onus which is thus laid upon him, and in my opinion he has discharged it by establishing the second and third of the foregoing propositions. He has proved that the bursting of the blisters happened in the course of his employment and arose out of it. This bursting necessarily resulted in some injury and consequent incapacity although the appellant continued to work for some days thereafter. The ensuing suppuration is found by the arbitrator to have been caused by dirt having got into the cuticle of the hand where it had been blistered. The incapacity for which compensation is craved was the result. The attack of a microbe or bacillus causing injury is an "accident" in the sense of the Act—*Brintons Limited*, [1905] A.C. 230. It is plain on these findings that had there been no bursting of blisters there would have been no incapacity at all. The bursting is thus a *causa sine qua non* of the ultimate incapacity, which is the result of the bursting plus the suppuration. There is no break in the chain of causation, and the suppuration is not a *novus actus interveniens*, but a cause operating in conjunction with the bursting to produce the joint effect.

There are three cases which at first sight seem hostile to the appellant's contentions —(1) In *Bellamy* (6 B.W.C.C. 53) a weaver got some dust in his eye while at work. A microbe at a time which could not be determined entered the eye which the workman had rubbed and destroyed it. Compensation was refused. The *ratio decidendi* seems to have been that the first occurrence, the dust getting into the eye, was not an accident causing injury, and that the workman had failed to prove that the attack of the microbe—the sole accident—occurred in the course of the employment and arose out of it.

(2) In *Doolan* (11 B.W.C.C. 93) the decision is explained on the same grounds.

(3) In *Grant* (1919 S.C. (H.L.) 62, [1919] A.C. 765) the decision seems to proceed on the footing that the only accident was the attack of the germs which produced blood-poisoning. The scratch on the leg was apparently regarded as having caused no injury, and as thus being causally unconnected with the workman's death, or it may be that it was held to be enough that the workman had proved that one of two combined causes occurred in the course of the employment and arose out of it.

On the other hand there is a large body of authority which supports the contention of the appellant. I content myself with referring to the following cases, the facts of which most closely resemble those of the present case:—*Dunham*, [1902] 2 K.B. 292; *Euman*, 1913 S.C. 246; *Saddington*, 10 B.W.C.C. 624; and *Laverick*, 12 B.W.C.C. 176.

I therefore am of opinion that the question of law (as properly expressed, namely, "Was I entitled to hold") should be answered in the negative.

The Court found that the arbitrator was not entitled on the facts stated to hold that the appellant had not sustained injury by accident within the meaning of the Workmen's Compensation Act.

Counsel for the Pursuer and Appellant—Burnet. Agent—John Baird, Solicitor.

Counsel for Defenders and Respondents—Moncrieff, K.C. — Reid. Agents — Fraser, Stodart, & Ballingall, W.S.

Saturday, June 23.

SECOND DIVISION.

[Lord Murray and a Jury.

LIVINGSTONE *v.* STRACHAN, CRERAR, & JONES.

Evidence—Competency—Hearsay—Attempt to Discredit by Anticipation Evidence which a Witness, if Examined, Might be Expected to Give—Evidence (Scotland) Act 1852 (15 *Vict. cap.* 27), *sec.* 3.

Evidence — Admissibility — Hearsay — Admission by Servant of Defender—Whether Statement by Servant Equivalent to Statement by Party Himself.

Process—Jury Trial—Bill of Exceptions—Undue Admission of Evidence—Failure to Show that Exclusion of Evidence Objected to but Allowed Could not have Led to Different Verdict—Court of Session Act 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 45.

At a trial by jury of an action of damages for personal injury in which the pursuer averred that he had been run down by a motor van belonging to the defenders and driven by one of their servants, the pursuer adduced a skilled witness who stated that he had examined the *locus* of the accident and had had subsequently a conversation with the driver. On being asked by pursuer's counsel, "What did he (the driver) say to you about the accident?" counsel for the defenders objected to this line of evidence, but the presiding Judge repelled the objection on the ground that a statement by the defenders' representative was *in pari casu* with a statement by the defenders themselves and therefore admissible.

On a bill of exceptions the Court (*diss.* Lord Murray) sustained the objection and ordered a new trial, *holding* (1) that the evidence in question could not be admitted either (*a*) under the provisions of section 3 of the Evidence Act 1852 as proof that a witness had made extrajudicially a different statement from that which he might if examined make in the witness-box, or (*b*) as being *in pari casu* with an admission made by the party himself; and (2) that the pursuer had failed to discharge the onus of showing that the exclusion of the evidence to which objection was taken could not have led to a different verdict.

Opinion (*per* Lord Murray) that section 3 of the Evidence Act 1852 was in the circumstances stated inapplicable, but that the evidence in question was competent as being *in pari casu* with a statement made by the defenders themselves.

Evidence — Admissibility — Statements Obtained by Way of Precognition.

Opinion (*per* Lord Murray) that "proof of a statement made on precognition is as matter of law competent and admissible, but it is always subject to the undoubted discretion of the judge to exclude proof of such statements where the circumstances under which the evidence was taken are such as to deprive it of any value as being fair and independent testimony" (Lord Justice-Clerk Inglis in *Macdonald* v. *Union Bank*, 2 Macph. 963, at 969), "or where there is reasonable ground for concluding that the testimony is merely 'what an unscrupulous agent has extracted by leading questions, suggested answers, and other unfair devices in precognition.'"

Process — Jury Trial — New Trial — Pursuer's Averments Inconsistent with Facts as Disclosed at Proof—Street Accident—Description of the Way in which Accident Happened.

In an action of damages for personal injury in which the pursuer averred that he had been run down by the defenders' motor van, counsel for the defenders at the trial objected to the line of evidence with regard to the pursuer's movements at the time when the motor van struck him, upon the ground that the case thus made was totally different from that averred on record. The presiding Judge having repelled the objection and allowed the evidence the defenders excepted to the ruling. *Circumstances* in which the Court (*diss.* the Lord Justice-Clerk and Lord Ormidale) *disallowed* the exception, *holding* that the evidence sought to be excluded was not necessarily totally inconsistent with the case made on record.

The Evidence (Scotland) Act 1852 (15 Vict. cap. 27), sec. 3, enacts—"It shall be competent to examine any witness who may be adduced in any action or proceeding as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified."

The Court of Session Act 1850 (13 and 14 Vict. 36), sec. 45, enacts—"A bill of exceptions shall not be allowed in any cause before the Court of Session upon the ground of the undue admission of evidence if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict than that actually pronounced. . . ."

Duncan Livingstone, baker, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against Strachan, Crerar, & Jones, manufacturing clothiers, Glasgow, *defenders*, for payment of £750 as damages for personal injuries which he alleged he had sustained through being knocked down by a motor van belonging to the defenders and driven by one of their servants.

The pursuer averred, *inter alia*—"(Cond. 2) On or about 17th October 1921 the pursuer left his employment at Riverside Mill Company, Glasgow, at the usual hour, 5 p.m., and came along Springfield Lane, Glasgow, and reached Paisley Road, Glasgow, at 5·5 p.m. He stood there almost opposite Crookston Street, Glasgow, waited to see that the way was clear for him to pass from the north to the south side of Paisley Road in order to get to the tramcar coming from Glasgow, and going in the direction of Ibrox to convey him to his home. . . . (Cond. 3) The point at which pursuer was standing for his tramcar was opposite the car stopping-place at said Crookston Street for cars going towards Ibrox, and on a car arriving at the stopping-place and being brought to a stop by the conductor, the pursuer after looking round carefully to see that no vehicles were coming in the direction to interfere with his passage before he walked across the street, started from the pavement and had almost reached the nearest car rail when he was knocked down by a motor car belonging to and driven by defenders' driver as after mentioned. . . . (Cond. 4) Just as the pursuer had begun to walk across the street a motor car, No. G.A. 9667, belonging to defenders and driven by Alexander Wright, 18 Nelson Square, Barlinnie, servant of the defenders in the course of the defenders' business, came along the Paisley Road going towards Glasgow, and without giving due notice of its approach or a proper lookout being kept by defenders' servant collided with the pursuer, the force of the impact dragging him a distance of ten yards. . . . (Cond. 7) The said injuries to the pursuer were caused by the fault and negligence of defenders or their servant for whom they are responsible in not giving due warning of his approach or sounding his horn as was his duty to do, or keeping a proper or careful or any lookout. Had the defenders' said driver driven said car carefully and been looking ahead as was his duty to do he would have seen the pursuer crossing the roadway in front of his car, and he could easily have drawn up or avoided contact with and consequent injuries to the pursuer. . . ."

The cause having been remitted to the Second Division of the Court of Session and an issue allowed in ordinary form, the cause was tried before Lord Murray with a jury, who returned a verdict for the pursuer and assessed the damages at £250.

The defenders lodged a bill of exceptions, which set forth—"Counsel for the pursuer adduced as his first witness Robert Craig Boyce, civil engineer, 144 St Vincent Street, Glasgow, who had prepared a plan, and who gave evidence with regard to the *locus* of the accident. The witness thereafter deponed that on 16th November 1922 (being about thirteen months after the occurrence of the accident) he met at the *locus* the driver of the defenders' car which was concerned in the accident. The witness was then asked by counsel for the pursuer what the said driver had said to him on that occasion about the accident. Thereupon counsel for the defenders objected

to the question and line of evidence as being hearsay evidence and incompetent. The presiding Judge repelled the objection and allowed the evidence. Whereupon counsel for the defenders respectfully excepted to his Lordship's ruling. And the said witness then deponed as follows with regard to said conversation with the defenders' driver:—'(A) He said that he was approaching Springfield Lane, and he got a signal from the points policeman to draw up. He did so, and that was about 23 yards distant from the points policeman. (Q) How far would 23 yards distant be on the plan?—(A) Practically in line with the west building line of Springfield Lane. (Q) That is near the end of the word "here" in the "cars stop here if required"?—(A) Yes. (Q) Did he say when he went on?—(A) That was 23 yards distant, but he moved on until he was within 15 yards of the policeman and waited a short lapse of time until he got the signal to go on, and then he proceeded forward. He (the driver) saw no one in front and continued on till a point, he said, 5 yards east of the policeman, when a man was knocked down by the front of his motor. (Q) And did you ask him (the driver) how he made the distance 5 yards?—(A) Well, he seemed very hazy about that information and he said that he did not measure the distance, that it might be different, because I had been informed by the points policeman that the distance to the east was 13 yards. (Q) Did you press him about the distance?—(A) I did, but he seemed hazy about it. (Q) What did he say that made you think he was hazy?—(A) Well, he said, "I am not sure; I did not measure it, but I think it would be about 5 yards." *By the Court*—(Q) Past the point at which the policeman was standing?—(A) Yes, to the east of the points officer. *Examination continued*—(Q) Did he say anything else about the accident?—(A) He said he saw no one in front. (Q) Did he say when he first saw the pursuer?—(A)—When he knocked him down. (Q) He did not say anything else?—(A) No. *Cross*—(Q) You made your examination of the *locus* in January?—(A) 21st January this year. (Q) What were you doing at that place in November?—(A) I was asked by the pursuer's agent in this case to go down and meet a witness along with him. (Q) What right had you to go and cross-examine any witness of the accident as you have told us you did?—(A) I simply was desirous of verifying the information that had been given me by the points policeman. (Q) What was your *locus* in this case? Were you assisting the agent in preparing the case?—(A) No. I wished to be thoroughly conversant with the case as it would be presented here so as to be able to give evidence. (Q) Were you there as an engineer or in what capacity?—(A) I was there in the capacity of an engineer. (Q) What has an engineer got to do with pressing the witness?—(A) I did not say I pressed the witness. (Q) You pressed him about "distance"?—(A) I did not say I pressed him about distance.' Later in his evidence for the pursuer the same witness was asked in re-examination—'Did the points policeman tell you where he was on the night in question?' Whereupon counsel for the defenders objected to the question as incompetent and inadmissible. The presiding Judge repelled the objection, whereupon counsel for the defenders respectfully excepted to his Lordship's ruling. The witness stated in reply to said question—'The points policeman told me that that (being a particular point in Paisley Road defined by the witness in cross-examination) was the position he was in at the time of the accident.' Counsel for the pursuer at a later stage in the trial adduced the pursuer as a witness and led evidence from him to prove that before the accident he had started to cross Paisley Road in order to catch his tramcar, an Ibrox car, which was going west; that said car moved off, and that he had then wheeled right about and come back to where he started from. Counsel for the defenders thereupon objected to the line of evidence and to any further evidence following the same line as incompetent upon the ground that the case thus made in evidence by the pursuer himself was totally different from that averred on record, and alternatively moved for the withdrawal of the case from the jury. The presiding Judge repelled said objection, refused the motion, and allowed the evidence, whereupon counsel for the defenders again respectfully excepted to his Lordship's ruling. The pursuer then deponed as follows:—[*Here followed the evidence*]. Thereafter at various stages in the pursuer's case evidence was led from the witnesses James Murdoch, Adam Dunlop, and John Callan in support of the same account of the occurrence, and counsel for the defenders repeated his objection which was again refused and asked that his exceptions to the presiding Judge's ruling should be held in all cases as applicable to each recurrence of the respective lines of evidence. To this the presiding Judge agreed and directed accordingly that the objections and exceptions should be recorded only where they first were taken, the objection to the general line of evidence being held sufficient to cover the subsequent cases. The evidence of Murdoch was as follows:—[*Here followed the evidence*]."

The defenders having obtained a rule on the ground that the verdict was contrary to the evidence, the bill of exceptions and the rule were heard together.

Argued for the pursuer—(*a*) The bill of exceptions should be disallowed. 1. *With regard to the objection to the questions put to the witness Boyce.* (1) It was competent to ask Boyce what the driver had said to him in order to test the driver's credibility—Evidence (Scotland) Act 1852 (15 Vict. cap. 27), sec. 3—and there was nothing in the section which rendered it incompetent to anticipate the driver's evidence by asking Boyce the questions objected to before the driver had himself been examined—*Shearer* v. *M'Laren*, 1922 S.L.T. 158; *Gilmour* v. *Hansen*, 1920 S.C. 598, 57 S.L.R. 518; *Whyte* v. *Whyte*, (1884) 11 R. 710, 21 S.L.R. 470. (2) In any event the driver's evidence on the point in question did not substantially differ

from that of Boyce, and accordingly the exclusion of Boyce's evidence could not have led to a different verdict from that actually pronounced. That being so the necessity for a new trial was avoided — Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 45. 2. *With regard to the objection that the pursuer's line of evidence was totally different from the case averred on record.* The pursuer's evidence was not substantially different from his averments on record, and in any event it was not open to the defenders to take the objection looking to the fact that the defenders' own evidence disclosed a case quite different from that which they, the defenders, averred on record. (*b*) The rule should be discharged. The verdict was not contrary to the evidence—*Clerk* v. *Petrie*, (1879) 6 R. 1076, 16 S.L.R. 626, *per* Lord Justice-Clerk (Moncreiff) at 6 R. 1077, 16 S.L.R. 627, and Lord Gifford at 6 R. 1078, 16 S.L.R. 627. [The case of *Binnie* v. *Black*, 1923 S.L.T. 98, was referred to by Lord Anderson.]

Argued for the defenders—(*a*) The bill of exceptions should be sustained. 1. *With regard to the objection to the questions put to the witness Boyce.* (1) It would have been competent to ask Boyce what the driver had said to him in order to test the driver's credibility provided the driver had previously given his evidence, but it was an abuse of process and incompetent to lead Boyce's evidence in anticipation of that of the driver—*Gall* v. *Gall*, (1870) 9 Macph. 177, *per* Lord Deas and Lord Kinloch at 178, and Lord President (Inglis) at 179, 8 S.L.R. 144. (2) Boyce's account of what the driver said to him was equivalent to a precognition taken by him from the driver, and it was not competent under section 3 of the Evidence (Scotland) Act 1852 to contradict a witness by what he said on precognition—Dickson on Evidence (3rd ed.), section 265; *M'Culloch* v. *Glasgow Corporation*, 1918 S.C. 155, 55 S.L.R. 178; *Macphee* v. *Glasgow Corporation*, 1915 S.C. 990, 52 S.L.R. 772; *Finlay* v. *Glasgow Corporation*, 1915 S.C. 615, 52 S.L.R. 446; *Mills* v. *Kelvin & James White, Limited*, 1912 S.C. 995, 49 S.L.R. 725; *Admiralty* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1909 S.C. 335, 46 S.L.R. 254; *Sheridan* v. *Peel*, 1907 S.C. 577, 44 S.L.R. 406, *per* Lord President (Dunedin) at 1907 S.C. 579, 44 S.L.R. 407; *Robertson*, (1873) 2 Couper 495, *per* Lord Ardmillan at 496; *Luke*, (1866) 5 Irvine 293 at 294; *Emslie* v. *Alexander*, (1862) 1 Macph. 209, *per* Lord Neaves and Lord Justice-Clerk (Inglis) at 210; *Aberdeen Magistrates* v. *More*, (1813) Hume 502; *The Lauderdale Peerage*, (1885) 10 App. Cas. 692, *per* Earl of Selbourne, L.C., at 710; *Dysart Peerage Case*, (1881) 6 App. Cas. 489, *per* Lord Watson, Lord Selbourne, L.C., and Lord Blackburn at 509. *Inch* v. *Inch*, (1856) 18 D. 997, was distinguishable. In that case a party had volunteered a statement. *Gilmour* v. *Hansen*, 1920 S.C. 598, 57 S.L.R. 518, *per* Lord President (Clyde) at 1920 S.C. 604, 57 S.L.R. 520, was referred to. 2. *With regard to the objection that the pursuer's line of evidence was totally different from the case averred on record* counsel cited—*Compagnie des Forges, &c., d'Homecourt* v. *Gibson & Company*, 1920 S.C. 247, 57 S.L.R. 260, *per* Lord President (Strathclyde) at 1920 S.C. 257, 57 S.L.R. 266; *Mitchell* v. *Caledonian Railway Company*, 1910 S.C. 546, 47 S.L.R. 456; *Littlejohn* v. *Brown & Company, Limited*, 1909 S.C. 169, 46 S.L.R. 42. (*b*) The rule should be granted. The verdict was contrary to the evidence.

LORD JUSTICE-CLERK—This action, which was tried before Lord Murray and a jury, arises out of an accident which occurred in a Glasgow street. The pursuer alleges that on 17th October 1921 he was knocked down and injured by a motor car belonging to the defenders, and that the accident was due to the fault of the defenders' driver. To the precise circumstances in which the mishap occurred I shall have at a later stage more precisely to advert. At the moment it is sufficient to say that the defenders deny the fault imputed to them, and attribute the accident to the contributory negligence of the pursuer.

At the trial the first witness adduced by the pursuer was Robert Craig Boyce, who in evidence described himself as a civil engineer and surveyor, and who stated that he had prepared many plans for similar cases to this. In point of fact he produced a plan of the *locus* of the accident in question which had been prepared by him. But Mr Boyce was not content to confine himself to the limited province of a skilled witness who had prepared a plan. He elected—or the pursuer's agent elected for him—to give evidence on the merits of the case. In particular, he deponed that he met the driver of the defenders' car at the *locus* of the accident on 16th November 1922 and had a conversation with him. He was asked by the pursuer's counsel, "What did he say to you about the accident?" The defenders' counsel thereupon objected to the line of evidence, but the Lord Ordinary allowed it on the ground that it was a statement by the defenders' representative. Counsel for the defenders excepted to that direction.

In my judgment the evidence which was tendered by Mr Boyce regarding this matter was incompetent and should not have been admitted. Mr Macquisten, for the pursuer, sought to justify it on the ground that under section 3 of the Evidence Act 1852 (15 Vict. cap. 27) it is competent to prove that a witness has made extrajudicially a different statement from that which he made in the witness-box. And Mr Macquisten openly avowed that his question to Mr Boyce was inspired by the fear that the defenders' driver, if and when adduced as a witness for the defenders, might give evidence less favourable to the pursuer than he (Mr Macquisten) conceived his statement to Mr Boyce to have been. I know of no other ground upon which it can be sought to justify this hearsay evidence. Now it is necessary in dealing with the argument of the pursuer's counsel to bear in mind the precise terms of section 3 of the Evidence Act to which I have already referred. It reads as follows:—"It shall be competent to examine any witness who

may be adduced in any action or proceeding, as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified." Now that section, in my judgment, postulates as a condition of its operation that the witness has in point of fact given evidence, before proof is admissible, that on an occasion specified he has made a different statement from that made by him in the witness-box. It is not, I think, competent under that section to assume (*a*) that a certain witness will be examined, and (*b*) that he will give certain evidence, and then by anticipation to contradict a statement which he may if examined be expected to make. That is what the pursuer in this case has done. But then the witness in question may not be called at all, and if called, may not make the statement which is feared. To such circumstances the Evidence Act, in my view, has no application at all. Mr Macquisten argued that he merely short-circuited procedure by adopting the course which he took. I cannot assent to that view for reasons to which I shall presently allude. But whether it was short-circuiting or not, the Act of Parliament, whose authority is invoked, lends no countenance to such a proceeding. Had the driver of the car been called, and had he on oath made a statement differing from that which he made to Mr Boyce, it would then have been open to the pursuer to move the Court to allow him to recall Mr Boyce in order to prove that at a specified time and place the driver had made a different statement to him. But what happened in this case demonstrates the inaptness and indeed, in my view, the incompetency of the course which was followed, for by the admission of the pursuer's counsel the evidence given by the defenders' driver did not materially differ from the statement which he had made to Mr Boyce. In these circumstances I fail to see that Mr Macquisten can seek and find sanctuary in the Evidence Act of 1852. The procedure contemplated by the statute is perfectly plain. The path which it points out is well defined. Mr Macquisten has not followed it. He preferred a short cut, and short cuts are proverbially dangerous. I therefore think that the procedure followed, and by consequence the question put, were incompetent.

Now this might in some cases be regarded as a narrow ground of judgment imposing as it does a severe penalty, viz., the upsetting of the verdict of a jury. But not so in this case. In the first place I cannot say too plainly that to turn a skilled witness into a witness on the merits in the manner in which that was done at the trial of this action is an undesirable if not indeed a reprehensible proceeding. The province of a surveyor who produces a plan in such a case as this is well defined and familiar. In order to prepare his plan it may well be that the assistance of an eye-witness to the accident may be desirable and indeed essential. But Mr Boyce would appear to have travelled far beyond that province. He seems to have busied himself in the management of the pursuer's case. He appears to have played off one witness against another and to have "pressed"—I quote his own word—a witness whose testimony he did not in the first instance deem satisfactory. This is, I think, quite illegitimate. "*Ne sutor ultra crepidam.*" A skilled witness who becomes an active protagonist of one of the parties to an action places himself in a false position which no Court, in my judgment, should regard with favour far less with definite approval.

But the matter does not end there. It would appear that the evidence taken by Mr Boyce from the defenders' driver was taken from him by way of precognition. The pursuer's agent was present, and Mr Boyce seems to have acted on his behalf in eliciting the statement in question. Now, without deciding, or indeed suggesting, that if the procedure contemplated by the statute had been followed, the statement might not have been competently proved, even if made in precognition to the pursuer's agent—for I apprehend that it is unnecessary to decide any such question in this case—I am clearly of opinion that the procedure followed was tainted by such irregularity as to render it quite inadmissible.

But further, I cannot regard the course which was followed as dictated by the perhaps laudable purpose of short-circuiting procedure. In any event, whether it was so intended or not, that procedure was in my judgment also intended, or at any rate it was calculated, to impregnate the minds of the jury in advance with suspicion of and prejudice against the defenders' driver. It must not be forgotten that we are here dealing with a highly susceptible tribunal, sensitive to "atmosphere" in no ordinary degree. And I cannot doubt that the fact that the question put to Mr Boyce induced the jury, to say the least of it, to be astute to weigh in fine scales the evidence of the driver when it was adduced by the defenders. Indeed the jury got a broad hint that they might expect to see later on an unreliable witness whose testimony had to be checked and controlled in advance by the evidence of a presumably disinterested person like Mr Boyce. Such procedure is simply fatal to a fair trial, and I desire to say in language which cannot be misunderstood that, whether it was merely thoughtless or whether it was designed, it merits and it receives the reprobation of the Court.

It only remains to add on this part of the case that I cannot regard a statement by the driver as equivalent to a statement by the defenders. The Lord Ordinary assimilates the statement of the driver to a statement by his employers. With great respect I do not agree. It may well be that if the defenders had made a statement of the nature attributed to their driver it could have been proved, free of the trammels of the Evidence Act. But I decline to

hold that a statement of a servant of an employer—even if he be a servant to whom blame is imputed for an accident—is other than hearsay, that he is not a witness in the sense of section 3 of the Evidence Act, or that his statements can be proved in any other way than that Act prescribes. I am of opinion, therefore, that the first exception falls to be sustained.

As regards the second exception, it arises in this way. The Court put to Mr Boyce this — "You have given in evidence an assumed position on the plan of the points policeman. Was that position fixed by you as being the position in which you actually saw the points policeman standing, or as being the position in which somebody told you that the points policeman usually stood?" Mr Boyce replied—"It was the position I observed the points policeman to be in with my own eyes on various occasions." The pursuer's counsel thereupon in re-examination asked Mr Boyce—"Did the points policeman tell you where he was on the night in question?" The defenders' counsel objected to the question, the Lord Ordinary allowed it, and the defenders' counsel excepted. The question appears to me to have been quite legitimate. It was a natural corollary of the question put by the Lord Ordinary, and it does not appear to me to have been put for the purpose of contradicting the points policeman in advance. The Evidence Act of 1852 therefore has no bearing on the matter. The question was put in order to elucidate the position of the points policeman on the occasion of the accident. That was, I think, an entirely unobjectionable proceeding. I am therefore of opinion that the second exception fails.

But, again, that does not end the matter. There is a third exception. The defenders contended that the evidence adduced by the pursuer at the trial was disconform to his case on record and should not have been allowed. In this contention I think that the defenders were well founded. The pursuer's averments, in my judgment, plainly and unambiguously imply that the pursuer was injured in the course of his outward journey from the north pavement in Paisley Road. The evidence discloses that he had changed his course before he was struck by the defenders' car—that he had in point of fact ceased his journey southwards and had turned round and taken a step in the opposite direction before he was knocked down. In my opinion no pleader with the latter case in his mind could conceivably have framed the record as it was framed in this case. If a record is designed, as I assume it is, to give fair notice to one's opponent of the case to be made against him, then I can only say that this record from the pursuer's point of view was a singularly defective instrument for effecting that purpose. I cannot help feeling and stating that in my opinion the case made by the pursuer at the trial was an afterthought, and was not present to the mind either of the pursuer or the pleader when the record was closed. It is, I think, *pessimi exempli* to encourage or even to countenance draftsmanship which is not only slovenly but which, though it may not be so intended, is also positively misleading. For myself, I should therefore be prepared to sustain the third exception also.

The only point which remains is whether the pursuer can take advantage of the provisions of section 45 of the Court of Session Act 1850. It provides—"A bill of exceptions shall not be allowed in any cause before the Court of Session upon the ground of the undue admission of evidence if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict than that actually pronounced." I am of opinion that the pursuer has failed to discharge the onus laid on him by this section. It may be, as was argued, that the testimony of the driver was not substantially different from the testimony of Mr Boyce. But that is not the point. I consider that such an atmosphere was created by the procedure followed that the minds of the jury were, or at any rate may have been, thereby poisoned in advance against the testimony of the defenders' driver, and that it is impossible to affirm with any certainty that the exclusion of the incompetent evidence could not have led to a different verdict from that which was actually returned.

While I consider that two exceptions fall to be sustained I am not prepared, as was suggested by Mr Mackay, to enter a verdict for the defenders here and now, but I suggest to your Lordships that a new trial should be allowed.

LORD ORMIDALE — The accident with which this case is concerned occurred on the 17th October 1921. The trial took place on the 21st and 22nd November 1922. The jury returned a verdict for the pursuer assessing the damages at £250. The defenders contend that the verdict should be set aside and a new trial granted on the ground that in the course of the trial certain evidence was admitted which ought to have been refused. If the evidence to which they took exception were properly before the jury, then I understand they did not dispute that there was evidence sufficient to support the verdict. Three exceptions are presented in the bill, and I shall deal with them *seriatim*.

The first witness for the pursuer was Mr Boyce, a civil engineer and surveyor, who was called to speak to a plan which he had prepared of the *locus*. He stated that he made an examination of the *locus* on 21st January 1922, and in the course of his examination he further stated that he met Wright, the driver of the motor van by which the pursuer was injured, on 16th November 1922 at the *locus* and had a conversation with him. He was then asked—"What did he say to you about the accident?" The defenders objected to this line of evidence, but the Lord Ordinary repelled the objection and allowed the evidence on the ground, according to the notes of evidence, that it was a statement by the defenders' representative, and the witness was then examined in detail as to what passed between him and

Wright. To my mind the evidence thus adduced discloses that the course followed by the expert witness was entirely irregular and most reprehensible. The accident, as I have said, occurred on the 17th October 1921. Mr Boyce's so-called conversation with Wright took place on 16th November 1922—that is, about a year later and within a week of the trial. The meeting, moreover, was held at the request and in the presence of the pursuer's agent. The statement made by Wright was not made in ordinary conversation, but was elicited from him in the course of a somewhat searching examination. On one point at least it was extracted from him by pressure. Mr Boyce's object in getting from the driver what he had to say about the accident was, as he himself puts it—"I wished to be thoroughly conversant with the case as it would be presented here so as to be able to give evidence." The circumstances, the method, and the object of the interview were thus all alike objectionable. Nothing could have been more foreign to the proper function of a skilled witness than the course of procedure followed, and the evidence resulting from it, even if technically admissible, should and can have very little, if any, value. But in my opinion the objection to its admission should have been sustained. It was hearsay evidence, and subject to what may be said of the application of section 3 of the Evidence Act of 1852 might have been competent only, first, if the statement had been made by a witness *de recenti*, when it might be proved as part of the *res gestæ*. That was clearly not the case here. Second, if the driver had been a party to the action, and it was on this ground, I take it from the notes, that the Lord Ordinary admitted the evidence. I respectfully think that the Lord Ordinary was in error. Wright is not a party to the action. He is merely one of the general witnesses in the case. His sole relation to the defenders is that he was in their employment as an ordinary servant at the date of the accident.

As regards section 3 of the Evidence Act of 1852, the pursuer is not entitled, keeping in view the course he followed, to call it in aid. The primary purpose of the section is no doubt to enable the credibility of a witness to be tested, but the foundation for applying the test must be laid in the cross-examination of the witness whose veracity is to be impugned. The section affords no ground for proceeding to discredit a witness by way of anticipation and on the assumption that he is when he comes to be examined likely to be untruthful. I apprehend that the case of *Gall* (9 Macph. 177), in which the course which must be strictly followed was expounded by the Lord President, is as living an authority now as it was at the date of its decision. Whatever may be the practice as described from the bar which has crept in in the case of proofs before a judge, there is certainly no room for it in trials with a jury. It is imperative in my opinion, if section 3 is to be relied on in justification of the admission of hearsay evidence, to follow implicitly the provisions of the statute. In my opinion therefore the bill of exceptions in this particular is well founded.

It was contended, however, that even if the evidence excepted to was unduly admitted section 45 of the Court of Session Act 1850 applied, and that the bill should not be allowed—"that the exclusion of the evidence unduly admitted could not have led to a different verdict than that actually pronounced." I am not able to affirm that. I am not disposed in the circumstances to examine very critically the evidence *hinc inde*, but I am satisfied that the evidence in question admitted at the very outset of the trial was calculated very seriously to prejudice the minds of the jury against the driver of the van and so lead them to discredit his evidence generally.

Accordingly in my opinion the bill should be allowed on the first exception, the verdict set aside, and a new trial granted.

The second exception I regard as of much less importance. The question objected to was no doubt as expressed a general invitation to the witness to give hearsay evidence. But having regard to the setting or context in which the question was put, it is fairly obvious that it was asked not with a view to discredit the policeman, but solely with the purpose of ascertaining or explaining one of the sources from which the witness had obtained the information necessary to enable him to prepare or check his plan of the *locus*. It appears to me that if the objection had been sustained an amended question varying very slightly in form of expression might have been put eliciting an identical answer. Accordingly I think the second exception should not be allowed.

On the third exception I entirely agree with your Lordship. The case presented on record is, it appears to me, absolutely inconsistent with and contradictory of the case submitted to the jury. On the record the pursuer is represented in condescendence 2 as waiting to see that the way was clear for him to pass from the north to the south side of the road. In condescendence 3 it is averred that the pursuer after looking round carefully to see that no vehicles were coming in the direction to interfere with his passage before he walked across the street, started from the pavement and had almost reached the nearest car rail when he was knocked down by the motor van. Condescendence 4 goes on to aver quite succinctly that just as the pursuer had begun to walk across the street the motor van came along the road and knocked him down. These averments can only mean one thing—that the pursuer was engaged in a continuing progressive movement from north to south until his passage was interrupted by impact with the motor van. The fault alleged against the driver is that by neglecting to keep a proper lookout he failed to see the pursuer crossing the road. That necessarily means as he was moving from north to south. That was the case the defenders had to meet. The case submitted to the jury, however, was entirely different. It was that the pursuer after starting from the north side proceeded as far as the north car rail, that he there arrested his progress, and having waited to allow an east-going car to pass by him,

instead of continuing his progressive movement to the south he wheeled right about and started to return to the north pavement when he collided with the motor van. On record there is no relevant averment of any breach of duty on the driver's part which brought about the accident so described. I cannot believe that the writer of the record had in his mind the remotest conception of the facts as these were presented to the jury. However that may be, the averments not only fail to give a frank, fair, and full disclosure of the pursuer's ultimate case, but they are, as your Lordship has said, positively misleading. It is not that they fail to give an exhaustive specification of unimportant details. Not only is the incident of crucial importance which led up to the mishap concealed but a totally different incident is substituted for it. In collision cases like the present the spot from which the moving bodies start and the direction of their movement in relation to each other immediately prior to the impact are of the utmost importance in determining the duties of the respective parties, and are very often conclusive on the question of contributory negligence. It is one case for a pursuer to say that he was run over in crossing a danger zone after a careful look to the right hand and to the left. It seems to me to be a case of a totally different character for him to say that he was run over after crossing a danger zone in safety, and after stopping for a bit thereafter suddenly wheeling round and without looking to the left or to the right proceeding to plunge back into the danger zone.

It appears to me that the defenders had no notice at all of the case which in the end they had to meet, and that the third exception accordingly is also well founded and should be allowed.

LORD HUNTER—The course, which is sometimes followed, of making an expert witness a witness to fact by asking him to give an account of what one or more of the general witnesses have told him is objectionable and, unless in exceptional circumstances, ought not to be tolerated by the Court. The present case appears to me to afford an example of a flagrant departure by the pursuer from proper and recognised procedure. The accident to the pursuer occurred on 17th October 1921. Mr Boyce, a civil engineer and surveyor, was instructed to prepare a plan on behalf of the pursuer. To enable him to do so he made an examination of the locus on 21st January 1922. He was duly examined as to his plan as the first witness in the case. Having concluded his evidence about the plan he had prepared he explained that he met the driver of the van which injured the pursuer on 16th November 1922, *i.e.*, thirteen months after the accident, and had a conversation with him. He was then asked by counsel for the pursuer, "What did he say to you about the accident?" Objection to this line of evidence was taken by counsel for the defenders, but the objection was overruled by the presiding Judge. Counsel for the pursuer then proceeded to ask Mr Boyce detailed questions as to what the driver had said to him, and elicited the fact that in regard to one question he had pressed the driver who was hazy in his answer. He suggested discrepancy between his statement and information he had got from another witness, the points policeman. The objectionable feature of this testimony is accentuated by the circumstance, which is elicited in cross-examination, that Mr Boyce had gone at the request of and in the company of the pursuer's agent to meet a witness in the case. On being further questioned as to his motive in conducting the inquiry which he did, he makes the extraordinary answer that he wished to be thoroughly conversant with the case as it would be presented here so as to be able to give evidence. The only evidence that Mr Boyce was competent to give was as to the plan which he had been instructed to prepare. In order to equip himself as a witness it was quite unnecessary that he should anticipate the functions which fell to be discharged by the cross-examining counsel at the trial.

Mr Boyce's testimony to which exception was taken appears to me to have been hearsay evidence of a more than ordinarily objectionable type, in respect that it was elicited by a gentleman who had received professional instructions on behalf of the pursuer and was taken in presence of the pursuer's agent. There are no doubt certain cases where hearsay evidence may be legitimately led. A statement made by the driver of a vehicle at or about the time of an accident in which he is involved may be proved as part of the *res gestæ*. What has been said by one of the parties to an action may generally be proved at whatever time it was made, but the presiding Judge would probably have a discretion to disallow such evidence if the circumstances indicated that it had been unfairly obtained. Under the Evidence Act 1852 a witness may be asked in cross-examination if he has not made a different statement on some specific occasion, and this foundation for the evidence having been laid, witnesses as to the contrary statement may be examined. The evidence in the present case does not come under any of these exceptional categories. I think therefore that it was incompetent and that the defenders are entitled to succeed in this first exception and to obtain a new trial unless we are able to say that, if the evidence had not been led, the jury could not have returned any other verdict than the one which they did. The evidence in my opinion was calculated materially to prejudice the defenders' case, and I am not able to say that the jury would have reached the same conclusion which they did if the case had been fairly presented to them. I think therefore that on this ground a new trial should be granted.

As regards the second exception the question and answer seem to have had reference to the plan prepared by Mr Boyce, and I do not think therefore that it was incompetent. At the same time it would be preferable if questions of the sort were not put to skilled witnesses as the practice readily lends itself

to the abuse to which I have referred of such witnesses introducing hearsay testimony of a prejudicial character.

So far as the last exception is concerned the record is open to criticism as wanting in frankness and failure to make a fair disclosure of the pursuer's case. At the same time I am not prepared to say that the presiding Judge should have taken the extreme step of excluding the evidence tendered as being necessarily inconsistent with the case made on record. I regard the unsatisfactory nature of the record, however, as confirming me in the view that a new trial should be granted under the first exception.

LORD ANDERSON—As regards the rule, it was conceded by the defenders' counsel that if the evidence was all properly before the jury there was a sufficiency of evidence to support the verdict. It was maintained, however, on the bill of exceptions, that certain parts of the evidence had been unduly admitted, and that in consequence judgment should either be entered for the defenders or the verdict should be set aside and a new trial granted. Three exceptions are set forth in the bill.

1. The first exception occurs in connection with certain evidence given by R. C. Boyce, the pursuer's first witness. The notes of evidence disclose that on 16th November 1922 Boyce met Wright, the driver of the van, who was the leading witness for the defenders. Boyce was asked by the pursuer's counsel—"What did he [Wright] say to you about the accident?" The line of evidence was objected to by the defenders' counsel. The Lord Ordinary repelled the objection and allowed the evidence on the ground that it was a statement of the defenders' representative. Exception was taken to this ruling.

It is a general rule of evidence that hearsay is incompetent. To this general rule there are four exceptions—(1) Statements made at any time by witnesses who are dead may be proved. (2) Admissions by parties made at any time may be proved. (3) Statements made by witnesses *de recenti* may be proved as part of the *res gestæ*. (4) Statements by a witness made at any time may be proved in accordance with the provisions of section 3 of the Evidence (Scotland) Act 1852 (15 Vict. cap. 27). As regards the first exception it is obvious that no foundation can be laid for the statement proposed to be proved. As regards the second exception it is not essential that a foundation need be laid. Thus, in criminal procedure, a statement voluntarily made at any time by an accused person may be proved without foundation laid; and so also in the case of a party to a civil suit. The only rejoinder open to panel or party is to go into the witness-box and contradict the evidence which has been led. As regards the third exception it is not necessary that a foundation should be laid. As regards the fourth exception it is essential, on a proper construction of the Act of 1852, that a foundation should be laid.

Before adverting to the provisions of that statute, I proceed to consider whether the ground on which the Lord Ordinary admitted the evidence is well founded. In my opinion it is not. I am unable to hold that a witness who is a servant of a party is entitled to claim any of the prerogatives, or is subject to any of the disabilities, of a party to a suit. It was suggested that as Wright was charged with *quasi* delict his position might be assimilated to that of a person accused of a delict, and his statement proved without a foundation having been laid. I am unable to agree and hold that Wright on the matter in question was in the same position as any other witness whose conduct, in reference to the subject-matter of the *lis*, had not been impeached.

The exception may in my opinion be supported before this Court on grounds which were not urged before the Lord Ordinary. The most formidable argument which was adduced in support of the exception was based on the provisions of the third section of the Act of 1852, the terms of which have already been quoted. The object of the enactment was to enable the credibility of a witness to be tested, and the test may be applied to the credibility of a witness of either party—*Gall*, 9 Macph. 177. The language of the section clearly indicates the course which the procedure ought to follow. The first "witness" alluded to is the witness whose credibility is to be tested. This witness must therefore be "adduced" before the statutory provisions begin to apply. It is only thereafter, according to the plain construction of the section, that it is competent to adduce evidence to prove that such witness has made a different statement on an occasion specified. That this is the clear meaning of the section was affirmed by Lord President Inglis in the foresaid case of *Gall*. In the course of his opinion the Lord President specifies the method by which the test should be conducted. "It seems to me," says the Lord President (p. 179), "that the statute, in allowing evidence to be adduced to prove that the witness has made a different statement 'on the occasion specified,' contemplated that a foundation should be laid for the introduction of such contradictory proof, by interrogating the witness not only as to his having made a different statement, but also as to the time, place, and person, when, where, and to whom that statement was made." It was suggested that there was a practice which sanctioned evidence of this nature being adduced by anticipation to test the credibility of a witness who might subsequently be called. In a civil case no great harm might be done by following this alleged practice, as the doubtful evidence could be deleted or ignored by the judge who has to decide the cause. In a jury trial, however, such a practice might occasion mischief which would be irreparable. In both cases I am of opinion that the strict statutory practice, as explained by Lord President Inglis in *Gall*, ought to be followed. This would necessarily lead, in cases where the credibility of a defence witness was being tested, to proof in replication, but this is a result which, if the statutory procedure is to be observed, cannot be avoided.

It follows from all this that the evidence excepted to was not *per se* incompetent, but that the defenders' real complaint is that it was admitted at the wrong time and in the wrong way. It was only admissible (*a*) after Wright had been examined, and (*b*) after it appeared from his evidence that he contradicted the testimony which Boyce was prepared to give. Strictly speaking, therefore, the ground of challenge of the verdict is not "undue admission of evidence." It may well be, however, that what was done is open to challenge under the general head "such cause as is essential to the justice of the case." If this last ground of challenge applies the verdict cannot stand, and there is no room for an appeal to the provisions of section 45 of the Court of Session Act 1850, which is limited to cases of "undue admission of evidence." If however the case be taken as one where evidence has been unduly admitted, it has to be decided whether or not the verdict can be saved under the provisions of the said section. This section imposes on the Court a singularly difficult task as it is impossible to determine, with any pretence to exactitude, what impression was made on the jurors' minds by the testimony of Boyce. I am unable, however, to reach the conclusion that the pursuer would necessarily have got a verdict had this part of Boyce's evidence been excluded. It is true that there is not much contradiction between the evidence actually given by Wright and the statement attributed to him by Boyce, but the minds of the jurors at a very early stage of the case were, as the result of Boyce's evidence, probably imbued with suspicion as to the straightforwardness and truthfulness of the man whose alleged culpability caused the accident. But for this it may well be that Wright would have been entirely believed and the defenders exonered. I am therefore of opinion that the first exception should be sustained. I agree that this is not a case in which judgment should be entered for the defenders in terms of section 6 of the Jury Trials (Scotland) Act 1915. That section applies solely to cases where a verdict has been challenged on the ground that it is contrary to evidence, and it is not on that ground that our decision is based. The provisions of the section are therefore inapplicable.

The proper judgment, accordingly, is to set aside the verdict and grant a new trial. I reach this conclusion solely on the first exception, as I am of opinion that the Lord Ordinary's ruling was correct as to the other exceptions.

The second exception was taken with reference to a question put to Boyce as to the place where the points policeman was stationed at the time of the accident. I am satisfied that the object of the question was not to attack the credibility of the policeman, who was a witness for the defenders, but to test the accuracy of certain measurements spoken to by Boyce. The question really followed up some queries on the same topic which were put to Boyce by the presiding Judge. If the thing had been more artistically done by pursuer's counsel, as by asking Boyce, "How do you know where the policeman was at the time of the accident?" and Boyce had answered, "The policeman told me where he was standing," it is plain that no objection could have been taken. I am therefore of opinion that the second exception is not well founded.

There is more difficulty as to the third exception, but I am satisfied that the Lord Ordinary's ruling was right. The legal principle to which the defenders appeal in support of this exception is "surprise." In view of the defence stated on record, which is that "the pursuer suddenly and without warning stepped off the north pavement right in front of the defenders' car," it is difficult to see how the defenders could be surprised and were prejudiced by what the pursuer and his witnesses say took place at the car lines. In view of the defence it appears to me to be of no moment to the defenders whether the pursuer, when struck, was moving or stationary. The real issue between the parties was whether the pursuer was knocked down at the kerb or at the car rails, and this issue is plainly disclosed in the pleadings. The case would have been very different could it have been said of it as was said in the case of *Littlejohn* (1909 S.C. 169) by the Lord Justice-Clerk (at p. 177), "There is not a single substantial part of the averments in this record which is not absolutely contradictory to the case presented to the jury." The whole occurrence, it is true, took place in a brief period of time and on a small part of the carriageway, but even so, it seems to me to be out of the question to expect that the pursuer's pleadings should specify every incident that happened. The evidence led for the pursuer was to the effect that he crossed from the pavement to the rails, paused and half turned there, and was then and there knocked down. This is his case on record, except that he does not aver the pause and half turn. I am unable to hold that the Lord Ordinary was in error in refusing to admit evidence of what was, in my opinion, a mere detail of the pursuer's case as disclosed in his pleadings.

LORD MURRAY — I shall consider the exceptions in their order in the bill of exceptions.

In regard to the first exception, the ground of the pursuer's objection to the admission of Mr Boyce's evidence relative to his conversation with the defenders' driver was that the evidence was hearsay and inadmissible, and in any event inadmissible if taken in anticipation of the driver's testimony. The defenders' counsel, on the other hand, maintained the admissibility of the evidence as being directed towards proving an admission made by the defenders' driver in regard to his conduct at the time of the accident. I repelled the objection and admitted the evidence upon this latter ground. I shall refer to certain other features of Mr Boyce's testimony, but these apart, I am of opinion that my ruling was well founded in law.

At the hearing on this exception the discussion on both sides of the bar centred

on the construction and effect of the third section of the Evidence Act of 1852. As regards the construction and effect of that section I concur in the view expressed by the Lord Justice-Clerk, but, as hereafter appears, I doubt its bearing on the ruling which I gave.

It was by our law always competent to test, or for that matter to impugn, the credibility of a witness by asking him whether he had not on a previous occasion made a statement inconsistent with the testimony given by him in the box. Prior to 1852, however, the matter was ended, subject to any legitimate comment, by the admission or denial of the witness. For the legal objection of hearsay rendered it incompetent, unless indeed where the prior statement was part of the *res gestæ*, to prove the alleged inconsistency by adducing contrary testimony. The effect of section 3 of the Act of 1852 was to overrule the former objection to such evidence as being hearsay, but at the same time the section restricted the admission of such evidence by prescribing certain conditions. In my opinion the section affords no warrant for the contention that such contrary testimony may be adduced in anticipation of the examination of the witness. The terms of the section indeed appear to me to negative this view. The true view of the section is thus stated in the second edition of Dickson on Evidence, section 1807—"The statute also requires the witness to be cross-examined on the point before other evidence upon it is adduced," and this is necessarily implied in the judgment in the case of *Gall* v. *Gall*, 9 Macph. 177. I do not think that our practice has, contrary to the terms of the statute, santioned the tendering of such evidence in anticipation. It is true that in practice, and in order to avoid the necessity of obtaining leave to call rebutting evidence after the close of the defenders' case, the pursuer sometimes does lead evidence in anticipation, but in my experience this is only done where the opposing counsel states that he is to call the witness in question and in effect waives any objection. This concession is of course less readily given in jury trials than in proofs before a Judge. It follows that if the question had, in my opinion, been ruled by section 3 of the Act of 1852, I would have sustained the defenders' objection.

In order to clear the ground upon which I gave the ruling under challenge I shall, first, consider the case in which it is proposed to prove an admission or statement against interest made by a party himself.

Proof of an extra-judicial admission made by a defender has always been open to a pursuer in leading his evidence in chief. And it is obvious that such a course could not in our older law have been open to any objection on the score of "anticipation," for it was not until the passing of the Evidence Acts of 1852 and 1853 (as finally extended in 1874) that the parties to a case became themselves competent witnesses *in causa*. That section 3 of the Act of 1852 was designed to have and has no application to the case of a party is, I think, made clear by the second section of the statute. This section admitted a party as a competent witness, but only when he was—so to speak—not a party but merely a nominal defender without real interest in the issue. It may of course be maintained that on the repeal of section 2 of the Act of 1852 by the Evidence Act of the following year the scope of section 3 of the 1852 Act became inferentially extended so as to cover the case of a party witness. I am, however, not of this opinion. In the first place, the primary object of these statutes was to relax the stricter rules of evidence, not to restrict or to render incompetent evidence which theretofore was admissible. But there is a further reason for my view. While, as above stated, section 3 of the 1852 Act removed, for the purposes of the section, the objection of hearsay, it is to be noted that this objection never had any place in proof of an admission made by a party. It is immaterial whether proof of admissions of parties falls to be regarded as an exception to the rule of hearsay, or whether, which is probably the sounder view, such proof is regarded as "original evidence" of the admission and is therefore outwith the reason of the rule as to hearsay. In either view the objection of hearsay or of "anticipatory proof" was not, nor in my opinion is it now, maintainable. I may refer in this connection to the well-known case of *Morrison* v. *Somerville*, 23 D. 232. In that case the admissibility of certain evidence adduced by the pursuer was objected to as being hearsay. The presiding Judge admitted the evidence as being in proof of an admission of a party, and in disallowing the exception taken Lord Justice-Clerk Inglis thus stated the law (at p. 238)—"The allegation here is . . . that the case in substance and effect embodied what was stated by Waddell himself. . . . The second objection was that the document was of the nature of secondary evidence and was not the best evidence that could be adduced of Waddell's statements, he being still alive. I do not say that that would not have been a good objection had Waddell been an ordinary witness, but this is a statement made by a party to the cause; and though a party may now be called as a witness, that does not alter the law that his extra-judicial statements may be received as evidence against him." The same law was laid down by Lord Watson in the *Dysart* case, 6 App. Cas. 489, at pp. 505, 506. Now, it may be true that such proof, the primary object of which is to establish an admission, may indirectly affect the credibility of the defender if and when he comes to give his testimony. But the two things—proof of an admission, and a direct impugning of the credibility of a witness—are quite distinct, and, in my opinion, it is with the latter case alone that section 3 of the 1852 Act with its provisions against so doing by anticipation is concerned. Counsel for the defenders at the hearing stated that he was prepared to argue the exception upon the footing that the statement objected to had been made by the defender himself. In my opinion any such concession would

have been fatal, and I do not proceed upon this.

I shall now turn to the questions which in my opinion raise the real point of difficulty, viz., Whether the statement or admission of the driver is to be deemed as *in pari casu* with an admission or statement of the party defender. But before doing so I desire to add, in view of certain observations which were made during the discussion, that in my opinion the rule which in certain cases admits statements made *de recenti* as part of the *res gestæ* has no application to the present question. It is quite settled that proof of an admission by a party is admissible whenever and to whomever made.

Although attention was directed to the point during the discussion, I regret that no argument was addressed to the Court from either side of the bar on the question I am now discussing. Reference indeed was made to such cases as *Admiralty* v. *Aberdeen Steam Trawling Company* (1909 S.C. 335) and similar cases relating to the recovery of documents under diligence. But these cases are concerned not with the admissions of an agent to a third party but with the recovery and admissibility in evidence as against the principal of reports made by him to his own agent, and belong to a different chapter of the law of evidence. There is no question but that an admission made not by a party himself but by his accredited representative is or may be good evidence against his constituent. Admissions by agents who are either expressly or impliedly clothed with authority to this end or made by one who is in effect *præpositus* are familiar illustrations. And just as in the case of admission by a party himself no limit is imposed by the law of evidence to such admissions only as are made in the course of the transaction in issue or which form part of the *res gestæ*. The only condition of admissibility is that the statement founded on should be made by the authorised representative in his representative character. The reported cases appear to be almost exclusively concerned with cases arising *ex contractu*, and I am not aware of any authority which covers a case such as the present in which the defenders' liability rests on *quasi* delict. The law charges the defenders with responsibility for the driver's conduct; it is the conduct of the driver while acting as the defenders' servant or "representative" that is the central fact in issue, and I think that an admission made by the driver in respect of his conduct while so acting is competent evidence, not only against the driver but also against the defenders who have to assume responsibility for that conduct. I am of course referring here only to such cases as the present in which there is no disclaimer by the defender of his responsibility for his servant's actings, or to cases in which the law would not sustain any such disclaimer if made. I accordingly think that the admission of the driver was competent evidence against the defenders. But there still remains the question, which is one of some difficulty, as to whether it is now competent to a pursuer in view of the terms of section 3 of the Act of 1852 to prove such an admission in anticipation. I readily concede that there is room for distinction between the case of an admission made by a party himself and the case of an admission by his servant or representative, for such representative may be fairly deemed to be a "witness" within the meaning of section 3 of the Act of 1852. If, however, I am right in what I have before stated in dealing with the case of admission by a party himself (in regard to the essential distinction between proof of an admission and a challenge of credibility, and as to the non-application to the former case of the rule of hearsay), it would seem to follow that the same considerations should govern proof of an admission whether made directly by a party or made by an agent or representative on his behalf. If this be not so, the result would be to subject a pursuer to a distinct disadvantage, for no matter how unquestioned the authority of an agent to bind his principal in the matter of admission, the pursuer would in the contrary view be debarred from proof of even a fatal admission made by such representative, unless the pursuer takes the risk of calling him as a witness for the pursuer. For the defender may or may not tender his representative as a witness for the defence, and if he does not do so the pursuer's chance of proving the admission and his case is gone. As at present advised I am unable to accept this result as being in accordance with the intent and effect of an enabling statute, and I do not think that the Act of 1852 was intended to have the effect, as put by Lord Justice-Clerk Inglis, of "altering the law" existing in regard to the proof of admissions. I may add that I have been dealing simply with the question as being one of competency of proof of extrajudicial admissions. The value or weight which attaches to such evidence if and when admitted is of course another matter. The need for caution in weighing evidence of oral admissions is familiar. My opinion goes no further than this, that the evidence was admissible *quantum valeat*.

In regard to the second exception I need say little, but it may be noted that the question objected to was put in re-examination and that it was fairly raised in the cross. Mr Boyce in chief and in cross in regard to certain measurements and distances assumed a given position for the points policeman, which assumption was based firstly on his own observation, and secondly on information derived from the policeman himself. I am of opinion that this explanatory evidence was unobjectionable and that the exception should be disallowed.

The third exception is based upon the alleged variance between the allegation and the proof. The material averments on record are these—(1) That on the occasion libelled the pursuer's purpose was to cross the street from north to south in order to board a west-going tramcar; (2) that just as he began to walk across a motor came along the road from the east, and (3) that

the *locus* of the collision was at a point of the street when the pursuer had "almost reached the near (northernmost) car rail." There is no further specification on record as to how the accident happened. In particular the record is silent as to whether the pursuer was at the moment of collision moving or standing; as to the direction in which he was then facing; by what part of the motor van or on what part of his person he was struck, unless indeed this last point is to be gathered from the description of the injuries contained in the condescendence. I turn now to the pursuer's case as disclosed at the trial. The substance of the evidence for the pursuer is in my opinion contained in the pursuer's initial statement, to which no objection was taken, that "when the (tram) car started I wheeled to the right and by that the motor struck me on the left side." I need not resume the evidence in detail. I have carefully re-read it and am of opinion that in substance the pursuer's evidence, which is on this point precisely confirmed by the evidence of the witnesses Murdoch, Dunlop, and Callan, is that the pursuer was struck when "in the act of turning," and that he had no time to do more than this. Such being my view of the fair import of the evidence, the question arises as to whether this case is contrary to or inconsistent with the allegations on record such as these are. I find myself unable to affirm this proposition, and accordingly I am of opinion that this exception should also be disallowed. The record, in my opinion, affords an incomplete account of the accident, but in so far as it goes it is not contrary to the case made out in evidence.

Assuming, however, that one or more of the exceptions fall to be allowed, the pursuer maintains that he is nevertheless entitled to retain his verdict in view of the provisions of section 45 of the Court of Session Act 1850. As regards the subject-matter of the first exception, the argument is that the evidence admitted proved immaterial in respect that the attempt to discredit the driver failed. If this was the purpose with which the evidence was led, I agree with the conclusion, as also that there is in substance no discrepancy in the accounts of the occurrence as spoken to by Mr Boyce, by the driver himself, and by the points policeman Bruce, and for that matter I might also add the other witnesses the two Maclaughlins. But then it is said that this does not conclude the matter—that the onus is upon the pursuer to satisfy the Court not merely that the attempt failed but that the attempt in no way affected the jury in arriving at their verdict. The onus of proving this is not an easy one to discharge, but I think it has in a reasonable sense been discharged in the present case. The more material statements spoken to by Boyce are those contained in the notes of evidence, and the driver's account as already stated was fully confirmed by the other testimony in the case. I hardly think that the jury can have failed to appreciate this. It is clear that the pursuer recognised his failure, for Boyce's evidence was not put to the driver in cross-examination, and no reference whatever was made to it by the pursuer's counsel in his address to the jury. I am not leaving out of sight the further statements spoken to by Boyce in his evidence, but these in my opinion are less material, for they were to some extent at least cognate to the surveyor's business of obtaining data for measurements and distances. It is true that in answer to a leading question by his counsel Mr Boyce assents to the view that he "pressed" the driver on a certain point in order to verify a figure he had obtained from the points policeman. But this point really takes end with the driver's statement that while he made no measurements the distance given by him was an approximate estimate. This estimate was fully confirmed by later testimony, and I should have regarded the matter of small moment had it not been that at the discussion a further question was raised as to the competency of the testimony in general as having been obtained "upon precognition." I shall refer to this point later. Meantime, while I agree that one cannot speak with certainty, I think it is fair to conclude that the Boyce conversation, if it ever affected the mind of the jury, had in view of what subsequently happened ceased to exist as a factor in the case when they came to consider their verdict.

While the above is my opinion upon the question of competency, I desire to express my concurrence in the view that it is undesirable in practice that a professional witness such as a surveyor, who is engaged for a definite and limited purpose, should become involved in the merits of the issue. It is, no doubt, proper that he should be prepared to give such explanations to the Court as are necessary for a proper understanding of the *locus*, but matters in controversy on the merits should find no place either in the plan or in his testimony. The cases must be rare in which any such question will arise, but I am unable to affirm that as a matter of competency the testimony of a professional witness on a matter of fact relative to the issue necessarily falls to be rejected. Accordingly I am of opinion that, assuming the first exception to be allowed, a new trial should nevertheless be refused.

The matter of the third exception stands differently, and should this exception be allowed, I am of opinion that a new trial falls to be granted. It is certainly true that the real issue between the parties was the simple one — whether the collision took place close to the kerb or in the vicinity of the northernmost car rail, and that the pursuer's turning movement does not immediately concern the issue at all. But in considering the evidence on the above issue *hinc inde* I do think that the question whether the pursuer was struck upon his right or left side became one of importance, and upon this ground I think that the evidence as to the alleged turn may have immediately influenced the verdict of the jury.

I am of opinion that should any of the exceptions be allowed, the proper course is to grant a new trial and not to enter a verdict for the defenders.

One further point remains for notice, arising on the evidence of Mr Boyce in cross-examination, to this effect, that on the occasion in question he had been "asked by the pursuer's agent to go down and meet (the driver) along with him (the pursuer's agent)." This, coupled with the evidence as to the "pressing" above noticed, it is argued, evidences that the driver's statement was truly made "on precognition," and therefore affords a further ground of challenge. On this point a considerable body of authority was laid before the Court. It is true that no objection upon the ground now suggested was taken at the trial, but I lay no stress upon omission, for the mischief, if any, was already out. I should, however, have expected that if the point had been considered material some reference would have been made to it by defenders' counsel, or that the Judge would have been invited when charging the jury to observe upon the quality of evidence thus obtained.

I do not feel warranted, on the slender evidence contained in the notes, in concluding that the driver's statement was made in precognition, or that he was trapped into making any statement contrary to his real intention. There is, indeed, no evidence that the agent intervened in any way, or, for that matter, that the agent was even present when the statements were made, although this may reasonably enough be inferred. Accordingly, in the view which I have taken, the question of the competency of proving a statement on precognition in contradiction of a witness's testimony does not arise for decision. As, however, the question was fully discussed, I may say that, as at present advised, I am not prepared to affirm that proof of a statement by a witness otherwise admissible becomes incompetent merely upon the ground that it was made in precognition. As was pointed out by Lord Justice-Clerk Inglis in *Macdonald* v. *Union Bank* (2 Macph. 963), this question, unless in quite exceptional cases, could not well arise until after the passing of the Evidence Acts of 1852 and 1853. For agents were in general disqualified owing to "partial counsel" from giving testimony. Upon this point there are conflicting decisions in the books in criminal cases, and it may be that in such cases, although I do not see any difference in principle, other considerations may have some weight. And I notice that the same Judges who excluded such evidence in criminal cases admitted it in civil cases. In the second edition of Dickson on Evidence, section 1808, the learned editor, in discussing the effect of section 3 of the Evidence Act of 1852, thus states the law—"There is no limitation as to the nature of the previous occasions on which the inconsistent statements are supposed to have been made. . . . Nor is there an exception of previous statements made by the witness on precognition." See also the note on page 1048, where the decisions are discussed. I am disposed to concur in this statement of the law. In the last edition of Dickson on Evidence, section 265, a contrary opinion is expressed, but this appears to have been influenced by the views expressed in the *Dysart Peerage* case (6 App. Cas. 509) and the *Lauderdale Peerage* case (10 App. Cas. 710). These cases, however, as also the case of *Macdonald* v. *Union Bank* above mentioned, are concerned with a different question, viz.,—the admissibility of a statement in the form of a precognition as documentary evidence, where also one or other or both of the witnesses concerned were dead. It is obvious that in such cases different considerations apply. That the element of precognition does not in itself infer incompetency is clear from the *Lauderdale* case, for there the document was admitted upon the ground that there were no circumstances apparent which would render it suspect or as being other than a fair record of the deponent's testimony, and this also follows from such cases as *Fraser* v. *Wilson* (4 D. 1171) and *Inch* v. *Inch* (18 D. 997), in both of which cases evidence of admissions made by a party to the opposite agent under precognition were admitted as competent evidence. The true view would appear to be that proof of a statement made on precognition is as matter of law competent and admissible, but it is always subject to the undoubted discretion of the Judge to exclude proof of such statements where the circumstances under which the evidence was taken are such as to deprive it of any value as being fair and independent testimony (Lord Justice-Clerk Inglis in *Macdonald*, at page 969), or where there is reasonable ground for concluding that the testimony is merely "what an unscrupulous agent has extracted by leading questions, suggested answers, and other unfair devices in precognition." Accordingly, were it necessary to decide the question, which I think it is not, I should, as at present advised, hold that, subject to the discretion of the Judge as before mentioned, a statement made upon precognition may competently be put to a witness for the purposes of section 3 of the Evidence Act of 1852.

The Court pronounced this interlocutor—

"The Lords, with the addition of Lord Murray, who presided at the trial . . . make the rule absolute: Allow the first exception taken: Disallow the second and third exceptions: Set aside the verdict of the jury, and allow a new trial: Remit to Lord Constable, Ordinary, to take the trial and to proceed in the cause as accords."

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