which must be adopted. My reading of it is that there was no final or absolute election of the conventional as in place of the widow's legal provisions, but that the arrangement which was concluded and carried out was to endure only so long as she might remain unmarried. On her second marriage the business was to be restored, the loan of £1000 repaid, and then she might, if she were so disposed, claim her legal rights in place of her conventional provisions. This she has done, and I think the claim ought to be allowed.

LORD RUTHERFURD CLARK—I have had rather more difficulty in coming to a conclusion, but I have now come to concur in the view already expressed.

LORD JUSTICE-CLERK—I have had considerable difficulty in coming to a conclusion on one branch of the case. The arrangement as to carrying on the business is a peculiar feature. Had there been nothing else in the case than the liferent of the house and the legacy of the furniture, I should have been of opinion that the widow, having taken and enjoyed her conventional provisions, was precluded from now resorting to her legal rights. Though I do not quite follow the argument that so long as she chose to go on the footing of the arrangement about the business she was entitled indefinitely to postpone her election, I am nevertheless of opinion in this case that the election, whether intended to have been made or not, does not matter here, because both the trustees and the widow were in error as to the true position of matters, and that she is therefore still entitled to claim her legal rights.

LORD YOUNG—I would just add a reason for my view in the case, and it is this, that I am of opinion that the election could now be made without involving injustice to anyone. Matters are still practically entire, and the change proposed would not now put anyone into a worse position than if she had made her election at the time of the testator's death.

The Court answered in the affirmative the question quoted above.

Counsel for First Party (Widow)—Mackintosh—Ure. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for Second Parties (the Trustees)—J. P. B. Robertson—Begg. Agent—D. Lister Shand, W.S.

Saturday, December 2.

FIRST DIVISION.

FRASERS *v.* THE EDINBURGH STREET TRAMWAYS COMPANY.

Reparation—Street—Carriage—Child Run Over by Tramway Car—Contributory Negligence—New Trial.

In an action of damages for injuries received by a boy six years old who was run over by a tramway car while attempting to cross a street, it was proved (1) that the car was being driven faster than the legal rate of six miles an hour; (2) that there was nothing to prevent the boy from seeing the car approaching; (3) that from the pavement to the furthest rail was a distance of 17 feet which the boy had to traverse before he could reach a place of safety; and (4) that when the boy started from the pavement the tramway car was only about 15 feet from the point at which he attempted to cross the rails. The verdict was for the pursuer. The Court *granted* a new trial on the ground that the boy had been guilty of contributory negligence.

Process—Jury Trial—Expenses—New Trial.

Where a new trial is granted, the ordinary rule is to reserve the expenses of the first trial to await the result of the second.

This was an action at the instance of Robert Fraser, a boy of six years of age, and Thomas Fraser, his father, against the Edinburgh Street Tramways Company (Limited), concluding for £250 as damages for injuries caused to Robert Fraser by a car belonging to the defenders. The pursuers averred that on 28th November 1881, while Robert Fraser was crossing Constitution Street, Leith, the defenders' car, "which was being driven furiously and recklessly, knocked down and ran over him," and that in consequence of the injuries then sustained it was found necessary to amputate the forefinger of the left hand, and that the middle finger was permanently injured.

The material facts of the case are fully detailed in the opinions of the Judges, *infra.*

An issue was tried before Lord Fraser and a jury on 9th November 1882, when a verdict was returned for the pursuer assessing the damages at £150. The defenders obtained a rule on the pursuer to show cause why the verdict should not be set aside. The grounds on which the defenders rested their motion were (1) that the verdict was contrary to evidence, (2) that the pursuer was guilty of contributory negligence, and (3) that the damages were excessive.

The pursuers now showed cause, and argued—The *onus* of proving contributory negligence was on the defenders, and they had failed to discharge it.

Replied for the defenders—In this case contributory negligence had been proved.

Authorities—*Grant* v. *The Caledonian Railway Company*, December 10, 1870, 9 Macph. 258; *Auld* v. *M'Bey*, February 17, 1881, 8 R. 495; *Abbott* v. *Macfie*, 33 L.J. (Exch.) 177; *Mangan* v. *Atherton*, L.R. 1 (Exch.) 239; *Campbell* v. *Ord and Madison*, November 5, 1873, 1 R. 149; *Lynch* v. *Nardin*, 1 Ad. & E. 29; *Grant* v. *The Glasgow Dairy Company*, December 1, 1881, 9 R. 182.

At advising—

LORD PRESIDENT—The issue in this case is—"Whether on or about the 28th day of November 1881, and while crossing Constitution Street, Leith, at or near Coatfield Lane there, the pursuer Robert Fraser was knocked down by a car belonging to the defenders, and suffered severe bodily harm, through the fault of the defenders, to the loss, injury, and damage of the said pursuer?" The only fault alleged on record is, that

the car by which the pursuer was knocked down was at the time being driven furiously and recklessly. Now, I attach no importance to these adjectives or adverbs, and therefore the ground of action is simply that the pursuer was knocked down in consequence of the car being driven too fast. If there had been nothing but the question whether the car was being driven too fast I would not on that ground have disturbed the verdict of the jury, for nothing could be more suitable for a jury to express their opinion upon than the rate at which the car was being driven. It is open to observation indeed that there is plainly a good deal of exaggeration in the evidence with regard to the pace at which the car was driven. I think the most reliable evidence is that of the witness Smith, who was driving a lorry which was overtaken by the car, and what he says is this—"I saw two cars standing at end of double line before going on single line. They waited a minute, and then started off. They passed me. What I saw was this—I saw something roll out from the horses' feet. This was the little boy. . . . The cars were going very fast—ten miles an hour. They were driving harder than usual." He explains that the two cars stopped at the siding in order to let a car pass which was going in the opposite direction, and that the place where they stopped was 10 yards from where the single line began—that is to say, they were 10 yards from the place where they could get off the siding and on to the single line. It was also admitted that the car could not go over the points at a rapid pace, because otherwise it would go off the rails; and the same witness, the lorry-driver, says that the place where the accident happened was only 20 yards beyond the points. Now, it is very difficult to suppose that even on tramway lines a pace could be got up in 20 yards of an extraordinary or furious kind; unless great exertions were made it is not at all probable that the pace was anything but moderate. At the same time, one is bound to remember that the distance of 20 yards is calculated, not from the place when the cars were at a standstill, but from where the cars were going at a fast pace, and it is not difficult to believe that a rate of three miles an hour could be got up to seven or eight miles an hour in that distance, especially when it is remembered that the gradient at this part of the street was 1 in 70. Therefore I think we may certainly assume that the pace at which this car was going was beyond what is permitted, and if the question related solely to the pace I would not disturb the verdict.

But the important question is that relating to contributory negligence, and here the jury have gone quite wrong. We have the evidence of three persons—Ness, Dick, and Cumming—who were on the spot, and though their evidence differs in some of the particulars, which is not surprising, yet they agree on the substantial facts, and the one or two points on which they do agree are conclusive in the case. Before adverting to their evidence, however, it is necessary to have a clear notion of the locality, and on this point Duff, the defenders' inspector, speaks quite distinctly. This street—Constitution Street—at the place where the accident happened is 29 feet broad; there is in the middle of the street a single line of rails whose breadth between the rails is 5 feet, so that there is a space of twelve feet on each side between the rails and the pavement; the pavement there is 6 feet broad. The boy who was injured was on the pavement on the left hand side of the street as the car was going down, and as the car approached he tried to cross. The boy had 12 feet to traverse to get to the rail, and 17 feet to traverse before he got across into a place of safety. Ness, who is one of the pursuers' witnesses, says that the boy could have seen the car coming, and gives this description of the occurrence—"I was in Constitution Street at a quarter to six. I saw car coming, 15 yards away. My neighbour, Cumming, gave a cry that a boy was among the horses. Saw boy between the rails, and then car passed on." The witness Dick says—"I was with Ness and Cumming on day of accident. When car was coming down we shouted when we saw child under horses. We cried to driver to stop—'Boy under horses.' Car went straight on. When I first saw boy he was crossing street. I saw him get under horses' feet. I went over to boy." Then in cross-examination he says—"When we first saw boy he was 4 or 5 yards from us; but the car was just upon him when we saw the boy. I saw the boy step off the pavement to go on the street. The car was at that moment 4 or 5 yards away from him." Now, that must mean 4 or 5 yards short of the place where the boy was attempting to cross the street. Then Cumming says—"I was the first who saw the boy in front of the horses. I called attention to it. In my opinion the car was going at ordinary rate of speed. This is my opinion now as it was at the time." And in cross-examination—"When I saw the boy he was within 3 or 4 feet of car. Boy was just run over when I cried to driver. He did not stop. I was 15 or 20 yards in front of car when I saw boy." Now, it appears clear from this what it was the boy did, and it must be remembered that though young he was quite accustomed to the place, because he was in the habit of going to meet his father every evening, and therefore he knew the street and the locality. He also knew what a tramway car was from having frequently seen them passing and repassing. The nature of a tramway car is not difficult to describe, and there is no doubt that it is a source of considerable danger to traffic. No one can doubt that tramway cars are an unpleasant accession to the ordinary dangers of a crowded thoroughfare introduced in modern times. Many people are not pleased to think that they are there, but unfortunately for that view they are lawfully there, and the danger must be provided against, and has to be taken into consideration. The driver of a tramway car cannot guide his car or horses in the way in which the driver of an ordinary conveyance can. In the case of the driver of an ordinary conveyance, he can, if anything of a skilful coachman, turn or pull up so as to avoid any obstacle that may be in front of him, whether it be a human being or anything else, but the driver of a tramway car is tied down to going on in one undeviating line, and all he can do to avoid collision is to put on the brake and pull up, and unless he can do this he is helpless. Keeping this in view, what did the boy do? He knew that the car was passing, for he must have heard the noise, particularly as it was followed quite close by another; yet in these circumstances he starts from the pavement while the tramway car, according to the witnesses, was

only 5 or 6 yards at the most from the point at which he attempted to cross, and making a run for it—for otherwise he could not have reached the place where he was knocked down—he tries to cross right in front of the car. Now, I can hardly conceive anything more reckless than this, and the pursuer must take the consequence of this foolishness and imprudence, for he is old enough to know the risk he ran. It appears that this poor boy, about whom I do not wish to say anything harsh, has himself to blame, and therefore I think that a case of contributory negligence was made out, and that the verdict should have been for the defenders. The jury missed this point, to which no doubt their attention was directed by the presiding Judge; they either disregarded it, or failed to see how clearly the pursuer was to blame in the matter. I think therefore that the rule should be made absolute and a new trial granted.

Lord Mure—I concur. If the only question depended upon the pace at which this car was being driven, I should not have been inclined to disturb the verdict, for I think that the evidence as to pace was sufficient to lead the jury to the conclusion that the car was being driven at considerably more than the prescribed rate of six miles an hour at the time this accident happened. Although I do not altogether adopt the evidence of the witnesses who say that in 20 yards you can get up such a speed as that, yet I think your Lordship's explanation of the circumstance that previous to that the car had been in motion for 10 yards shows that it was possible for the driver to do it in the distance travelled between the points and the place where the accident happened. On the question of contributory negligence I am of opinion that the jury are wrong. With reference to this there are two points to be considered—first, the distance the boy had to go after he left the pavement; and second, the distance the car was from the point at which he attempted to cross at the time he left the pavement. As to the first, the evidence of Duff, the defenders' inspector, is quite clear—"The breadth of street at places is 29 feet. Only a single line there. Breadth within rails 5 feet, and so 12 feet on each side of line. Pavement at that place 6 feet broad." So that from the point of the pavement from which the boy started to the rails is 12 feet, and he had to go 5 feet more before he was safe. The second point depends upon the evidence of Dick, which your Lordship has referred to. He says—"I saw the boy step off the pavement to go on street. The car was at that moment four or five yards away from him"—that is to say, four or five yards from the spot where the boy would be when crossing the street. Therefore the boy had 17 feet to go to be safe, while the car, going at the rate of ten miles an hour, had only 15 feet to go to get to the place where the boy intended to cross. Starting from the pavement in these circumstances the boy was bound to come into collision with the car, and could not possibly avoid it. In attempting to cross he showed a great want of caution It was said that the street was not well lighted, but some of the witnesses say that they saw the car fifteen or twenty yards off. I think that if the boy had looked out he must have seen the lights of the car coming down. It would only have been an act of ordinary prudence to stand still, and as the pursuer showed such a want of due caution he must be considered as contributing to the accident. On this ground I come to the conclusion that this verdict is against the evidence.

Lord Shand—I am of the same opinion as your Lordship and Lord Mure on the question of whether the verdict is contrary to evidence as to the speed of the car. The verdict is against the defenders, and I think that the jury were right. The rules of the company specify a certain rate as the maximum, and I am satisfied that this car was travelling faster than that. The case therefore starts with this, that the car driver was in fault in driving at a rate which was contrary to regulations. Even taking it so, I am of opinion that contributory negligence has been proved. If in this case the injured party had been a grown-up person, I think that he would have had great difficulty in giving an explanation of how this accident happened. It is not said that there was any bend or turn in the street, and the car gave ample notice of its approach; its lights were lit, and there were its bells and the noise of the horses hoofs; the car went straight along the road; and I cannot doubt that if in these circumstances a grown-up person had made a nice calculation that he had time to get over in safety and had failed he would have been guilty of contributory negligence. Now, it is true that we cannot expect or demand from a child of five and a-half the same amount of caution as from a grown-up person, but at the same time, looking to the circumstances of this case, this boy does seem to have been guilty of great imprudence. It is just a case of a class we see too often, where a child runs in front of a conveyance advancing towards it, and but for the caution and skill of the driver would certainly be killed.

The grounds on which I proceed in this case are those which your Lordship has stated, namely, the short distance that the car had to travel before it came to the place where the boy attempted to cross, and the fact that the car could be seen quite plainly. The boy may not have realised the speed at which the car was going, for when a car is approaching it is hard to tell the pace at which it is coming, but even on the footing that it was going at the usual pace it showed a gross want of care to insist on trying to cross in front of the car instead of waiting until it had passed. My only difficulty in connection with the case is the fact that Lord Fraser who tried the case does not concur in the judgment to be pronounced; that has forced me to weigh doubly the circumstances of the case and the reasons of my opinion. But after due consideration I am constrained to agree with your Lordships. It may be said that it is not right to take as correct the exact number of feet and yards spoken to in the evidence even though there was no attempt to break down the witnesses in cross-examination. But though the distance may not be considered exactly correct, I yet think that in the circumstances the boy's conduct contributed to the accident.

Lord Fraser—Three grounds have been stated in support of the motion for a new trial.

The first of these is that there was no fault

on the part of the defenders, in respect that the car was not driven at a faster pace than usual. Now, upon this matter there was evidence upon both sides, and the preponderance of it told against the defenders. Only one neutral witness said that the car was going at its ordinary speed, while there were four witnesses who gave evidence to the contrary. The question was one for the jury, and in coming to the conclusion which they did, that the car was driven at a very quick pace, they certainly did not return a verdict against the evidence, but in accordance with it. I cannot therefore sustain this as a ground for a new trial.

The second ground upon which a new trial is asked is that the pursuer Robert Fraser was guilty of contributory negligence. In regard to this, I am of opinion that a young child may in law be held capable of contributing to its own injury, and thereby be debarred from claiming damages from the person who caused it. The rule, however, cannot be applied to the same extent as it would be in reference to an adult. From a child of six years of age, which the pursuer in this case was, it cannot be expected that it should exercise any greater capacity or care than a child of that age could naturally have. School children, for example, of tender years, who have every day to go to school unattended, and must cross streets in order to reach the schoolhouse, must use such reasonable care as school children can. It must be reasonable care no doubt, but care adapted to the circumstances, or, in other words, the ordinary care to be expected from school children. Then, too, the dangers that they must avoid must be such as lie within the range of their limited experience. Hence the Second Division in *Campbell* v. *Ord & Madison*, 1 R. 149, held that a child of four years of age was not capable of contributory negligence although it put its fingers into a crushing machine left in the market place of a country town unguarded, and of which it previously had no knowledge or experience. The child in the present case was a little older. But there is this peculiarity in reference to this pursuer, that he was not dealing with an unknown danger. He had gone regularly to meet his father coming from his work, and was therefore acquainted with the cars of the Tramway Company, and the danger of the streets arising therefrom. Such a child, even of six years of age, therefore, may fairly be open to the plea of bar founded upon contributory negligence. But it is because I hold that contributory negligence is not proved that I cannot sustain this as a reason for granting a new trial.

It has no doubt been proved that the child, instead of waiting to allow the car to pass him, took the other course of running across the street, hoping to get beyond the tramway before the car reached him. It would certainly have been a more prudent course not to have done this, but to have waited. One witness says he must have seen the car, for the lamps were lit, but assuming this to be the case, the question as to whether this was rashness, and therefore contributory negligence, on his part is a question of circumstances. In itself it cannot be held to be rashness to cross a street in front of an advancing carriage. It must depend upon the distance from the carriage whether it would be safe and proper, or foolhardy and rash, to make the attempt. This was a question of fact within the province of the jury, and in regard to which there was very scanty evidence led. The burden of proof is, however, upon the defenders, and I am not satisfied that the jury went against the evidence when they decided the point in favour of the pursuer. That evidence seems to stand as follows:—The witness James Dick said that when he saw the pursuer step off the pavement to go on to the street the car was four or five yards away from the pursuer, and it is suggested that as there were twelve feet between the pavement and the tramway, the boy just ran among the horses' feet, seeing that they could run over the four or five yards far quicker than he could run over the twelve feet before reaching the rail. I am not satisfied that it is safe to trust to this guess of Dick's as to the number of yards between the boy and the horses. I am certain the jury did not rely upon it. I referred to it specially in the observations I made to the jury, and after my charge was ended I was requested by Mr Darling, for the defenders, to point out to the jury once more the circumstance that the boy had twelve feet to cover before he reached the tramway, and this I did. The jury, I think, must have proceeded upon the ground that it was a random guess of Dick's, and they had some ground for that opinion looking at the discrepancies as to distances in regard to other matters in the evidence given by the witnesses. Thus, for example, Francis Smith and Dick say that there were only four or five yards between the two cars, numbers ten and eleven, after they had started, while Thomas Ness says that there were thirty yards, and John Wilson says that there were forty yards between them. The night was dark, the place was imperfectly lighted—having only two street lamps—and Dick and Cumming were, according to Cumming, fifteen to twenty yards in front. It was impossible under such circumstances to gauge accurately the distance between the advancing car and the boy on the pavement; and when we find such discrepancies as to distances on other points, one cannot rely upon the exact accuracy of Dick in specifying four or five yards, so as to upset the verdict of a jury who had heard Dick give his evidence, and who had the point distinctly presented to them for their consideration.

Further, if the boy made a mistake in calculating the distance between himself and danger, the Tramway Company are to blame for that. He was entitled to rely upon the cars going at their usual rate of speed—the legal rate of six miles an hour—and the verdict of the jury has found that they went at a faster rate.

I also give to the boy this presumption, that being acquainted with the street he would, under the ordinary instincts of self-preservation, not run into a danger which he had avoided every evening before. If he judged erroneously the distance between him and the advancing car, he was led into the error, not by his own rashness, but by his ignorance of the unusual pace at which the car was coming down the incline.

On the third ground—that the damages given were excessive—I am not inclined to interfere with the verdict of the jury. The sum of £150 is larger than I would have given, but not so large as to induce one to order a new trial. The injury

which the pursuer has sustained will undoubtedly shut him out from a number of trades whereby he might earn a livelihood, and restrict him to such occupations as that of teacher, where both hands are not necessary.

I am therefore of opinion that the rule should be discharged.

LORD PRESIDENT—I wish to say that I give no opinion as to the amount of damages. In the view I have taken of the case that is not necessary.

LORD SHAND—As the question of the amount of damages has been mentioned, I must say that I think the amount awarded very large.

The pursuer moved the Court to make the payment by the defenders of the expenses already incurred a condition of allowing a new trial.—*Neville* v. *Clark*, Feb. 6, 1864, 2 Macph. 625.

The defenders opposed the motion on the ground that the question of expenses was now almost invariably reserved until the result of the second trial.—Mackay's Practice, ii. 550.

LORD PRESIDENT—No doubt there has been great diversity of practice with regard to this matter. When I first recollect the practice it was the rule to make the payment of the expenses of the first trial a condition of the second being allowed. The Court, however, came to be of opinion that this rule often operated very unjustly, and the practice was changed. It was after that change that *Neville* occurred, but that was in respect of the particular circumstances of the case. The present practice is perfectly well stated by Mr Mackay in his book, and I see no reason in this case which will induce the Court not to follow the ordinary practice. I therefore think the question of expenses should be reserved.

LORD MURE—After some hesitation the practice with regard to this matter has now been settled in the way your Lordship has stated. I recollect when it was the other way, but now the rule is to reserve expenses, and I see nothing here to take this case out of the general rule.

LORD SHAND—The general rule is now clear. There might be exceptional cases in which that rule would not be applied, as where the party moving for a new trial had been guilty of fault, such as leading evidence without giving notice of it, but that is not the case here, and I think the ordinary rule must be applied.

LORD FRASER concurred.

At the new trial, which took place before LORD SHAND and a jury at the Christmas Sittings, new and additional evidence was led by the defenders as to the result of experiments which had been made since the previous trial as to the maximum rate of speed at which cars could be driven over the points near the place of the accident without going off the rails. It further appeared from the evidence of Mrs Fraser, the boy's mother, that the boy was in the habit of going to the close mouth of the house in which he lived in Duke Street to meet his father at night, "but not further;" and in answer to the Court Mrs Fraser stated—"I would not have thought it prudent to allow him to go further. I would not have allowed it—had I known—not at night. I would have been afraid of his going among the horses' feet, or the like of that, he was so young."

His Lordship directed the jury first to consider the question whether the pursuers had proved fault on the part of the company, from the car having been driven at an excessive speed; and on the point of contributory negligence, the *onus* being in the first instance on the defenders, his Lordship stated that such negligence might be shown in either of two ways—first, if the child was too young to be trusted alone at night in such a busy street as Constitution Street, in which cars were constantly running—then there might be contributory negligence on the part of his parents, or of the child if he went there in disobedience of orders; and second, if the child was of sufficient age and intelligence to be trusted in such a locality, but did not exercise such care as might fairly be expected from one of his age who might properly be so trusted.

The jury found for the defenders, and stated that in their opinion the pursuers had failed to prove that the car had been driven at excessive speed.

Counsel for Pursuers—Scott—Watt. Agent—A. Duncan, S.S.C.

Counsel for Defenders — Trayner — Darling. Agents—Paterson, Cameron, & Company, S.S.C.

Saturday, December 2.

OUTER HOUSE.

[Lord M'Laren.

MACKINTOSH (ROBERTSON'S TRUSTEE) *v.* ROBERTSON OR MACKAY AND OTHERS.

Succession — Marriage-Contract — Parent and Child — Power of Appointment — Validity of Appointment.

Where an appointment is made to persons in succession which is partly *intra vires* and partly *extra vires*, the validity of the appointment is to be determined by the event.

By an antenuptial contract of marriage the wife's fortune was conveyed to trustees for the spouses, and the survivor in liferent, and the children in fee, subject to any deed of appointment during the subsistence of the marriage or by the survivor of the spouses. By a deed of appointment, bearing to be irrevocable, made by the husband, who survived, he directed that the greater part of the estate should belong to the eldest son of the marriage, "whom failing to the heir-male or female of his body who might be entitled to succeed" to an estate belonging to the appointer at the period of his (the appointer's) death. The eldest son predeceased his father leaving issue, and after his death the father by another deed of appointment made a different division of the trust estate. *Held* that as the son's issue were not objects of the power of appointment, the first deed of appointment contained in the event which had happened no valid scheme of division,