Thursday, January 23.

FIRST DIVISION.

[Lord Hunter and a Jury.

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

(*Ante* February 22, 1912 S.C. 580, 49 S.L.R. 431.)

Reparation — Negligence — Contributory Negligence — Proximate Cause — Bill of Exceptions.

In an action of damages at the instance of a pursuer who had had a leg broken through being run over by a tramway car, counsel for the pursuer requested the presiding judge to direct the jury "that even if they be of opinion that the pursuer contributed by her fault to the accident which happened, she is not disentitled to recover damages from the defenders if the jury are also of opinion that reasonable care on the part of the defenders, viz., provision of side-guards to the car, would have prevented the accident." His Lordship having refused the direction the pursuer brought a bill of exceptions.

Held that the direction tendered had been rightly refused, the proximate cause of the accident being the pursuer's negligence in running against the car, though the want of side-guards, if that were negligence, might have affected the results of the accident.

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

The case is reported *ante ut supra.*

This was a bill of exceptions for Mrs Catherine Gibb, widow, 4 Merchiston Avenue, Edinburgh, *pursuer*, in an action at her instance against the Edinburgh and District Tramways Company, Limited, *defenders*, in which she claimed £2000 damages for personal injury sustained, as she alleged, through the fault of the defenders.

On 7th December 1911 the Lord Ordinary (GUTHRIE) approved of the following issue:—"Whether on or about 14th September 1910, in Lothian Road, Edinburgh, the pursuer was injured in her person through the fault of the defenders, to her loss, injury, and damage."

The case was thereafter tried before Lord Hunter and a jury. The jury having returned an unanimous verdict for the defenders, the pursuer on 8th July 1912 brought the present bill of exceptions.

In her bill the pursuer stated—"The pursuer maintained, *inter alia*, that the defenders were negligent in respect that they had failed to provide side-guards for their cars, and that had this precaution been adopted the injuries to the pursuer would have been prevented. The pursuer led evidence to the effect that she had stood in the four-foot way between the two lines of rails waiting till the car passed, that her dress was caught by the car and she was thrown down; that had there been guards at the side of the car the injury sustained by the pursuer would in all probability have been avoided. The defenders maintained that the cars were safe without side-guards, and led evidence to the effect that the pursuer, in a pre-occupied manner, walked against the side of the car, with the result that she was thrown down on the street. It was common ground between the parties that the pursuer fell clear of the car, but that her leg went under the car, and was run over by the front wheel of the rear bogie. After the evidence of both parties had been closed, and after their respective counsel had addressed the jury, the presiding judge charged the jury to the effect that if they came to be of opinion that the pursuer's carelessness contributed to the accident they must return a verdict for the defenders, and that the question as to their opinion with reference to the propriety of having side-guards or not was immaterial. Counsel for the pursuer did then and there request the presiding judge to direct the jury—'That even if they be of opinion that the pursuer contributed by her fault to the accident which happened, she is not disentitled to recover damages from the defenders if the jury are also of opinion that reasonable care on the part of the defenders, viz., provision of side-guards to the car, would have prevented the accident' — which direction the presiding judge refused to give, whereupon the counsel for the pursuer respectfully excepted to his Lordship's refusal."

At the hearing on the bill, argued for pursuer—*Esto* that the pursuer had been guilty of contributory negligence, her negligence was not the proximate cause of the injury, for that was due to the absence of side-guards on the car. That being so, his Lordship was in error in directing the jury that the pursuer's negligence was sufficient to disentitle her to recover—*M'Naughton* v. *Caledonian Railway Company*, December 17, 1858, 21 D. 160, *per* Lord Wood at p. 166, foot. The real question was, what was the proximate cause of the accident?—*Radley* v. *London and North-Western Railway Company*, (1876) L.R., 1 A.C. 754; *Mitchell* v. *Caledonian Railway Company*, 1909 S.C. 746, 46 S.L.R. 517, and 1910 S.C. 546, 47 S.L.R. 456. [LORD HUNTER—All that was fully explained to the jury.]

Argued for defenders—*Esto* that there might be a good rejoinder to the plea of contributory negligence, viz., that such negligence was not the proximate cause of the accident, there was no such other proximate cause present. When the proximate cause was want of reasonable care on both sides neither of the parties could sue the other—"*The Bernina*," (1887) L.R., 12 P.D. 58, *per* Lindley, L.J., at p. 89. The case of *Radley* (*cit.*) was distinguishable, for in that case there was a subsequent conscious act of volition. That was absent here, for the failure to provide side-guards was not subsequent to but existed prior to the pursuer's act of negligence. The direc-

tion tendered at the trial has been rightly refused, for if given it would have misled the jury, for no relevant rejoinder to the plea of contributory negligence was raised by the facts of the case.

LORD PRESIDENT—This is an action of damages at the instance of a lady who met with an accident by being run over by one of the tramway cars belonging to the Edinburgh and District Tramway Company. She did not allege, in her action, any fault on the part of the driver of the car, but her complaint was that the car was not provided, as it ought to have been, with a side-guard filling up the space between the front and the back wheels. She said that the provision of such side-guards was a proper precaution adopted elsewhere, and that the absence of them constituted negligence on the part of the defenders. She averred that if there had been side-guards it would not have been possible for her leg to get under the car. The Tramway Company put in defences in which they admitted that there were no guards. They contended that the side-guard was not a proper contrivance, and that while it might prevent one class of accidents, it courted another, and that there was no negligence in the facts in which she averred negligence to be. But they also said that the real cause of the accident was the pursuer's own actings, in respect that she had simply walked into the car while it was in motion and was so run over. This was denied by the pursuer.

In that state of matters your Lordships upon a former occasion held that there was a relevant case made and sent it for trial to a jury upon the usual issue of fault.

The learned Judge, after hearing evidence, which was directed on both sides to making good the points which I have just mentioned as being in the pleadings, charged the jury—and now I am reading from the statement in the bill of exceptions—"charged the jury to the effect that if they came to be of opinion that the pursuer's carelessness contributed to the accident, they must return a verdict for the defenders, and the question as to their opinion with reference to the propriety of having side-guards or not was immaterial."

Now the learned counsel for the defenders did not take any exception to that portion of the charge. If that is so, they cannot be heard now to say that that portion of the charge was misleading. It would be possible to argue that, if that sentence which is quoted in the bill of exceptions had been the only thing that the learned Judge said, it might have been misleading, because it would be possible to argue upon the question of what the true meaning of "carelessness" is, and it would be possible to argue upon the true meaning of the words "contributed to the accident"; and it is only after the words "contributed to the accident" that the Lord Ordinary goes on to say that "the question as to their opinion with reference to the propriety of having side-guards or not was immaterial." But inasmuch as they have not excepted, I think, in accordance with the well-known practice of this Court, we must hold that there was no ambiguity, because these matters had been explained in the other portions of the learned Judge's charge which are not here quoted. And I have no doubt whatsoever that they were so explained; no judge, I am certain, ever charges a jury upon the question of contributory negligence without explaining to them what the true meaning of the word "contributory" is, and I have no doubt it was done here. I may mention here that I think the leading authority upon this matter is the opinion of Lord Young in the case of *Woods* v. *Caledonian Railway Company* (13 R. 1118). In the same way, I think that the expression "carelessness" must be taken with the evidence that we know was led upon the only point which was alleged, namely, that the pursuer walked into the car.

Now that having all been satisfactorily explained to the jury in a way which one must consider was proper and in accordance with the law, the learned counsel afterwards asked the Judge to add to what he had already said the following:—"That even if they"—the jury—"be of opinion that the pursuer contributed by her fault to the accident which happened"—and again I say that here the words must be taken in their true sense; that is to say, as meaning that she contributed materially to the cause of the accident—"she is not disentitled to recover damages from the defenders if the jury are also of opinion that reasonable care on the part of the defenders, viz., provision of side-guards to the car, would have prevented the accident." The learned Judge refused that direction, and to that refusal exception is taken.

I am of opinion that the learned Judge very rightly refused that direction, because I think it would have been either a wrong direction or at least a misleading direction. The learned counsel for the pursuer bases his argument on this, that it always comes to be a question of what is the actual *causa proxima* of the accident, and then he defines the accident here as the loss of the pursuer's leg. "Now," he says, "I was entitled to maintain to the jury that the actual particular accident, to wit, the loss of the leg, would not have occurred if there had been a side-guard; and if the failure to provide a side-guard is a negligent act, then the loss of the leg is due to that negligent act and to that act alone, and has nothing to do with the question of the pursuer walking into the car, and I did not have an opportunity of pleading this with effect to the jury, because the direction which was asked for was not given."

I think there are two fallacies in that argument. In the first place, I do not think that the accident, in the strict sense of the word, or rather—because I wish to use what I think is the proper word—the legal wrong for which the pursuer is suing, is the loss of the leg. The legal wrong was

the car running over the pursuer. After that it was more or less luck what happened. No doubt the pursuer's damage will be measured by what happened, and she will recover much more damages if the defenders are in fault, for the loss of the leg than she would have recovered for a trifling injury or scratch. But that is not really the legal wrong—the legal wrong is running over her. I think that is the first fallacy.

The second fallacy is the assumption that it could be still in the pursuer's mouth to say that the proximate cause of the accident was the want of the guard in a case where the jury had come to the conclusion that the pursuer had been guilty of contributory negligence in the proper sense of the word. Of course, if the jury had not come to the conclusion that the pursuer had been guilty of contributory negligence, then *cadit questio*; there is nothing else left but the possible fault of the Tramway Company in not providing the guard. And such a case might have arisen on other facts at the trial. Supposing it had been the case that the pursuer was standing, not on the tramway line, but in its vicinity, and that she had, by no fault of her own, been violently thrown upon the tramway lines by the fault of somebody else coming up behind her, or through the pressure of a crowd, or anything of that sort, and then she had been run over by the tramway car, that would have raised the pure question of whether there was negligence on the part of the Tramway Company in not having a side-guard. But in this case Lord Hunter only put the matter to the jury if they came to the conclusion that she had not been, in the proper sense of the word, guilty of contributory negligence. Now if that is once found—that in the proper sense she had been guilty of contributory negligence — I think it is tantamount to a finding that the want of the guard is not the only *causa proxima* of the accident. The truth is that, although *causa proxima* is used in the singular, yet no doubt there are cases where the accident is so much the result of the actions of two different parties, that the act of both or one or other, or rather the acts of the two combined, are truly the *causa proxima*.

The only other thing I have to say is that I respectfully agree entirely with the analysis of the various positions which are set forth by Lord Lindley in the case of the "*Bernina*" (1887, L.R., 12 P.D. 58, at p. 89), which was cited to us by Mr Macmillan, and when you come to consider the facts of this case it is certain that the case comes under one of the categories in which he says that A, the injured party, could not sue B, who is supposed to be the injurer.

No one doubts the proposition that is generally associated with the case of *Radley* v. *London and North-Western Railway Company* (1876, L.R., 1 A.C. 754). The learned Judge who presided at the trial has told us that he explained that to the jury. I do not think, on the facts of this case, that he need have done so, because the facts of this case do not seem to me to raise a case analogous to the case of *Radley* v. *London and North-Western Railway Company*. In other words, I do not think there is any instance of the doctrine of *Radley's* case except instances in which the subsequent negligence is due to a subsequent act of volition. Now here there was no room for a subsequent act of volition, because nobody says that after the lady stepped into the track of the tramway lines it would have been possible for the Tramway Company to have let down a side-guard. And accordingly the original negligence in not having a side-guard—if that was negligence—could never have been made to do duty again for the subsequent act of negligence which may infer liability, as in *Radley*.

On the whole matter, therefore, I think that the bill of exceptions must be refused.

LORD JOHNSTON—I have come to the same conclusion as your Lordship on the following—it may be somewhat narrow, but to me sufficient — ground, namely, that the result of the argument for the pursuer is that an injured person cannot commit, or rather be responsible for, contributory negligence if the primary negligence is of such a character that it is continuous before, during, and after the accident. There is nothing in the authorities, so far as I can see, to justify this result, and its mere statement satisfies me that the argument itself is unsound. While I base my own judgment upon that somewhat narrow ground, I desire to say that I entirely agree with the wider views expressed by your Lordship.

LORD MACKENZIE—I agree with your Lordship that when the circumstances under which the accident happened are explained the direction was rightly refused. In a case of this kind the succession in point of time appears to me to be essential, and that as the act which immediately preceded the accident was that the pursuer walked up against the side of the car, the question of setting up subsequent negligence on the part of the defenders does not arise. It is impossible, that being the act which immediately preceded the accident, that there could be any opportunity for subsequent negligence on the part of the defenders —that is to say, you cannot use the want of the side-guard as negligence subsequent to that act of the pursuer which was the proximate cause of the accident. Accordingly I am of opinion that the bill of exceptions should be refused.

LORD HUNTER—I concur. I may say I only referred to *Radley's* case because counsel for the pursuer argued at length upon it, and asked me to direct the jury upon the lines of *Radley's* case. I explained *Radley's* case to the jury, and asked them to disregard it in so far as the law I was laying down to them was concerned.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"The Lords (along with Lord Hunter, who presided at the trial) refuse the bill; disallow the exceptions; of consent apply the verdict found by the jury on the issue in the cause, and in respect thereof assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses, and remit," &c.

Counsel for Pursuer—Sandeman, K.C. —MacRobert. Agents—Connell & Campbell, S.S.C.

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

Thursday, January 24.

SECOND DIVISION.

[Sheriff Court at Dumbarton.

HERBISON *v.* M'KEAN.

Sheriff—Poor's Roll—Application for Admission—Reporters on Probabilis causa litigandi—Poor's Agents—Poor's Agents Acting in Double Capacity in Same Action both as Agent for Party and as Reporter —Competency—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *Sched. I, Rule* 163.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—"First Schedule, Rule 163.—The Sheriff shall remit the application [for the benefit of the poor's roll] to the procurators for the poor, who shall notify the parties, and after inquiry shall make a report to the Sheriff."

It is incompetent in the Sheriff Court for a poor's agent to act as a reporter on the *probabilis causa litigandi* in an action where he is acting as poor's agent for one of the parties.

May M'Kean, Yoker (*respondent*) presented a petition in the Sheriff Court at Dumbarton for the benefit of the poor's roll for the purpose of prosecuting an action against James Herbison, Dalmuir (*appellant*). Mr Andrew Duncan, one of the agents for the poor, acted as agent for the petitioner, and as such signed the petition. On 17th December 1912 the Sheriff-Substitute (M'DIARMID) remitted "to any two of the agents for the poor to inquire and report as craved," and on 24th December 1912 Mr Duncan, along with Mr Kenneth S. Mackenzie, another of the agents for the poor, considered the application in the capacity of reporters on the *probabilis causa litigandi*, and reported as follows:—

"*Report.*—At Dumbarton the 24th day of December 1912. Appeared the defender, with John Lawrie, writer, Clydebank, as agent for him, and in presence of the undersigned agents for the poor, who, after due inquiry into the pursuer's cause, report that the pursuer has a probable cause of action and is entitled to the benefit of the poor's roll.

"AND. DUNCAN, *Agent for the Poor.*

"KENNETH S. MACKENZIE."

Thereupon the Honorary Sheriff-Substitute (HENDERSON), by interlocutor dated 30th December 1912, appointed Mr Duncan, "one of the agents for the poor, to take charge of the pursuer's cause and conduct the same to its final issue."

The defender appealed to the Second Division of the Court of Session, and on the case appearing in the Single Bills objected to the admission of the pursuer to the poor's roll on the ground that one of the two reporters on the *probabilis causa litigandi* who had considered the pursuer's application and reported in favour of her admission was the agent who was acting for her at the time.

The Court, which consisted of the LORD JUSTICE-CLERK, LORDS DUNDAS, SALVESEN, and GUTHRIE, pronounced this interlocutor—

"Find that the proceedings before the agents for the poor on the remit to them by the Sheriff-Substitute were irregular and incompetent, in respect that the agent for the applicant was one of the two agents who reported in favour of the admission of the applicant: *Hoc statu* recal the interlocutor of 30th December 1912, and remit the petition to the Sheriff to remit of new to the agents for the poor to inquire and report and thereafter to proceed as accords."

Counsel for the Appellant—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent—W. A. Fleming. Agents—Shield & Purvis, S.S.C.

Saturday, January 25.

SECOND DIVISION.

(Before Seven Judges.)

[Sheriff Court at Alloa.

ALLOA COAL COMPANY, LIMITED *v.* DRYLIE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c* 58), *sec.* 1 (1)—*Injury by Accident—"Accident" — Pneumonia following Chill Caused by Partial Immersion in Water.*

A pump in a wet pit having been stopped in order to repair a defect, water accumulated in the pit bottom and rose to the knees of certain miners, who in consequence of the rising water had left their work, and were waiting for the cage to take them to the pit-head. One of the miners in consequence of this immersion contracted a chill, on which, after he had done some work on three subsequent days, pneumonia