffic going the other way. And she replies, "Well, I had not time to look. . . . There was nothing to prevent me standing behind the car or on the four-foot way to look and see if the traffic was coming. . . . I never saw the car until I was actually struck." "(Q) So that you had not looked to see if traffic was coming, but had walked on to the set of rails where the car was; is that so?"—"(A) Yes." Now that is her own evidence, and then there is the evidence of a very close eyewitness, Mr Murray, who was in the same car with her, descended at the same place, and was just behind her. He says this—"She just walked behind the car and struck the front corner of the south-going car. That is the corner next the inner rail. By the 'inner rail' I mean the centre track. Her leg was run over." And then again—". . . She just walked straight behind the car, round the car, and the other car coming up caught her. She never hesitated from the time she started to walk till she was struck, and thus walked into the front corner." Then he describes how she was lying on the four-foot way behind the car which had knocked her down with her leg just over the rail.

Under these circumstances I think the jury could only come to one conclusion, that it was the pursuer's own negligence that was the true cause of the accident, and I do not think that the jury were entitled to come to any other conclusion upon the evidence.

In these circumstances it would have been necessary, under our former practice, to grant a new trial, and I may say that the only case that has given me any consideration in this matter is the well-known case of *Slattery* (1878, 3 A.C. 1155). I have considered that case in all its bearings most carefully, and I think it would be possible, if it were necessary, to distinguish the case of *Slattery* upon the ground that this accident happened in broad daylight and the accident in *Slattery* at night; that ground of distinction would seem to be pointed at by some of Lord Cairns' remarks in the case. But the real distinction between this case and *Slattery* seems to me to be this—in *Slattery's* case, owing to what I may call peculiarities of Irish procedure, it was not open to their Lordships to grant a new trial—a situation which could not have arisen here, or, I believe, in England. As it was, the judges in minority thought the verdict ought to have been entered for the defendants, and everyone of the judges in the majority thought that the verdict was contrary to evidence, and indicated that if they could have given a new trial they would have done so. Now all we could have done under our old practice would have been to grant a new trial, but we have got a new power under the Jury Trials Amendment (Scotland) Act 1910—I may say I think a most beneficent power, because I cannot but think that the result which would have been reached in *Slattery*. if the matter had been open, would have been most disastrous. According to Lord Cairns and the other judges in the majority, they would have given a new trial, and very likely the same verdict would have followed, and they would have had to go on giving new trial after new trial. It was to avoid such a situation that the Act of Parliament was passed, and it only gives us power to enter judgment for the unsuccessful party when two conditions are fulfilled—first of all, when there is unanimity in the Court; and secondly, when we are satisfied that there could really be no other evidence produced which could affect the result.

Now it is perfectly clear that there could be no other evidence produced which could affect the result in the case before your Lordships. We have had the evidence of the only two real eyewitnesses of the scene and that one piece of hearsay evidence—that of the deceased cabman—which I think may be entirely disregarded. As I understand your Lordships are entirely of the same opinion as I am, I think the proper course will be to enter judgment for the defenders.

LORD JOHNSTON—I entirely concur.

LORD MACKENZIE—If the verdict is one which cannot from any reasonable point of view be reconciled with the weight of the evidence, it cannot stand. The question put to the jury was whether the pursuer was injured through the fault of the defenders, and this they have answered in the affirmative.

I regret to say that in my opinion the jury were not entitled to come to this conclusion. On her own evidence it clearly appears that the pursuer never looked before she attempted to cross the rails on which the tramcar that struck her was travelling; from the evidence of the passenger who followed her she just walked behind the car she had left and struck the front corner of the south-going car. It is therefore clear that the pace at which that car was going is not of moment in this case. I say so because I am of opinion that when the foot-passenger has a clear view he is entitled to rely upon the fact that the car is not going at an excessive speed. There is evidence that the driver of the south-going car failed to take the necessary precaution when passing the other car of sounding his bell. Though evidence upon a point of this kind is open to criticism, the jury were entitled to believe it. Under certain circumstances this might raise a question which would properly be left to the jury, viz., whether the failure to sound the bell or the want of reasonable care on the part of the foot passenger was the *causa causans* of the accident. Such a case is put by Lord Cairns, L.C., in *Dublin, Wicklow, and Wexford Railway Company* v. *Slattery*, 3 A.C. at p. 1167. But in that case the accident happened not in the daytime but at night. Here it was daylight, and had the pursuer looked she would have seen the oncoming car. It was her unfortunate omission to do so that was the cause of the accident. The verdict therefore, in my opinion, cannot stand.

LORD HUNTER—I concur. The inference I drew from the evidence was that this unfortunate accident would not have happened had the pursuer exercised that precaution for her own safety which is expected of pedestrians crossing a street.

LORD KINNEAR was absent.

The Court set aside the verdict and assoilzied the defenders.

Counsel for Pursuer—Sandeman, K.C.—MacRobert. Agents—M'Leod & Rose, S.S.C.

Counsel for Defenders—Watt, K.C.—Macmillan, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

Wednesday, January 29.

SECOND DIVISION.

COLLINS' TRUSTEES *v.* COLLINS.

Succession—Faculties and Powers—Power of Appointment—Validity of Exercise—Power to Appoint under "Terms and Conditions"—Appointment Partly among Objects and Partly outwith Objects of Powers.

A testator directed his trustees to hold part of his estate for behoof of a son "for his liferent alimentary use allenarly and his children in fee, in such proportions and under such terms and conditions" as his son might appoint, "which failing, equally among such children, share and share alike, the division being *per stirpes*." By his deed of appointment the son, who was survived by three sons and one daughter, directed that part of the fund should be held by trustees for the alimentary liferent of his youngest son, with power on the son attaining twenty-five to pay him the whole or part of the capital thereof, and in the event of his death the appointer directed any balance to be paid to the son's widow in liferent and his children or their issue *per stirpes* in fee, whom failing to his other two sons and his daughter equally, the issue of predeceasers taking their parent's share, and the shares of predeceasers who left no issue accrescing to the survivors *per capita* and the issue of predeceasers *per stirpes*. The appointer further apportioned to his two elder sons such sums as should amount to debts due by him to them, these payments being accepted by them in full satisfaction of such claims. He made a similar apportionment in favour of his daughter, and directed further that the residue should be divided among his two elder sons and his daughter equally, with a similar clause of substitution and accretion. He further directed that the shares of the daughter should be held by trustees for her liferent allenarly and her children equally in fee, the issue of predeceasers taking their parent's share, whom failing to his two elder sons with a similar clause of substitution and accretion. There was further a clause of forfeiture in the event of any child impugning the apportionment thus made. *Held* that the children and issue of children of the appointer's children and the widow of the youngest son were strangers to the power, that the gift to the two elder sons in satisfaction of debts due to them by the appointer was invalid, and that as it was impossible to sever the gifts to objects of the power from the invalid provisions the appointment was wholly invalid.

Opinion per curiam that the statement of contentions in a Special Case