the right of appeal by merely extracting a decree for expenses which was quite distinct from the decree on the merits. The only way he could have put an end to the case was by extracting the decree of absolvitor.

At advising—

LORD JUSTICE-CLERK—In such a case as this, which is under a statute by which there is an exclusion in a special case of a right of appeal otherwise competent, one rather leans towards the exercise of the right of appeal than towards its exclusion. Here my own impression is that the extract of the decree of expenses was not equivalent to extract of the decree of absolvitor, although in this case it is of consequence to observe that the decree of absolvitor was followed by decree for expenses in favour of the defender, for there are many cases where the award of expenses may be inconsistent with the judgment of absolvitor. But the ground of my judgment here is that the interlocutor disposing of the merits of the case was not extracted, and therefore that the appeal is not excluded by the statute.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I am also inclined to read the statute as your Lordship has done. The statute declares in very express terms that the right of appeal is competent for six months, provided that it has not before the lapse of that time been extracted or implemented. There is here a decree of absolvitor. Has it been extracted or implemented? Now, I think the meaning of the statute is that a party shall not be cut out of his appeal unless the right of appeal is expressly excluded by the statute. But it is said that the appeal is barred here because the decree of absolvitor was followed by a decerniture for expenses, and that has been extracted. I do not think that extracting that decree is equivalent to extracting the decree of absolvitor, and therefore I think that the appeal is competent.

The Court repelled the objection and sustained the competency of the appeal.

Counsel for Pursuer (Appellant)—D.-F. Macdonald, Q.C.—Gardner. Agent—A. Trevelyan Sturrock, S.S.C.

Counsel for Defender (Respondent)—Darling—Law. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, October 24.

SECOND DIVISION.

CLAPPERTON, PETITIONER.

Poor—Admission to Poors'-Roll—Act of Sederunt 21st Dec. 1842, *secs.* 2 *and* 3*—Declaration of Poverty—Procedure to be adopted where Applicant is unable from Bodily Injuries to Appear before the Minister and Elders and Emit a Declaration.*

Alexander Clapperton, residing at No. 7 Spence Place, Edinburgh, having been run over by an omnibus belonging to the Edinburgh Tramways Company, and being desirous of obtaining admission to the benefits of the poors'-roll to enable him to raise an action of damages against the Company, applied to the Session-Clerk of St Cuthbert's Parish (in which parish he was resident) requesting that a meeting of the minister and elders of the parish should be held within his house for the purpose of taking his declaration of poverty in terms of the Act of Sederunt 21st December 1842, which enacts:—Sec. 2—"That no person shall be entitled to the benefit of the poor's-roll unless he shall produce a certificate under the hands of the minister and two elders of the parish where such poor person resides, setting forth his or her circumstances according to a formula hereto annexed (Schedule A)." Sec. 3—"That if the party's health admit of it, he or she shall appear personally before the minister and elders, at the time and place to be appointed by them, to be examined as to the facts required by said formula."

He produced a medical certificate to the effect that he was unable to leave his own house to appear before the minister and elders.

The request having been refused by the session-clerk, who acted on his own responsibility in the matter, Clapperton presented this petition praying the Court "that the minister and elders of the parish of St Cuthberts be ordained to hold a meeting within No. 7 Spence Place, Edinburgh, for the purpose of taking the declaration of poverty in terms of the Act of Sederunt 21st June 1842."

It was stated at the bar that regular meetings were held by the Kirk-Session for the purpose of meeting with poor persons applying for such certificates; that the parish contained 85,000 parishioners, and the parochial duties were very heavy, and therefore it was not expedient that such an additional duty as would be involved in such special meetings as was here applied for should be imposed.

The Court, without pronouncing any order, intimated that they were of opinion that the request was a reasonable and proper one, and ought to be complied with.

LORD CRAIGHILL was absent.

Counsel for Petitioner—Salvesen. Agent—Arthur Adam, W.S.

Counsel for Respondents—Lyell. Agents—Horne & Lyell, W.S.

Friday, October 24.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles at Edinburgh.

M'DERMAID *v.* THE EDINBURGH STREET TRAMWAYS COMPANY (LIMITED).

Street—Tramway Car—Duty of Driver to pull up if Necessary till Temporary Obstruction is Removed—Reparation.

The driver of a cab stopped in a crowded street to take up a passenger, in such a manner that one wheel of the cab was on tramway rails which ran along the street. A driver of a car coming behind saw the obstruction, and whistled, but did not stop, and his car struck the cab and upset it.

Held that it was in the circumstances the duty of the car-driver to stop till the obstruction was removed, and that his employers were liable for the damage caused to the cab.

This was an action by a coach-hirer in Causewayside, Edinburgh, against the Edinburgh Street Tramways Company (Limited), concluding for the sum of £40 for loss and damage which he alleged he sustained in consequence of one of the defenders' tramway cars striking and overturning, on 1st January 1884, in Leith Street, a cab belonging to him. He averred that the collision had occurred through the fault of the defenders' car-driver, who had failed to give the cabman timeous notice of his approach by whistling, and had failed to draw up his horses in time to stop them and avoid the collision.

The defenders averred that, in accordance with the company's regulations, the car-driver was proceeding down Leith Street at a slow pace. As soon as he saw the cab on the rails he shouted and whistled, and put the brake on, at the same time throwing down sand, as the rails were in a slippery condition owing to the state of the weather; that the cab was stopped in front of the car at a distance which rendered it impossible to stop the car before it reached the cab; and the damage was caused solely by the carelessness and neglect of the driver of the cab, who might have avoided the collision at the last moment by taking his cab straightforward from where it stood.

The facts of the case, as ascertained in the proof, were as follows:—George Innes, who was the driver of the cab in question, was engaged by two gentlemen to drive them from the Tron Church to Powderhall. The day being New Year's Day, the streets were unusually crowded. He was driving the cab down the left side of Leith Street, and when he had proceeded about 50 yards down the street he was hailed by three men, who asked if he was going to Powderhall. He stopped, drawing up as near to the pavement as he could get owing to the crowd of people who were passing down the street at the time, but the cab was not clear of the tramway rails, the off hind-wheel resting on the edge of them. Leith Street is narrow at that part, but there is more than room for a cab to stand between the left rail and the edge of the foot-pavement. Innes got off his box and went to open the door, and some little delay was occasioned by the party making arrangements about going to Powderhall. One of the party got into the cab, and while the second one was proceeding to enter, Innes, hearing the whistle of the driver of a tram car which was coming down the street, looked up and saw the car 4 or 5 yards from the cab, and too near him (as he stated) to enable him to draw his cab clear of the rails. The car then struck the cab, and Innes took the horse down the street, the car and cab being at the time in contact, the car, according to the pursuer's witnesses, pushing against the cab. The lock of the cab became fixed, and it overturned. Both horse and cab were damaged.

The Sheriff-Substitute (Hamilton) issued this interlocutor:—"Finds it not proved that the overturn of the pursuer's cab on the occasion libelled was caused by the fault of the defenders' servant, the driver of the tramway car; and finds that in any view the person in charge of the pursuer's cab, who had stopped to take up chance passengers, was guilty of contributory negligence (1) in not drawing up his cab (as he might have done) clear of the tramway rails; and (2) in leaving his seat upon the box, going to the cab door, and there allowing his attention to be distracted by a discussion going on among the persons proposing to enter the cab, so that he did not hear the signals made to him by the car-driver until the car horses were within 4 or 5 yards of the cab, after which he was unable to get to his horse's head in time to draw forward the cab and so prevent the accident occurring: Finds, in these circumstances, that the defenders are not liable to the pursuer in damages: Therefore assoilzies the defenders from the prayer of the petition and decerns.

"*Note.*—The Sheriff-Substitute decides the case upon the point of contributory negligence. But he is further of opinion that the pursuer has failed to establish fault against the defenders. No doubt if the car-driver had stopped the car at the head of Leith Street, and remained there until the cab had moved off, the accident would not have occurred. The Sheriff-Substitute, however, does not think he was bound to do this. It was enough that he went down the street at a cautious pace, using his whistle, and shouting to the cabman as he approached. He could not anticipate that his signal would be unheard or disregarded."

The pursuer appealed, and argued—The Sheriff-Substitute was in error in deciding the case upon the point of contributory negligence. The decision of the case really turned on the question whether the car-driver did his duty or not, and that question fell to be answered in the negative. It was his duty, as soon as he saw the pursuer's cab on the rails, to have pulled up the car until the temporary obstruction was removed. It was not enough to whistle and shout to the cabman as he approached.

Authorities—*Clerk* v. *Petrie*, June 19, 1879, 6 R. 1076; *Auld* v. *M'Bey, &c.*, February 17, 1881, 8 R. 495.

The defenders replied—1. The car-driver did all that could have been reasonably required of him in the circumstances. He shouted and whistled as he approached, put on his brake hard, and placed sand on the rails as the road was in a slippery condition. Besides, the car could not have been entirely stopped at that point. 2. But for the cab-driver's contributory negligence the accident would never have happened. He ought to have drawn up the cab clear of the rails, and he ought not to have left his box and given his attention to the altercation going on between the passengers as to the route.

At advising—

Lord Justice-Clerk—This is an important case affecting the interests of the public in Edinburgh, and I cannot say that I agree with the view which the Sheriff-Substitute has taken of it. It appears to me that the driver of the tram-car was bound to obey the rules to which his employers subjected him, and he was also bound independently of those rules to act on the ordinary rules for the use of the street. Of course the Tramway Company have in a sense the monopoly of the use of the tram-rails, and no one may obstruct them in such a use as is reasonable, but this right must be always subject to the con-

sideration that the rails are laid down on a highway which is public, and that consequently the Company are bound to use their right consistently with the use of the streets for public traffic. Now, the Sheriff-Substitute has found that on the occasion in question the driver of the car was not bound to have stopped his car when he saw the stationary obstruction on the rails in front of him, and that is the whole question. I think that, however great the fault of the cabman might have been, there can be no doubt of the duty of the car-driver. He was not entitled on any pretence whatever to drive the car against the cab, as it stood at the time upon the rails, if he could have avoided it; and it does not matter how the obstruction came to be there if he could with reasonable care have avoided it, he was bound to have done so. Now, it is certain that he could have done so, for he saw the cab with the off hind wheel resting on the edge of the rail, and the incline of the street was a dangerous one. It was his duty then to have stopped till the obstruction had been removed; no doubt he did whistle and call out, but he must have seen that the obstruction was a temporary one, and for the reasonable use of the thoroughfare. On the simple ground therefore that the driver ought to have stopped the car till the cab was removed, I am of opinion that the Sheriff-Substitute is wrong. As to contributory negligence, I am not prepared to say that there was any. There must arise occasions on which vehicles may stop for a temporary purpose, and I do not see that in a crowded thoroughfare such as this, and in the circumstances of the case, there was anything amounting to such negligence. There would have been no accident if the defenders' driver had done his simple duty. It would be a dangerous precedent if the Court were to sanction the notion that because a cabman did not get out of the way as quickly as a car-driver thought he ought to do, the latter was entitled to drive his car against the cab. It is said he could not stop the car, but that does not improve the respondents' case because in a city like Edinburgh, where there are so many steep gradients, the Tramway Company are bound to have vehicles so constructed that they can stop—as the car did not do in this case—in obedience to their own rules.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court pronounced the following interlocutor—

"Find that on the occasion in question the driver of the tramway car, on turning it into Leith Street, which at that point slopes rapidly downwards, came in sight of the pursuer's cab standing at a short distance across the rails of the tramway: Find that it was the duty of the driver of the tramway car to have stopped the vehicle until the obstacle was removed, but that he proceeded, and the car therefore came into contact with the cab and upset it, causing the damage libelled: Find that the defenders are liable for the damage thereby occasioned: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute appealed against; ordain the defenders to make payment to the pursuer of £40 sterling, with interest as libelled," &c.

Counsel for Pursuer (Appellant)—Galloway—Rhind. Agent—George Hutton, L.A.

Counsel for Defenders (Respondents)—Trayner—Guthrie. Agents—Paterson, Cameron, & Co., S.S.C.

Saturday, October 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DALGETY AND OTHERS *v.* THE LORD PROVOST AND MAGISTRATES OF GLASGOW.

Road—41 *and* 42 *Vict. c.* 51 (*Roads and Bridges* (*Scotland*) *Act* 1878), *secs.* 66, 67, *and* 89.

The roads under a road trust existing before the Roads and Bridges Act 1878, were situated in the counties of Stirling, Dumbarton, and Lanark, some portions of the roads in the latter county being within the bounds of the city of Glasgow. The Act was adopted by the county of Stirling in April 1880, before it had been adopted in Dumbartonshire or had come into operation in Lanarkshire under section 89. One of the debt commissioners appointed under the statute allocated a certain portion of the debt due by the former trust on the county of Lanark including Glasgow, another portion on Dumbarton, and the remainder on Stirling, leaving the ultimate allocation as between Glasgow and Lanark to be effected by section 89, sub-section 1. *Held*, on a construction of sections 66, 67, and 89, that this allocation was unobjectionable.

This was an action by Mary Dalgety and others against the Lord Provost and Magistrates of Glasgow, as Local Authority having the management of the streets of Glasgow, and power to levy assessments in respect thereof, and as such the Local Authority of Glasgow in the meaning of the Roads and Bridges Act 1878. The pursuers concluded for declarator that they were creditors of the Cumbernauld Road Trust at 15th May 1880 in the sum of £7866, 1s. 2d., and £6592, 0s. 5d. unpaid interest, and that by virtue of the Roads and Bridges Act 1878 they were creditors of the defenders in so much of the value of this debt, ascertained in the manner prescribed by the Act, as had been or should be, allocated upon the burgh of Glasgow, and that to the extent of £803, 12s. 7d. the said debt was a charge against the defenders and their assessments. They concluded for delivery of a certificate of debt for that sum, or otherwise for payment thereof with interest from 15th May 1880.

It was not disputed that the pursuers were at the passing of the Act creditors of the Cumbernauld Road Trust, the roads comprised in which were situated in Stirling, Dumbarton, and Lanark. Part of their roads in Lanarkshire were situated within the burgh of Glasgow.

The Roads and Bridges Act was adopted in Stirlingshire in April 1880.

The section of the statute relating to the allocation of road debts in such circumstances is the