LORD ATKINSON.—I concur.

Jan. 28, 1919.

Malcolm v. Inland Revenue.

INTERLOCUTOR appealed from affirmed, and appeal dismissed with costs.

THORNE, PRIEST, & Co.—GUILD & GUILD, W.S.—H. BERTRAM COX, Solicitor of Inland Revenue, England—Sir PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue, Scotland.

No. 6.

Mar. 14, 1919.

Clarke v. Edinburgh and District Tramways Co.

Poor MRS SARAH ANN CLARKE, Pursuer (Appellant).—*J. A. Christie—J. B. Melville.*
EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED, Defenders (Respondents).—*Macmillan, K.C.—Cooper.*

Administration of Justice—Appeal on question of fact—Proof—Witnesses—Credibility—Opinion of Judge who heard witnesses.

Observations on the weight to be attached by a Court of appeal, in dealing with questions of fact, to the opinion of the Judge who saw and heard the witnesses, irrespective of any observations by him as to their credibility.

Lord Buckmaster. Ld. Atkinson. Lord Shaw of Dunfermline. Lord Parmoor. Ld. Wrenbury.

(IN the Court of Session, 26th February 1918.)

Mrs Sarah Ann Clarke brought an action of damages against the Edinburgh and District Tramways Company, Limited, in respect of the death of her son, who was run over and killed by a tramway car belonging to the defenders.

The pursuer averred that the accident was due to the negligence of the driver. The defenders denied negligence on the part of the driver, and averred that the negligence of the pursuer's son was the cause, or a contributory cause, of the accident.

The Lord Ordinary (Anderson) refused an issue and allowed a proof. On 15th June 1917, after proof had been led before him, he decerned against the defenders for payment of the sum of £100.

The defenders reclaimed, and the case was heard before the First Division, and was afterwards re-heard before a Court of five Judges (the Lord President, Lord Johnston, Lord Mackenzie, Lord Skerrington, and Lord Cullen).

On 26th February 1918 the Court (*diss.* Lord Johnston and Lord Skerrington), recalled the interlocutor of the Lord Ordinary and assoilzied the defenders, the opinion of the Judges who formed the majority being that the defenders had proved contributory negligence on the part of the pursuer's son.

The pursuer appealed to the House of Lords *in forma pauperis.*

The appeal was heard on 14th March 1919. Reference was made by counsel for the respondents to *"Strathlorne" Steamship Co.* v. *Baird & Sons,*[1] and *Taylor* v. *Dumbarton Tramways Co.*[2]

LORD BUCKMASTER.—It is impossible to avoid regretting that this action, which involves no uncertain principle of law nor any complicated combination of facts, has been the subject of such prolonged and costly litigation. In saying this I find no fault with the parties, who have merely availed themselves of their indisputable rights; it is the change

[1] 1916 S. C. (H. L.) 134. [2] 1918 S. C. (H. L.) 96.

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of system in removing this dispute from the forum of a jury which is responsible for what has occurred. For, in truth, this case is nothing but a simple claim for damages occasioned by a fatal street accident alleged to have been caused by the negligence of the respondents. Upon such an issue the verdict of a jury on the evidence furnished would have been beyond dispute.—[His Lordship then stated his reasons for holding that negligence on the part of the defenders, in respect that their car was being driven at an excessive speed, had been clearly established; and that they had failed, on the evidence, to make out their counter case of contributory negligence on the part of the deceased.]

I think for these reasons the learned Lord Ordinary was well justified in the conclusion to which he came; and I have only to add that, though the finding in this case is open to review, yet when a case depends upon the simple determination of a plain question of fact it is not desirable that Courts should seek too anxiously to discover reasons adverse to the conclusion come to by the learned Judge, who has seen and heard the witnesses and determined the case upon comparison of their evidence.

Lord Atkinson.—I concur, and especially in the concluding words of my noble and learned friend on the woolsack. It is quite true that a Judge who hears the witnesses has a great advantage in determining upon the question of their credibility, but when you have to deal with the inference which he draws from the evidence given before him, I think, before his finding is disturbed, it is absolutely necessary that the Court of appeal should be clear that he has drawn a wrong conclusion from the evidence. I think that in this case the Lord Ordinary has drawn the right conclusion.—[His Lordship then dealt with the evidence, and stated his reasons for concurring with the judgment of the Lord Ordinary that the defenders' servant had been guilty of negligence, and that contributory negligence on the part of the deceased had not been established.]

Lord Shaw of Dunfermline.—I agree with the judgments which have just been delivered and with the terms in which both of those judgments have been couched. I only desire to add one observation, and it arises in reference to the interesting disquisition in the latter portion of the observations of Mr Macmillan as to the duty of appellate Courts in cases like the present.

When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their

manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

The present is a street accident case without any undue complications, and I do not see any reason for departing from this ordinary, simple, salutary rule. In the judgments of the Court below I have some doubt whether sufficient stock has been taken of this doctrine, or whether sufficient deference has been paid to the judgment of the learned Lord Ordinary. In those circumstances I can only repeat my regret, as expressed by my noble and learned friend on the woolsack, that a jury was not possessed of this case, and, once possessed of it, finished it once and for ever. The case was tried on 15th June 1917, and in your Lordships' House in London we are reviewing the ultimate judgment passed after a long course of procedure extending to over nineteen months. The case was appealed to one of the Divisions; the Judges were equally divided; at great expense it was again re-heard before five Judges; and now on this simple elementary question of fact three Judges take one view and three take another. I, however, do not enter upon that topic, as in the case of *Taylor*,[1] which was cited at your Lordships' bar, I expressed my view as to the legal situation of that matter.

Lord Parmoor.—I concur. I think that there was excessive speed in this case, that is to say, a speed which did not enable the driver to see the deceased until the accident had become inevitable, and therefore that there was negligence on the part of the respondents. As regards the case of contributory negligence, the onus of proving it is on the defenders, and I agree with the learned Judge at the trial that that onus has not been discharged.

Lord Wrenbury.—This is a class of case in whose decision I can feel no satisfaction. There is no question but that there was negligence. The only question before your Lordships is whether there was contributory negligence. The question is one of fact. The evidence is such that a reasonable person might well find either that the man was, or that he was not, guilty of contributory negligence. The question is whether the defenders have satisfied the onus of proving that he was. It is no doubt my duty, as this case comes not from a jury but from a Judge, to accept

[1] 1918 S. C. (H. L.) 96.

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the responsibility of saying what is the result of the evidence; but in so doing the finding of the Judge who saw the witnesses weighs strongly—not so strongly that I may confine myself to asking myself why he was wrong, but to the extent that I may as an appellate Judge properly recognise that the Judge of first instance stood in a position of advantage which I myself do not enjoy. It was for the defenders to prove contributory negligence. I think I ought to uphold the Judge of first instance in holding that the defenders have failed to prove it.

INTERLOCUTOR appealed from reversed, and interlocutor of the Lord Ordinary restored, with pauper costs.

JOHN CUTHBERT—WILLIAM GEDDES—R. S. TAYLOR, SON, & HUMBERT—MACPHERSON & MACKAY, S.S.C.

No. 7.

April 4, 1919.

Commercial Union Assurance Co. v. Waddell.

THE COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, Pursuers (Respondents).—*Chree, K.C.—Greenhill.*
MISS MARGARET WADDELL AND ANOTHER, Defenders (Appellants).—*Lord-Adv. Clyde—Macmillan, K.C.*

Superior and Vassal—Casualties—Meaning of "duplicand"—"And further to pay" a duplicand every twenty years.

A feu-contract, by which certain areas of building ground were feued, took the vassals bound to pay a feu-duty of stated amount by equal portions at Whitsunday and Martinmas in each year, "And further to pay . . . a duplicand of the said . . . feu-duty at the termination of every period of twenty years."

Held (1) that the term "duplicand" meant a sum of double the yearly feu-duty; (2) (*per* Lord Buckmaster and Lord Dunedin, *diss.* Lord Finlay and Lord Atkinson) that, on a construction of the feu-contract, the vassal was bound every twentieth year to pay the duplicand in addition to the feu-duty for the year.

The House being equally divided, judgment of the First Division to the above effect *affirmed.*

Authorities *reviewed.*

Lord Buckmaster. Lord Finlay. Ld. Dunedin. Ld. Atkinson.

(IN the Court of Session, 22nd June 1917—1917 S. C. 585.)

The defenders appealed to the House of Lords.

The appeal was heard on 21st, 22nd, and 23rd January 1919, when the undernoted authorities were referred to.[1]

[1] Magistrates of Inverness v. Duff, (1769) M. 15,059; M'Kenzie v. M'Kenzie, (1777) M. *voce* "Superior and Vassal," App., Part I., No. 2; Innes v. Reid's Trustees, (1822) 1 S. 556; Earl of Mansfield v. Gray, (1829) 7 S. 642; Earl of Zetland v. Carron Co., (1841) 3 D. 1124; Buchanan's Trustees v. Pagan, (1868) 7 Macph. 1; Magistrates of Inverkeithing v. Ross, (1874) 2 R. 48; Magistrates of Dundee v. Duncan, (1883) 11 R. 145; Alexander's Trustees v. Muir, (1903) 5 F. 406; Governors of George Heriot's Trust v. Lawrie's Trustees, 1912 S. C. 875; Adam v. Finlay, 1917 S. C. 464; Murray v. Bruce, 1917 S. C. 623; Ersk. Inst. II. v. 47, 49; Stair Inst. II. iv. 26, 27; Bell's Prin. (10th ed.) sec. 727; Bell's Lectures on Conveyancing, (3rd ed.) p. 635; Duff on Deeds, pp. 84, 481, 482; Feudal Casualties (Scotland) Act, 1914 (4 and 5 Geo. V. cap. 48).