paid the debt of Mr Kirk who no doubt was liable for the defender's debt. Further, the pursuer had no assignation of Mr Kirk's right as against the defender. If his assignation purported to be an assignation of Mr Kirk's right as against the defender it was *ultra vires*, because the only contract between the pursuer and Mr Kirk was that the pursuer should guarantee Mr Kirk's debt not the debt of anyone else.

Counsel for the pursuer were not called on.

LORD PRESIDENT—I cannot say the defence to this action is unstateable, because it has been very clearly stated by Mr Brown, but I do say that it is almost unarguable. I see no other result to the action than that which has been reached by the Lord Ordinary. I move your Lordships accordingly that we should affirm his judgment.

LORD JOHNSTON—There is a verbal criticism that can be made on the assignation, but I do not think it is one of any substance. The real situation is that Lord Ruthven's debt has been paid by the pursuer, and that the pursuer is entitled to recover.

LORD SKERRINGTON—I concur. The defence here is not merely technical, but devoid of all substance.

LORD MACKENZIE was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—Sandeman, K.C.—M. P. Fraser. Agents—Tait & Crichton, W.S.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—C. H. Brown. Agents—Hope, Todd, & Kirk, W.S.

Thursday, June 6.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

M'LEAN AND OTHERS *v.* GLASGOW CORPORATION.

Reparation — Negligence — Contributory Negligence—Tramway—Street—Foot-Passenger Run Down by Tramway Car—Duties of Driver of Car and of Foot-Passenger Crossing Street on Slant.

On a dark wet night in December a woman started to cross a busy street in Glasgow on the slant; before leaving the pavement she looked and saw a tramway car which was proceeding in the same direction as herself. On reaching the rails she did not look again to ascertain the position of the tramway car. If she had done so she would have observed that it was dangerous to proceed. She was knocked down by the tramway car and died as the result of her injuries. In an action for damages at the instance of her husband and children, *held* (*dub.* Lord Skerrington) that assuming there was negligence on the part of the defenders' servant, the driver of the car, damages could not be recovered as the accident was due to contributory negligence on the part of the woman in respect that she had failed to look to see the position of the car when she reached the rails on which it was approaching.

Observed per Lord Mackenzie that a person who crosses a street on a slant, going in the same direction as an approaching tramway car, takes an unnecessary risk, as calculation of the margin of safety and observation of the position of the car were both rendered more difficult by that mode of crossing the street.

Joseph M'Lean and others, the husband and children of Mrs Mary M'Lean, *pursuers*, brought an action against the Corporation of Glasgow, *defenders*, concluding for decree for payment of £250 to Joseph M'Lean and £100 to each of the children of Joseph M'Lean and Mrs M'Lean in name of damages for the death of Mrs M'Lean, who was knocked down by a tramway car driven by the defenders' servant and died from the injuries so received.

The defenders *pleaded*, *inter alia*—"3. The accident to the deceased Mary M'Kellar or M'Lean having been caused or materially contributed to by her own fault and negligence, the defenders are entitled to absolvitor."

On 17th November 1917 the Lord Ordinary (ORMIDALE), after a proof, assoilzied the defenders.

Opinion, from which the *facts* of the case appear—"This is an action at the instance of the husband and children of a Mrs M'Lean, who was knocked down by a tramway car belonging to the defenders on Saturday 30th December 1916, and so injured that she died half-an-hour afterwards.

"The accident took place about 9 p.m. as Mrs M'Lean was crossing Argyle Street (in Glasgow) from the east corner of Perth Street on the north side to a dairy on the south side.

"It was very dark at the time and place of the accident. The lighting restrictions were in force. The street lamps were lighted only on the north side of Argyle Street—the nearest lamp in front of the car being 70 yards distant—and the illumination from these was of a very subdued character. It was a 'right dirty wet night.'

"The offending car showed no light ahead except that proceeding from a lamp fixed on the middle of the dash about two feet from the ground. The lower half of that again was obscured.

"The witnesses Phillips and Jackson were in every way satisfactory. Their evidence was given with moderation and intelligence, and I have no doubt that they gave a perfectly truthful account of what, to the best of their observation and recollection, happened to Mrs M'Lean.

"According to these witnesses Mrs M'Lean left the north side of the street to cross over, when the car would be about twenty yards away to the west of her. She proceeded in a slanting direction, that is, with her back

slightly turned towards the car. To clear the rails on which the car was running she had to traverse about 20 feet. She had just reached the second rail when the car struck her and knocked her down on to the four-foot way. The motorman sounded his bell and applied the brakes almost simultaneously just before the woman was struck, and the car came to rest about a car's length from where the woman was struck by it. Another car proceeding in the opposite direction on the other set of rails was warned by Duffy to stop, and drew up 'nose to nose' with the offending car.

"Phillips said that the woman looked round as she left the pavement and would see the approaching car. Jackson saw her look round only once when she was either just on the first rail or between the rails. The car bell gave a double peal, and it was when the first peal was given that she looked round, the car being half its length from her. He thought that the woman was frightened or dazed, and seemed to hesitate. He thought that she was too far advanced to get either back or forward out of the way of the car. Duffy could not say whether the woman looked round at all, or how far off the car was when she reached the first rail.

"The first question is whether the pursuers have proved fault on the part of the defenders. The faults alleged are excessive speed, failure to keep a proper lookout, and failure to give timeous warning.

"The speed I take to have been between nine and ten miles an hour. The car was coasting on a down gradient, and had done so for about 100 yards. The motorman said that it would gather a little speed, but that he always kept it under control by means of the brake. He could not say when he had last applied the hand brake before the accident.

"What is excessive speed must always depend on the circumstances of the moment, and it appears to me that one of the most cogent considerations is the distance ahead that the driver can see. On the occasion in question the night was very dark, and it was raining. The car was a vestibule car, and the glass by which the driver's platform was enclosed was so obscured by the rain that it was impossible to see through it. To counteract this the driver had let down the 18-inch wide window in front of him about 6 or 8 inches with the result that he could see right ahead. Everything to the side of that line of vision remained in obscurity. The dash light lit up the tramway in front for 3 to 5 yards. Beyond that the driver could see nothing. On the occasion in question he was not sounding his bell as he came along.

"Now to drive ahead in a pitch black and very wet night with such a very restricted outlook at nine or ten miles an hour without notice of the car's approach except that given by the partially obscured dash-light was in my opinion to drive at an excessive speed. The rate of speed must have some relation to the length of effective outlook or view ahead, and also to the distance within which the car can be brought to a stop. A good stop going at eight miles an hour would be about a car's length or 30 feet, *i.e.*, twice the distance that the driver could on the night in question see in front of him. It may be highly inconvenient to go at a rate slower than the speed usual and perfectly safe in daylight, or even at night when the streets are well lighted, but under the conditions proved to have been existent on the night in question it was the duty of the driver to proceed with the utmost care and circumspection, and in my judgment at a slower rate than the car was in fact travelling. His speed was in the circumstance excessive.

"According to the driver he only saw Mrs M'Lean when she was 3 or 4 feet from the car and when she was on the second of the rails she had to cross. That in my opinion is not consistent with the driver having kept a proper lookout even under the prevailing conditions. If his attention had been directed to the tramway straight ahead of him—the only direction in which he could usefully look—he was bound to have seen the woman at a distance of 9 to 15 feet. It was for the driver to explain how he failed to notice her sooner, and he entirely failed to do so. It may be that he exaggerated the difficulties of seeing about and in front of him, and according to the account given by Philips and Jackson he must have first seen Mrs M'Lean at a greater distance than 3 or 4 feet, but whether that be so or not the evidence to my mind establishes that he failed to keep a proper lookout.

"As regards the alleged want of warning, pursuers' counsel did not press this point, and the driver appears to have sounded his bell as soon as he had notice of Mrs M'Lean's presence on the rails.

"I am prepared to hold that the pursuer has proved negligence or fault on the part of the defenders.

"But the further question has to be answered—have the defenders proved that Mrs M'Lean was herself guilty of contributory negligence? Before attempting to cross the street it was Mrs M'Lean's duty to look to see whether she would be in safety to do so. Philips says that she did so look, and would see the car coming. Jackson did not see her look round until she was on the rails and the car bell sounded. Assuming that she did look up the street before leaving the pavement she would see the car about 20 yards off. Was she justified in attempting to cross in front of it without paying further heed to the car? In my opinion she was not. Before entering upon the actual danger zone, *i.e.*, the tramway rails, it was her duty again to look. It seems to me that it is what nine people out of ten would do, and they would do it just because it is a reasonable precaution in their own interest to take. The dicta of the Lord Justice-Clerk in *M'Allister* v. *Corporation of Glasgow*, 1917 S.C. 430, 54 S.L.R. 401, are in point—'If people proceed to cross tramway lines when they know or ought to know that there is an approaching car in very close proximity, and put that car outwith their range of vision without looking previously to see how far off it is

before they enter the danger zone, they have themselves to blame if they get hurt.' The judgment in *Watson* v. *Corporation of Glasgow*, 1917, 54 S.L.R. 593, is to the same effect. Here Mrs M'Lean was crossing the street diagonally—slanting across. She had nearly 20 feet to go to clear the first set of rails. The car had about three times that distance to go, but it was travelling three times as quickly as Mrs M'Lean. Obviously it was a very near thing, and on the assumption that she knew of the car's approach Mrs M'Lean was not entitled, without watching the car closely, to take the risk. As Mrs M'Lean is dead it is impossible to say with certainty what was in her mind, or whether she saw the car at all. My own impression is that Jackson is probably right, and that Mrs M'Lean did not know of the car's approach until she heard the bell and looked up, when it was too late. But if she did not look to see before leaving the pavement then she was doubly in fault. Just as in my opinion on a night so dark and at a place so badly lighted the car driver should have proceeded with special care and modified speed, so I think a foot-passenger in attempting to cross the street should have exercised even more than ordinary caution. It is only a conjecture, but I fancy that Mrs M'Lean as she angled across the street had her attention centred on the westward-bound car which would be directly in her line of vision. But however that may be, she failed in my opinion to exercise reasonable care in attempting to cross the street, and so contributed to the distressing accident which brought about her death.

"My verdict accordingly is for the defenders."

The pursuers reclaimed.

The following were referred to:—*Frasers* v. *Edinburgh Street Tramways Company*, 1882, 10 R. 264, 20 S.L.R. 192; *M'Allester* v. *Corporation of Glasgow*, 1917 S.C. 430, 54 S.L.R. 401; *Watson* v. *Corporation of Glasgow*, 1917, 54 S.L.R. 593.

LORD PRESIDENT—In this case I am clear that the death of this unfortunate woman was due to her own fault. Confessedly the pursuer's wife started from the pavement when the approaching car was in view, about 20 yards off. Then according to the evidence for the pursuers the car was 8 or 9 yards off when the deceased reached the first set of rails. It is unnecessary to consider whether these figures are quite accurate or not; and it is not sufficient to say, as two of the pursuers' witnesses do, that they thought the woman could cross in safety. No doubt she herself thought she could cross in safety, otherwise she would not have tried to do so. She looked up, according to the evidence, and saw the approaching car, and doubtless made up her mind that if she walked across at her usual pace she would be enabled to reach the other side. But when she approached the rail it was, I hold, plainly her duty then to look up once more and see where the approaching car was, and the mere fact that she may have thought when she started from the pavement that she would have time to go did not at all absolve her from the very simple duty of looking to see where the approaching car was when she was approaching the nearest pair of rails. If she had done so, then according to the evidence she would have seen this car some 8 or 9 yards away, and I cannot for a moment doubt that seeing it she would have refrained from crossing.

The dilemma in this case is either she looked up and saw the approaching car or she did not. If she did she was guilty of great negligence in attempting to cross; if she did not she was guilty of equally great negligence in failing to observe the position. Whichever view one takes it seems to me that she was the direct author of her mishap.

I am of opinion on the whole that the pursuers have failed to prove excessive speed on the part of the car, but it is unnecessary to express any concluded opinion upon that question. In my view the evidence clearly demonstrates that the proximate cause of this disaster was the fault of the pursuer's wife.

LORD JOHNSTON—I think there is a preliminary consideration in this case which aids very much to explain it and to lead to judgment. The driver and the deceased woman were very differently placed in relation to the general circumstances in consequence of the state of the weather on the occasion. It was a dirty night, dark, and with a strong drizzling rain. Visibility was not good, but for the driver driving against the rain and with a limited sphere of vision the possibility of seeing was different from that of the deceased, who was on the street with a much wider sphere of vision, and who, in particular, had not a driving rain to contend against.

It may be that the driver did wrong in so enclosing himself as so much to limit the possibility of vision, but that is, I think, a matter which affects the question of his speed. I am satisfied that he was driving at the usual speed, and that if he had slowed down at all it would have been something unusual. But the question is—Did the circumstances not require that he should drive at an unusual speed—that is to say, slower than usual? I think that they did, and that the very fact that he had so to enclose himself as to limit his sphere of vision imputed that as a consequence. I do not think the Lord Ordinary is justified in raising the admitted speed of the car of seven or eight miles an hour to nine or ten. But I should be prepared to hold with him that if the circumstances were such as to require the driver to confine his sight to what he could see through an 8-inch opening of the window before him, the top of which was brought down to just about the level of his chin, that the driver's speed was not unusual regarded from the general point of view, but was excessive in the circumstances. On the other hand the late Mrs M'Lean was in the open air, and there are several witnesses who speak not only to seeing her, but

to seeing not only the car which ran over her but also the car which was approaching on the other line, with sufficient distinctness to know what the situation was, though at the same time it may be that the car-driver was so confined in his vision as not to see her.

As far then as I can judge from the evidence, had she looked Mrs M'Lean would have been aware that the car was coming—nay, I think she would have been aware that two cars were coming in different directions, and that she would have to pass between them. The position of matters was perfectly well known to the men on the street *ex adverso* of where she was attempting to cross, and the conclusion I come to is that had she looked she must have known it also, and that if she did not know it it was because she did not look and therefore did not see. The night was indeed dark, the weather was bad, and she may have misjudged distances, but she could not but be aware if she looked that there was a car coming, and if this was the state of matters and she chose to pass in front of it she took, I think, the risk of her own judgment. That was even then, under the circumstances, running a risk which she had no business to take if she was to lay responsibility for the result on the Corporation of Glasgow as owners of the tramways. I think therefore that Mrs M'Lean was guilty of contributory negligence which was the proximate cause of her own death, and that the Lord Ordinary has justly assoilzied the defenders.

LORD MACKENZIE—I think with your Lordships that this case may be disposed of on the ground of contributory negligence, and that for the reasons already stated. I would only add that a person who crosses a street on a slant, going in the same direction as an approaching tramway car, takes an unnecessary risk, and that for two reasons—it makes it more difficult to calculate what the margin of safety is, and it makes it necessary to turn the head much further round in order to see the position of the on-coming car. Consequently the risk is greater than if the street is crossed in the safer manner of crossing at right angles.

As regards the question of excessive speed, I am not to be taken as concurring with the Lord Ordinary on that branch of the case, but it is unnecessary to go into that matter.

LORD SKERRINGTON—The defenders have established that the deceased contributed to her own death by crossing the street. But that is not the issue in a case of this kind. It is necessary for the defenders to demonstrate from the evidence that the person injured contributed to the injury by her negligence and rashness. I have some difficulty as to whether the Lord Ordinary was justified in inferring from the circumstances disclosed in the evidence that this woman was guilty of rash conduct. At the same time my opinion is not sufficiently clear to justify me in dissenting from the judgment which your Lordships propose.

The Court adhered.

Counsel for the Pursuers—J. A. Christie—Mackinnon. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Defenders—Morton, K.C.—Forbes. Agents—Simpson & Marwick, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, June 11.

(Before the Lord Justice-General, Lord Mackenzie, and Lord Skerrington.)

MACKENNA *v.* DUNN.

Justiciary Cases—War—Paper Restriction—"Advertising Circular"—Bookmaker's Coupons—Paper Restriction (Posters and Circulars) Consolidation Order, 22nd October 1917 (*S.R. & O.*, 1917, *No.* 1078), *Articles* 6 *and* 13.

Justiciary Cases—War—Defence of the Realm—"Procuring" the Commission of an Offence—Placing Order for Prohibited Article with Printer—Defence of the Realm Regulations 1914, *sec.* 48.

A bookmaker employed a printer to print football coupons for him. In the coupons odds were offered weekly by the bookmaker upon the results of football matches. The coupons were designed to be used for placing bets with the bookmaker but his name did not appear upon the coupons. He was, however, known as the sender of the coupons by persons in the habit of betting on football matches. The coupons were usually sent to regular customers of the bookmaker or to persons who asked for them. Several coupons were sent, which could be handed on by the recipient to his friends, and the bookmaker's friends and agents were also in the habit of passing the coupons round amongst customers of the bookmaker and persons who asked for coupons. The coupons in question were seized in the printer's premises. The bookmaker was charged with making and printing by the hand of the printer 32,000 advertising circulars contrary to Articles 6 and 13 of the Paper Restriction (Posters and Circulars) Order of October 22, 1917, or otherwise with causing the printer to make and print for him the advertising circulars contrary to that Article, and thus procuring the commission by the printer of an act prohibited by that Order, contrary to section 48 of the Defence of the Realm Regulations 1914. *Held* (1) that the coupons were advertising circulars in the sense of the Paper Restriction Order; (2) that the bookmaker was guilty of an offence in that he had procured the commission of a deed prohibited by the Paper Restriction Order.