diction having been stated which the Lord Ordinary held to be untenable. As this judgment had become *res judicata* as between the parties it precluded the question being again raised in the proceedings which Mrs Stewart at that time contemplated bringing. I think it would have resulted in a serious injustice in that case if she had been forced to repay the expenses occasioned by an untenable plea put forward by the defender with regard to a preliminary matter which affected the competency of any new proceedings she might bring, and decided that matter in her favour. The same considerations necessarily apply where any interim award of expenses is made, as in the present case, because such an award implies that there has been unnecessary procedure due to the course taken by the unsuccessful defender. I think therefore that we must adhere to the judgment reclaimed against.

LORD GUTHRIE—I agree with your Lordship in the chair. It may be that if in a case of abandonment full justice in all cases was to be done between the parties reinstatement would be required. But it is admitted that in cases of consent to absolvitor where the equity would be substantially the same no such element has ever been considered. I am of opinion that the rule must be the same in a case where a pursuer takes the course of abandonment of the action.

The Court adhered.

Counsel for the Pursuers (Respondents)—Lord Advocate (Clyde, K.C.)—Brown, K.C. —Black. Agents—Webster, Will, & Company, W.S.

Counsel for the Defenders (Reclaimers)—Sandeman, K.C.—R. M. Mitchell. Agents —Cumming & Duff, W.S.

HOUSE OF LORDS.

Friday, March 14.

(Before Lord Buckmaster, Lord Atkinson, Lord Shaw, Lord Parmoor, and Lord Wrenbury.)

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

Reparation — Negligence — Proof — Sufficiency of Evidence.

Observations per curiam on the importance to be attached by appellate courts in cases involving the determination of questions of fact, to the conclusion come to by the judge who saw and heard the witnesses.

Sarah Ann Clarke, widow, *pursuer*, brought an action against the Edinburgh and District Tramways Company, Limited, *defenders*, for £500 damages in respect of the death of her son, who was run down by a car belonging to the defenders.

On 20th February 1917 the pursuer moved for issues to be allowed. The Lord Ordinary (ANDERSON) refused the motion and allowed a proof before answer, which was subsequently led. On 15th June 1917 the Lord Ordinary found the pursuer entitled to damages and assessed the same at £100. The defenders reclaimed to the First Division, and after the case had been heard by the Court (the LORD PRESIDENT, LORD JOHNSTON, LORD MACKENZIE, and LORD SKERRINGTON) a re-hearing before five Judges was ordered. The case was subsequently re-argued before the First Division with LORD CULLEN, and on 26th February 1918 the Court (LORD JOHNSTON and LORD SKERRINGTON dissenting) assoilzied the defenders.

The pursuer appealed to the House of Lords.

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 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 in the circumstances 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 should be 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.*]

LORD SHAW—I entirely 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 the 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, each judge of it, to put to himself, as I now do in this case, the question, Am I—who sit here without these 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, recognising that I have not the same privileges which he enjoyed, it appears to me to be my duty to defer to his judgment.

The present is the simplest ordinary street accident case, and I do not see any reason for departing from the 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*, 1918, 55 S.L.R. 443, which was cited at your Lordship's 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 trial Judge that that *onus* has not been discharged.

LORD WRENBURY—This is a class of case in whose decision I can feel no satisfaction. It is a pure question of fact which has been found, and there is no question but that there was negligence. The only question before your Lordships is whether there was contributory negligence. 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 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.

Their Lordships reversed the interlocutor appealed from, with costs.

Counsel for the Pursuer and Appellant—J. A. Christie—Melville. Agents—William Geddes, Solicitor, Edinburgh—John Cuthbert, Solicitor, London.

Counsel for the Defenders and Respondents—Macmillan, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C., Edinburgh—R. S. Taylor, Son, & Humbert, London.