July 12, 1881, 18 S.L.R. 725; *Macdonald*, April 30, 1895, 4 S.L.T. 4.

LORD SKERRINGTON—"I refrain from expressing any opinion on the general question as to the power of the Court to appoint a *curator bonis* to a *minor pubes* in the face of opposition on the part of the minor. In certain circumstances it might be proper to appoint a curator *ad litem* to confer with the minor, and upon his report I should be disposed, if I thought the case an urgent one, to report the matter to the Inner House. On the other hand, it seems to me that there would require to be exceptional circumstances to justify such a step and in the present case I do not think there are any such circumstances.

"With regard to the person who should be appointed as factor *loco tutoris* to the pupil boy, I cannot say that I attach much importance to the case of *Sinclair*, 7 S. 214, or to the case of *Jackson*, 13 S. 961, quoted by the petitioner's counsel as laying down any rule to the effect that the Court ought to appoint the person nominated by the nearest agnate. The case of *Jackson* suffers somewhat severely from the criticism of the Lord Justice-Clerk in the case of *Armit*, 1844, 16 S.J. 471. As regards *Sinclair's* case, the Court did no more than express a preference for the course recommended by the relations of the father rather than for that recommended by the relations of the mother.

"In the whole circumstances I am of opinion that the right course in the present case is for me to appoint a neutral professional man of my own selection as factor *loco tutoris*.

"I shall give Mr Wilson an opportunity of communicating with those instructing him so as to enable them, if so advised, to lodge in process a letter from the minor *pubes* consenting to the appointment of the same gentleman as *curator bonis*."

The Lord Ordinary appointed Walter A. Reid, F.F.A., Aberdeen, to be factor *loco tutoris* to John Alexander, with the usual powers, and *quoad ultra* refused the petition.

Counsel for the Petitioners — A. M. Mackay. Agent—D. Hill Murray, S.S.C.

Counsel for the Respondents — D. M. Wilson. Agents—Kinmont & Maxwell, W.S.

Wednesday, July 17, 1907.

FIRST DIVISION.

[Lord President and a Jury.

TULLY *v.* NORTH BRITISH RAILWAY COMPANY.

[Reference is made to the cases of *Mitchell* and *Strachan* v. *Caledonian Railway Company*, reported *ante*, p. 517, in which the case now reported was referred to by the Lord President.]

Process—Jury Trial—Withdrawal of Case from the Jury—Contributory Negligence.

Circumstances in which, in the opinion of the Lord President, a case which had gone to jury trial should have been withdrawn out of the hands of the jury.

Reparation — Negligence — Contributory Negligence—New Trial.

In an action for damages at common law for the death of a husband, brought against a railway company, the evidence showed that the deceased was killed while crossing a siding at the coal pit where he was employed; that in order to get to the other side he was creeping under the buffers of some stationary waggons lying on the siding when they were struck and set in motion by the rear waggon of a train of waggons which was being shunted backwards into the siding; that had he looked before beginning to cross he would have seen the approaching train which must have then been quite near. It was maintained that no proper lookout had been kept by the railway servants, that if such reasonable care had been taken the accident would not have occurred, and consequently that the deceased's conduct could not be considered "contributory negligence."

Held that the deceased's conduct constituted "contributory negligence," and that a verdict which had been obtained must be set aside and a new trial granted.

Radley v. *London and North-Western Railway Company* (1876), L.R., 1 A.C. 754, *distinguished.*

On 11th December 1906 Mrs M. Blackie or Tully, Dalkeith, brought an action against the North British Railway Company for £750 damages in respect of the death of her husband through the alleged fault of the defenders.

The pursuer averred—"(Cond. 1) The pursuer is the widow of the late James Tully, who at the time of his death, as hereinafter condescended on, was a dross waggon trimmer in the employment of the Lothian Coal Company (Limited) at the pit-head of their Lady Victoria Pit, Newbattle Colliery, Newtongrange. The said Lady Victoria Pit is situated on the east side of the defenders' main line of railway between the stations of Dalhousie and Gorebridge. (Cond. 2) For the purpose of dealing with the traffic from the said pit

there is a branch line from the defenders' said main line, and from the said branch line there are various sidings or lines of rails running in a north-easterly direction into or past the pit-head, and almost parallel with the defenders' main line. The first of these lines, being that nearest the defenders' main line, runs outside the pit-head building, and is known as the said Coal Company's main line; the second line is known as the 'Penn Road,' and along with nine other lines of rails on the east side thereof runs underneath the pit-head building. When the defenders' mineral trains return to the pit-head with empty waggons, these are shunted either into the said 'Penn Road' or into the said Coal Company's main line. (Cond. 3) On the 31st day of July 1906 the said James Tully was engaged trimming coal off dross waggons on one of the said sidings. About 7·30 a.m. on the morning of the day in question the said deceased had, in the course of his duties, occasion to cross the said line known as the 'Penn Road.' On the said line there was standing a number of waggons, two of which were outside the said pit-head building, and the deceased at the time mentioned was crossing the said line at the end of the said building behind the said two stationary waggons. (Cond. 4) As the said James Tully was in the act of crossing said line a mineral train of empty waggons belonging to the defenders was shunted backwards into the said 'Penn Road.' The engine was in the rear of the train and was preceded by a number of empty waggons. The said empty waggons were pushed back with considerable force without warning to the said James Tully or other workmen who might be on the line. The two stationary waggons behind which the said James Tully was passing were thus driven backward and the leading waggon of the two struck him while he was crossing the said line as aforesaid, knocking him down on the line. The wheels of the waggon passed over his haunch, and he died almost immediately as the result of his injuries. . . . (Cond. 6) The said accident occurred through the fault of the defenders and their servants. It was their duty to take all due precautions while conducting said shunting operations for the safety of the said James Tully and other workmen engaged in or about the said pit-head. In particular, the said mineral train ought to have been preceded by one of the said guards or other servant of the defenders for the purpose of warning workmen of the approach of the train, of warning the engine-driver of the train's proximity to the waggons standing on the line, and of stopping the moving waggons in case of any danger arising. Notice ought also to have been given, by whistle or otherwise, by the servants of the defenders of the approach of the said train so as to warn workmen who might be on or near the said 'Penn Road' to keep clear of the moving waggons and waggons that might be set in motion by those attached to or being pushed by the engine. Said precautions are the ordinary and usual methods taken in conducting such shunting operations, and, as the defenders well knew, they were absolutely necessary if the work was to be carried on with safety to the workmen about the pit-head. These precautions were, however, entirely neglected by the defenders on the occasion in question, and as a consequence of said neglect the said James Tully was killed. (Cond. 7) At the time when the said James Tully was run over, the view of the defenders' servants of the line on which the shunting operations were taking place was entirely obstructed by the waggons which were being pushed in front of the engine. Nevertheless they took no means to discover what the condition of the line was into which they were pushing said train of empty waggons. As they were well aware, it was dangerous to shunt empty waggons into said line without ascertaining whether workmen were employed on or passing over said line at any part of it. Further, they gave no warning, by whistle or otherwise, to any workmen who might have occasion to be upon said line that shunting operations were going on, although they well knew, or ought to have known, that workmen who might happen to be on said line in the course of their duties behind the stationary waggons standing at the pit-head would have no opportunity of seeing that a train was in process of being brought in. Such warning was rendered all the more necessary because, as defenders and their servants knew, the noise of the operations at the said pit-head prevented the workmen from hearing the approach of waggons. Moreover, the said mineral train was shunted against the said stationary waggons at a rate of speed which made the presence of a brakesman on or about the leading portion of the train to warn the workmen on or about the line of its approach, and to signal to the engine-driver when to stop, an absolute essential of safety. Had the said usual and necessary precautions been taken by the defenders' servants, the pursuer's husband would not have been killed. The explanations in answer are denied."

The defenders pleaded, *inter alia*, contributory negligence.

The case was tried before the Lord President and a jury on 21st March 1907. The evidence showed that Tully, when he met with his accident, was endeavouring to cross the rails by creeping under the buffers of the trucks, and that he had reached the second rail when the trucks were set in motion and knocked him down and passed over him.

The jury having found for the pursuer, damages £250, the defenders moved for a rule, which the Court granted.

At the hearing on the rule Counsel for the pursuer argued that even assuming there was negligence on the part of the deceased, that negligence did not prevent the recovery of damages, for in spite of it the defenders might, had they used ordinary care, have avoided the accident. This they had not done, for they had failed to keep a proper look-out or to give warning of the approaching train, and but for that the

accident would not have happened—*Radley* v. *London and North-Western Railway Company*, 1876, L.R., 1 A.C. 754.

LORD M'LAREN—It is impossible to resist the conclusion from the evidence in this case that the cause of Tully's death was his own negligence, either solely or as contributory with any negligence that might be supposed to exist on the part of the driver of the train which was the cause of the accident. In either case the result would be the same, because whether the accident was caused solely by the negligence of the party himself, or whether it was caused in part by his negligence and partly by the negligence of some other person, in neither case can the pursuer recover damages or retain the verdict.

Now this man who was run over, being a worker at a pit-head, was perfectly familiar with the system of rails constituting the shunting lines, and at the same time knew perfectly how he could pass from one place to another. I assume that he had some communication to make at the other side of the crossing at the time he met with the accident, though from some part of the evidence it seems doubtful whether he was entitled to be there at all. But I assume that he had a right to be there—that he was entitled to get across the line somehow. This was a line that led up to the junction; there was only one set of rails on the one side and eight sets of rails on the other, that side being occupied by the waggons at the pit-head. When there is only one line feeding eight others there must be a good deal of traffic on that line, and anyone who crossed the line, if familiar with it, could not but be aware that some precautions were necessary for his own safety.

What happened at the time was that a few empty waggons—I think eight waggons—were standing outside with no engine affixed and no apparent risk of the waggons moving of themselves. In these circumstances the unfortunate man Tully, instead of going round, which would not have occupied any appreciable time, thought he was in safety to duck between two of the waggons until he got across, but just at that moment a train of empty waggons drawn by an engine of the North British Railway Company came from what corresponds to the right side of the plan before us and at a moderate pace—the driver himself says six miles an hour—drove up against these waggons that were lying on the line and pushed them forward, the result being that three of the waggons passed over Tully and caused his death.

The case of negligence on the part of Tully is that he seems not to have looked in the proper direction, otherwise he must have seen the advancing train and would not have attempted to cross. But that in the opinion of the jury might be excusable on the ground that people who are habituated to moving in such dangers are not always so cautious as those who know less about them and are more likely to be careful. Although the waggons were at rest for the moment it must have been known to Tully that at any moment an engine might come up and set these waggons in motion, especially as they were standing at a place and at an hour of the day when that part of the line was being chiefly used for transferring waggons from one line of rails to another. I think it is impossible to take any other view of the facts than that the death of Tully was caused or contributed to by his action in going between the waggons and thus exposing himself to the risk of being run over. That being so, it is unnecessary to consider whether there was negligence on the part of the servants of the North British Railway Company in charge of the train. As regards the administrators of the company, they seem to have done their duty, because the train was provided with four men. No doubt they are responsible for the faults of these men, if fault there was. The case put forward on behalf of the pursuer is that it was a necessary or at least a reasonable precaution that one of the servants attached to the train should be seated on the foremost waggon as the train was advancing in order to keep a look-out and to warn anyone who might be in the way of danger. We do not know what it was that prevented this being done in this particular case. There is evidence that this was a usual precaution in the case of shunting waggons belonging to the coal company themselves. I do not say that there is not evidence in the case which might entitle the jury to think that there was some negligence on the part of the servants of the railway company. But then that negligence would be of no avail if the accident was also attributable to the negligence of the person who suffered from it. Then again, advantage was sought to be taken from a known principle of law—which is founded, I should say, on humanity and good sense—that even where there is contributory negligence, still if it be in the power of the person who is in the act of doing what may result in injury—if it be in his power to avert the consequences of indiscretion on the part of the other, he must do it and be responsible if he fails to give help in an emergency. Now, this supplementary rule presupposes that an accident is imminent but avoidable, and that it is in the power of a person who is doing that which is likely to be the cause of an accident to prevent it. But even if it were in the power of the railway company to take precautions by stationing persons on the line or in advance of the train, it will not do to represent that the omission to take such precautions is negligence falling under the supplementary rule, because this would in the result be to put an end to the doctrine of contributory negligence altogether and confine the inquiry to the negligence of the defender, in this case the Railway Company. In all the circumstances I think it is impossible, consistent with the known rules of law, to hold that the widow of the injured man is entitled to damages, and my opinion is that there ought to be a new trial.

LORD KINNEAR—I am of the same opinion, because on the evidence, as it was stated to us by Mr Horne, it appears to me to be clear that the direct cause of the accident that happened to this unfortunate man was not the negligence of the Railway Company but his own. I assume, without forming an opinion about it, because I think it was a question for the jury, that they were justified in thinking that the Railway Company in ordinary prudence, and with due regard to the safety of the public who might be on the line, ought to have taken precautions which they did not in fact take; and if that be so, then I think it follows that the jury were entitled to hold that the company had been negligent. But then it is not enough that negligence should be proved against parties against whom an action is brought. It is necessary to go a step farther, and prove that that negligence was the cause of the injury of which the pursuer complains. I take it to be quite settled law—and indeed I do not think it is disputed—that although the negligence of the company may have brought the pursuer into a position of peril he is not entitled to recover damages by throwing on them all the consequences of an accident that has befallen him provided he might have avoided the danger by ordinary care and prudence on his own part. And therefore the question is, Whether, assuming that this unfortunate man was put into a position of danger by the failure of the company to take certain precautions, he might not have avoided the harm which happened by reasonable prudence in taking care of himself. Now if, instead of going round the line of trucks coupled together, he chose to duck down and crawl under between the buffers so as to expose himself to imminent danger in the event of anything happening to cause the waggons to move, and at the same time make it quite impossible for him to see whether there was a probability of the waggons being moved or not, no one will dispute that that was exceedingly rash and foolish conduct on the part of this unfortunate man. But it is clear on the evidence that that was the cause of the accident. I therefore hold that the Railway Company are not responsible in damages in respect of the death of this man, which was caused by his own fault; for assuming that they were in some respects negligent, since the jury has so found, the direct cause of the fatal accident to the pursuer was not their negligence but his own.

LORD PEARSON—I also agree to there being a new trial.

LORD PRESIDENT—I tried this case, and the jury no doubt gave a verdict absolutely in the teeth of the recommendation I made to them. I am willing to assume that I did not sufficiently clearly explain what I wanted though I used plain language, because I am driven to suppose that the jury either did not understand plain language or were so obstinate as to go in the teeth of the recommendation made to them, but I rather take blame to myself now, for on further consideration I think this is one of the comparatively rare cases in which I should have taken the case out of the hands of the jury, and if a new trial were allowed and the same evidence led I should do so for this reason—I am satisfied that the pursuer only got an issue by describing the accident on record in a way that is inconsistent with the facts as presently proved. Condescendence 4, on which she got her issue, bore this—"As the said James Tully was in the act of crossing said line a mineral train of empty waggons belonging to the defenders was shunted backwards into the said 'Penn Road.' The engine was in the rear of the train and was preceded by a number of empty waggons. The said empty waggons were pushed back with considerable force without warning to the said James Tully or other workmen who might be on the line. The two stationary waggons, behind which the said James Tully was passing, were thus driven backward, and the leading waggon of the two struck him while he was crossing the said line as aforesaid, knocking him down on the line." That was a perfectly good averment, and had it been proved might well have entitled her to a verdict. But if the description of the accident had been given in the language in which it is proved to have happened, detailing the fact that he did not stand behind the waggons at all or cross behind the waggons, but that he crept under them while they were standing, I take it you would have refused issues on the ground that the facts showed contributory negligence, because that it must be contributory negligence for a man to step under waggons without looking if anything was coming seems to me too clear for argument. It was asked of one of the pursuer's witnesses if a man should look for waggons, and he first said he might, and when the question was again put he said he would be a fool if he did not. I am sorry I did not take that course, because it would have saved what has been useless expenditure. I preferred to leave it to the jury, certainly little expecting that the jury would bring in the verdict which they did, which is absolutely in the teeth of the evidence. With regard to the argument which Mr Horne submitted, I quite agree with your Lordship that that doctrine has no bearing on the present case, and, indeed, it is only reached by leaving out the words "in the result" in Lord Penzance's judgment.

The Court set aside the verdict and granted a new trial.

Counsel for Pursuer—Horne—Jameson. Agents—Anderson & Chisholm, Solicitors.

Counsel for Defender—Dickson, K.C.—Grierson. Agent—James Watson, S.S.C.