pose of their railway, or that portion of it which consists of the piers of the viaduct standing upon and being supported by this ground. So that really the right which they obtain under this part of the conveyance is in all practical effect exactly the same right which they get under the other portion of the conveyance, which conveys to them in appearance and formally and technically the property of the land itself.

Now, I think it would be a most unreasonable construction of such an Act of Parliament as this to say, that because the conveyancer chooses to put the thing in this particular shape in making out his conveyance of the subject, therefore this shall not be taken to be a purchase of land within the meaning of the 56th and other clauses of the statute. I think it is a purchase of land just as much as the purchase of the other piece of land. It is a purchase of land for a special and limited purpose. So is the other. And the special and limited purpose in the one case is just as special and limited as it is in the other—neither more nor less. It is for the same purpose in both.

I am therefore of opinion that the mineral clauses, as they may be called, of this statute, 7 and 8 Vict. chap. 87, are clearly applicable to this part of the conveyance as well as the other, and therefore I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—The question in this case is whether the mineral clauses—sections 56, 84, and 85—of the Act of 1844 are applicable. The Caledonian Railway Company maintain that they are not applicable, and originally (as your Lordship has pointed out) they maintained that on two grounds. In the first place, that this transaction and conveyance were not subsequent to the Act of 1844, and that therefore the Act was not at all applicable; and, in the second place, that this was not a purchase of land, but the constitution of a servitude, and that therefore these clauses in the Act did not apply. But latterly the second became the sole ground of the contention for the Railway Company, and, as your Lordship has said, it is very clear that, even apart from the concession, that is so.

The Caledonian Railway Company say that this is not a purchase of land in the sense of the statute, because (and this is the main ground) this was not a sort of deed or conveyance which the Railway Company could have compelled the granters to make. They say it was a mere voluntary transaction, to which the statute has no application.

I am of opinion that that contention is not well founded, and I rest my opinion upon this simple ground. The reason why a conveyance of land is subject to those clauses in the statute is simply this—that the conveyance of the land implies the constitution of the servitude of support. That is the sole ground of it. Now, we have here this servitude of support constituted, not by implication, but by an express deed. My humble opinion, however, is that that makes no difference. As I have said, the servitude of support implied in the disposition of the above brings in these clauses; and when we have that servitude of support expressly given in place of by implication, I think it makes no difference on the result.

Lord Mure—I have come to the same conclusion, and very much on the same grounds as your Lordship and Lord Deas have mentioned. The substance of this transaction is the acquisition of ground under an Act of Parliament for the use of the railway; that is distinct throughout the whole of the conveyance. And secondly, there is the peculiarity in the expression of the conveyance of the servitude, which I was at first struck with, but I am satisfied it arises from the fact that the viaduct was actually built and in existence at the time the land was acquired; and referring to the terms of the disposition and to the clauses in it, by which the provisions of the Act of Parliament are imported into that conveyance, I think it must be regulated by the ordinary rules which are applied in all such cases. After the conveyance of the ground, the deed bears that it is taken by the Railway Company, and shall be held by them and their successors "according to the true intent and meaning" of the Act of Parliament. And that is applicable not merely to the land acquired, but to the whole premises expressly above mentioned.

On these grounds I have come to the same conclusion.

The Court adhered, with additional expenses.

Counsel for Pursuers (Reclaimers)—Lord Advocate (Watson)—Johnstone. Agents — Hope, Mackay, & Mann, W.S.

Counsel for Defenders—Balfour—Mackintosh. Agent—T. J. Gordon, W.S.

Thursday, November 17.

SECOND DIVISION.

GIRDWOOD OR THOMSON *v.* THE NORTH BRITISH RAILWAY COMPANY.

Reparation—Contributory Negligence—Railway.

In an action of damages raised by a widow against a railway company as responsible for the death of her husband, it was proved that the deceased was, as a passenger upon a winter night, at a station belonging to the defenders. Access from the one platform of this station to the other could only be obtained by means of a level-crossing over the line. The deceased, in order to reach his train, had to go over the level-crossing, and in doing so was knocked down by an express, and died shortly afterwards of the injuries received. There was evidence of warning having been given by the station-master, but it was not proved that the warning was given timeously, or that it had been heard by deceased. The jury returned a verdict for pursuer.

In a motion for a new trial on the ground that the verdict was against evidence—*held* (1) that although the railway company might not be bound in law to provide a bridge at their station for the benefit of those crossing, the question of whether or not they had

sufficiently provided for the safety of their passengers was one entirely for the consideration of the jury; and (2) that it also fell to the jury to consider the question of contributory negligence on the part of the deceased.

This was an action raised by Mrs Thomson, residing in Leith, widow of the deceased Thomas Thomson, against the North British Railway Company, in which she claimed £3000 as damages and solatium in consequence, as she averred, of her husband having been killed through the fault of the defenders. The deceased Thomson was a commercial traveller, who, upon the evening of the 6th of last December, while in the act of crossing the defenders' line at their station at Castlecary, was knocked down by an express train, and shortly afterwards died from the injuries which he had received. The Railway Company denied liability, maintaining that Thomson's death had been caused by his own fault, or at least that there was contributory negligence upon his part.

The case was tried before Lord Ormidale and a jury, when an issue for the pursuer—whether the injuries which caused the death of Thomson were received through the fault of the defenders—and a counter issue for the defenders—whether the said injuries were caused or materially contributed to by the fault of the said Thomas Thomson—were submitted to them.

The following facts were brought out at the trial:—The access to the station at Castlecary is upon the south side, where the booking-office is situated. There is a level-crossing from the south to the north side, communicating with the platform by means of wooden steps, and this was the only access to the north from the south platform. Upon the evening of the 6th December Mr Thomson was upon the south side of the station awaiting the train for Edinburgh due at Castlecary shortly after 6 o'clock, and starting from the north platform. The night was cold, and there was a fire at the waiting-room upon the south side. Upon that night all the trains appear to have been late—the 5 o'clock express from Glasgow not reaching Castlecary until 6·33, and the parliamentary, by which Mr Thomson should have travelled, due there at 6·13, not arriving until 7·12. The evidence of William Kirkwood, an eye-witness of the accident, was as follows—"I was at Castlecary station on the evening of 6th December last, in company with Thomas Neilson, quarrier. I got there about a quarter-past 6 o'clock. I saw the late Mr Thomson come out of the waiting-room on the south side. I was on the south side. I saw the train from Edinburgh to Glasgow come up about 6·30, I think. Neilson was standing beside me, and Mr Thomson on the west side of Neilson. The train was busy at the time, and the station-master came up to about two or three yards on the west side of me. There was a railway porter on the west side of the station-master. I saw two railway porters on the platform. As the train for Glasgow was moving off, one of the porters, who had on a top-coat and a uniform cap —the preceding witness, Rutherford—jumped down from the platform and crossed over to the north side. An express was coming up on that side at the time. Thomson followed the porter across, but just as he appeared to be getting up on the north platform he was caught by some part of the engine on the side furthest from me, and, as it were, fell back again. The porter had barely time to get across. On going over I found Thomson lying about 15 yards from the place where he was caught. Half of his body was inside the north waiting-room and half outside. Immediately after he was struck I heard a cry from somebody—I do not know from whom—in the direction where I had seen the station-master standing. I heard no cry before that. I am certain it was far too late to save Thomson." Rutherford, the porter whom Thomson followed, stated—"On 6th December last I went to Castlecary Station to go to Bonnybridge. I was in uniform, with a grey top-coat over it. I had my uniform cap on. I reached Castlecary station at 6·9, intending to travel by the parliamentary train from the west, leaving Castlecary at 6·13 p.m. A goods train going towards Edinburgh passed after I went upon the platform. I knew there was an express train which left Glasgow for Edinburgh at 5 o'clock. When I saw the goods train I thought the express had passed, because they do not run goods in front of express trains when the express is overdue, unless she is far behind. I waited at the station. I saw a train from Edinburgh to Glasgow come up about 6·30, but I did not look the time. That train stopped at the south platform. As she was moving off I heard the whistle of an approaching train from the west. I thought it was the 5·30 parliamentary from Glasgow, by which I intended to travel. To catch that train I required to cross the line to the north side, and I did cross. From the sound of the whistle I thought the train might be a quarter of a mile away. While I was on the six-foot (the space between the two lines of rails), on the level crossing, I saw the train approaching. I cannot form any idea how far distant it was when I noticed it. What I saw was the white light in front of the engine. I still thought it was the parliamentary. Had it been so, I would have had plenty of time to get across. The train would have slowed as it approached the platform. When I was on the four-foot of the up or north line of rails (the space between the rails), I saw she was coming on quicker than she would have done if she had been the parliamentary, and I made a spring up on to the north platform. I had scarcely got upon the platform when the train rushed past. I had a very narrow escape. I was much agitated. Before I crossed I saw some men standing on the south side. I do not know whether they were passengers or not. I cannot say whether the late Mr Thomson was amongst them. After I crossed I saw him lying on the platform between the pillar and the east wall of the verandah. I do not know whether he had followed me across. I never saw him till I saw him lying on the platform. The train from Edinburgh to Glasgow was just leaving the station as I began to cross. Nobody warned me not to cross the line. I did not hear the station-master or porter warning anybody when I stepped down off the platform."

James Robertson, stationmaster at Castlecary, *inter alia*, deponed — "The train from Edinburgh arrived at Castlecary that night at 6·32. It drew up at the south platform, with the van standing on the level-crossing. It was my duty to see the passengers safely out and in, and to go along the train to see that the doors were all properly secured. Cruick-

shanks, the porter, was also attending to the train. While I was starting the train I heard the whistle of a train coming up from the west. It was very loud and clear, and quite audible to anyone on the platform. It was a long shrill whistle, not a whistle of a stopping train at all. A stopping train just gives a short sharp whistle on approaching the distance signal—one blow, as we would say—to call the signalman's attention; while a train going through gives a long, shrill, clear whistle, and that is only if there is a train standing about the station, the object being to warn everybody connected with it to keep clear. Such a whistle was given on this occasion. Just as the train on the south side was moving off, I saw two men (as I thought) going to run across at the rear of it. There were four or five persons all standing together on the south platform, and two of them—whom I now know to have been Rutherford, the porter, and the late Mr Thomson—stepped before the rest. I bawled out to them to 'stand back there.' I did not say there was a train coming. There was no time for me to do more than I did. I was about the length of one carriage and the van from them when they made as if to cross. They did not stand back when I bawled, but went across. The whole thing was the work of a moment—the twinkling of an eye. Rutherford was not doing any duty that night at Castlecary, but was simply there as a passenger to Bonnybridge. I would not have expected any man to dart across behind the train on the south side after hearing the whistle coming from the other side. I think it was a very rash and haphazard leap that the two men took." In cross-examination he further stated—"When an express train is expected, if it is due or overdue, I consider it my duty to warn people not to go over the level crossing. At 6·30 on the evening in question the 5·0 express was overdue. It was my duty to warn people on the platform not to cross. I fulfilled that duty by giving warning in the way I have mentioned, by bawling out to Thomson and Rutherford."

Cruickshanks, the signal-porter, in his evidence said—"I remember the arrival of the train from the east at 6·32 that evening I attended to it along with the stationmaster. Just as I was about to leave, I heard the whistle of an express coming up from the west, and as the train was moving away I saw a man spring from the platform and cross the line. I saw only one man spring. I happened to be looking along the platform at the time, and whether or not another had sprung before him I could not tell. I heard the stationmaster calling out something just as the man sprang off the platform. I cannot be certain what it was he called out. It is always our practice at the station to ring a bell when a stopping train is coming up. There was no bell rung when the express was coming up by which Thomson was killed. We never ring for a train that is not going to stop. Anybody in the way of travelling by rail must know that practice. I think it was a dangerous thing for a man to jump down behind a train that was moving off when another was heard whistling, as Thomson did. If he had looked along the line from the six-foot when he jumped down, he could have seen it was not a stopping train that was approaching; but when he took the jump he could not see it for the train that was moving off."

The statement of the stationmaster as to his having called out to Rutherford and the deceased was corroborated by several witnesses.

The jury returned a verdict for the pursuer upon both issues—damages £600.

The defenders obtained a rule upon the pursuer to show cause why the verdict should not be set aside as contrary to evidence.

Authorities cited—Deas on Railways, 220, App. 10; Railway Regulation Act 1868, sec. 23; *Jarvie* v. *Caledonian Ry. Co.*, March 18, 1875, 2 Rettie 623; *Potter* v. *The North British Ry. Co.*, June 7, 1873, 11 Macph. 664; *Daniel* v. *Metro. Ry. Co.* Feb. 10, 1868, 3 L. R., C. P. 216; *Stutley* v. *The London and N.-W. Ry. Co.*, Nov. 18, 1865, 1 L. R., Ex. 13.

At advising—

Lord Ormidale—In this case of Thomson against the North British Railway Company we granted a rule to the defenders on the pursuer to show cause why a new trial should not take place, and we are now to determine whether the rule should be discharged or made absolute.

The action is at the instance of Mrs Thomson, the widow of the deceased Thomas Thomson, who was a commercial traveller, and who received injuries at the level crossing at Castlecary Station on the defenders' railway in December 1875, so severe as to cause his death within a few hours thereafter; and the action was laid upon the ground that his death was caused through the fault of the defenders. Accordingly an issue was sent to a jury to say whether or not the injuries he had received, and in consequence of which he died, were received by him by and through the fault of the defenders, to the loss, injury, and damage of the pursuer; and a counter-issue was also sent to the jury, taken on the part of the defenders, putting the question, Whether the said injuries were caused or materially contributed to by the fault of the late Thomas Thomson. If the injuries were caused by the fault of the Railway Company, they would be answerable under the first issue; but then if, on the other hand—it might be through their fault to some extent,—the deceased himself contributed to a material extent to the accident, that might be a sufficient answer, and the pursuer could not now recover. The jury returned a verdict by a majority of eight to four, finding for the pursuer on both issues, and assessing the damages at £600. No complaint is made that the damages are excessive; the only ground of application for a new trial was that the verdict was contrary to evidence—against the weight of the evidence that was laid before the jury.

Now, there can be no doubt that there could scarcely be conceived a case more eminently fitted for the decision of a jury. Whether they might be right or wrong, according to our view of the matter, in the conclusion at which they arrived, is not the question for us now. The question which we have to determine—and the only view we can take of it—is this, Had the jury such evidence laid before them as, on consideration of the case, warranted them in returning the verdict which they did return?

Without going into any very minute detail, two points were made on behalf of the pursuer at the trial, and also adverted to in the argument before us on the rule, as shewing fault on the part of the

defenders. It was said, in the first place, that there was no bridge for passengers to cross the line at Castlecary Station, and that in order to cross from the south to the north side, which he required to do in order to go by the train he intended to go by—the train from Glasgow to Edinburgh—on the occasion in question, the late Mr Thomson had no other method than by using the level-crossing across the rails. There was no bridge there, and it was said that that was one of the precautions which were wanting, and which were incumbent upon the Railway Company, who were bound to use, in a reasonable sense, all necessary precautions for the safety of their passengers at that station. Secondly, it is said that, independent of the want of a bridge, there ought to have been warning given to the passengers, including Mr Thomson, on the occasion in question, not to cross till they got notice that the rails were clear and that it was safe for them to do so; and that at the time when the unfortunate man was killed an express train was expected and might come up every minute.

Now, in regard to the first of these matters—the necessity for a bridge across the line—we cannot tell how far the jury may have proceeded upon that, or whether they may have proceeded upon it at all. For myself, and with a view to the conclusion at which I have arrived, I do not think it is necessary for us to say or to hold that it was incumbent upon the Railway Company to have a bridge across at that station. I would rather for myself be disposed to think that there was not sufficient in the evidence or otherwise to entitle us to say that any such obligation lay upon the Railway Company. There has been no such bridge at that place since the railway was established, and so far as was seen from the evidence no complaint was ever made in consequence of the want of a bridge there. I am rather inclined, therefore, to adopt the view which I took at the trial in charging the jury, and which, I observe is stated in the report of the case of *Stutley* v. *The London and N.-W. Railway Co.*—a case which was cited by the Lord Advocate in the argument before us, and which related to an action for damages at the instance of the representatives of a woman who was killed on a level-crossing on a railway in England. There an application was made for a new trial, and Baron Pollock, alluding to this matter about a bridge, said—"It is true that the public footway crosses the line on a level, but the Legislature saw no mischief in allowing the railway to be constructed thus without requiring the erection of a bridge, and it cannot be said that the defendants were bound to make one of their own accord." Now, that recommends itself to me in reference to the bridge in the present case. I do not find that any other of the learned Judges in that case—and the whole of the Barons of the Court of Exchequer gave their opinions—dissented from that view of the matter of a bridge which was stated by Baron Pollock.

But there is a great deal in this case independent of that question of a bridge, and upon another branch of the case a different view may legitimately enough be taken. With regard to the allegation of the pursuer, that no warning was given on behalf of the Railway Company to the late Mr Thomson not to cross when he did cross, or about the time that he did cross from the south o the north side of the railway, we have a good deal of evidence; and I find the stationmaster Robertson saying this, which is very important—"When an express train is expected, if it is due or overdue, I consider it my duty to warn people not to go over the level-crossing. At 6·30 on the evening in question the 5·0 express [from Glasgow] was overdue. It was my duty to warn people on the platform not to cross. I fulfilled that duty by giving warning in the way I have mentioned." And the way he mentions is—"I bawled out to them to 'stand back there.' I did not say there was a train coming." Now, that is the evidence of the stationmaster. Is there evidence to the effect that he did give that warning, or is there evidence to the effect that he did not? The next witness I require to notice who speaks to this matter is Cruickshanks, who was standing on the south side just about the time of the accident, attending to a train on that side of the line. "I remember the arrival of the train from the east," he says, "at 6·32 that evening." There was a train from the east standing on the south side of the station at the very time; and that is the train to which he there alludes. Then he says—"I heard the stationmaster calling out something just as the man sprang off the platform"—that man being either Thomson or Rutherford, who had succeeded in crossing immediately before him, and the platform being the platform on the south side from which they required to cross to the north side. That is what Cruickshanks says; but we have a good deal more evidence besides as to whether there was a warning in any shape given to the passengers who were waiting to cross. We have it stated by Kirkwood—"Immediately after he [Thomson] was struck, I heard a cry from somebody—I do not know from whom—in the direction where I had seen the stationmaster standing. I heard no cry before that. I am certain it was far too late to save Thomson." That was the evidence of Kirkwood, who was a miner's contractor at Parkfoot, by Denny, and who was at Castlecary station that evening with Thomas Neilson, quarrier. Well, Neilson says when examined—"I did not hear anybody crying out either before or at the time of the accident. I did not hear the stationmaster or porter tell anybody not to cross." And we have still some more evidence on this important matter. We have the evidence of Rutherford, the man who did manage to get across. He says—"Nobody warned me not to cross the line. I did not hear the stationmaster or porter warning anybody when I stepped down off the platform. I was at the back end of the train that was moving away. When I was on the four-foot of the up line I heard somebody calling out. I could not have turned then." Now, that is the evidence on this important matter; and I think it is impossible to doubt or to question that there was evidence here of a conflicting description as to whether or not warning had been given by the stationmaster, or by anybody on behalf of the defenders, either to Thomson or to any of the other passengers, not to cross the line, as an express train was expected. Surely there was evidence for the jury upon that question, and I think a very important matter of evidence was here raised for their consideration. They had it all before them, and it is to be presumed that having considered it, and given to it all the attention they possibly could

give, they came to the conclusion—looking to the verdict they gave—that that warning was not given, or if given at all by the stationmaster (as he says himself) bawling out to the people to stand back, that it was given when it was too late and of no use. Rutherford, who most narrowly escaped, crossing immediately before Thomson, says that he heard the cry when he was on the four-foot on the north side. Then there were some other persons who were in a position to hear the warning, and none of them say (except the stationmaster himself) that warning was given in time for Thomson to desist attempting to cross. Well, if I am right in the views I have now suggested, this was undoubtedly a fair enough question of evidence for the jury to consider, and to come to a conclusion on the evidence, which is of a very conflicting nature. I rather think the preponderance of evidence would lead to the conclusion that the warning which the stationmaster says it was his duty to give was not given, or at least not given in time. If that be so, we cannot hesitate to say that the jury were warranted in coming to the conclusion in regard to this matter that there was fault on the part of the defenders.

That, however, may not be enough to dispose of the case. There is the other issue, which we cannot overlook,—the counter-issue taken on the part of the defenders,—to the effect that if there was fault on their part it was materially contributed to by Thomson himself,—that it was in a great degree rash and imprudent in him to have attempted to cross by the level-crossing, or rather behind the train from the east, which was standing on the level-crossing at the time, in the face necessarily of a train coming in the opposite direction. If it had been the train by which he intended to travel—the slow train—he might have managed to cross in perfect safety, because that slow train would have stopped for a minute on the north side before it proceeded on its way, in place of (as the express did) rushing past and catching him and causing the injuries which resulted in his death. Again, that question whether or not there was imprudence, thoughtlessness, and rashness on the part of the pursuer sufficient to entitle the jury to return a verdict that there was contributory negligence and fault on the pursuer's part, and to bring in a verdict for the defenders on that issue,—that question, I say, was just a question eminently for the consideration of the jury. It is an exceedingly difficult question. I felt at the time of the trial that that was the most difficult point in the whole case, and I may say that I feel the greatest difficulty yet in regard to that question; for I would be sorry that any observations made, in so far as I am concerned at all events, should lead the public to suppose that they are not to take care of themselves and protect themselves by vigilance and circumspection. It would be most dangerous to relax that rule in the least degree. It is impossible for railway companies, with all the duties they have to attend to, to ensure, or anything like ensure, the safety of their passengers. If passengers will not be careful in looking out for their own safety, it is impossible, considering the exigencies of railway travelling and of the various duties incumbent upon railway companies, to hold that there would be any safety at all. But if there was a duty here,—and the stationmaster at Castlecary says there was,—to give warning to passengers not to cross at this particular juncture of time, when an express was expected, and was past due a considerable time, and might necessarily have been expected every minute and every second,—and if it is true he neglected to give that warning, or to give it in time—then it can hardly be said that, having received no warning, there was any such rashness on the part of the deceased as to make it incumbent on the jury to say there was contributory fault on his part. I think they were fairly enough entitled, looking to the evidence, to negative the counter-issue taken for the defenders, and to return a verdict in favour of the pursuer upon that as upon the first issue.

Upon these grounds, and without entering into further detail as to what might or might not be my opinion now or at the time of the trial in regard to that second issue, I have come to the conclusion that there are not sufficient grounds to entitle the Court to say that the jury were wrong or were not entitled to return the verdict they did return, and therefore I think the rule ought to be discharged.

Lord Neaves—I think this is a case in which we are peculiarly called upon to inquire, not what we would have done as a jury—a duty for which perhaps the Bench is not the least adapted,—but what the jury were in the circumstances entitled to do—not what conclusion I should have arrived at, or anybody else should have arrived at, but whether the jury, having arrived at a certain conclusion by a majority of eight to four, were entitled, upon the evidence led, to arrive at that conclusion. If they were entitled to do so, it is perfectly clear that we have no ground upon which to order a new trial.

Now, it appears to me that this class of cases is always very peculiarly for the consideration of a jury. There may be cases that will arise of questions where juries may go perfectly wrong, and therefore we may set their verdicts aside and order a new trial; but in general they are the judges, and the best judges, of such questions, if they approach the subject with deliberation and with a desire to arrive at a just conclusion. Now, I cannot doubt that that was the case here; at least I see no ground for doubting it.

The case is a very peculiar one. The whole circumstances taken together raise considerations that are of very great importance to the public, and also to railway companies. There was no bridge at this station, and I quite concur with Lord Ormidale that we are not entitled to say it was the specific duty of the railway company to make a bridge at such a station. They were not called upon to do so by their statute, and we cannot say it was their specific duty, the non-observance of which would have of itself rendered them liable for the consequences, or what might be the possible consequences, of such a neglect. But we have very few cases in which an absolute rule exists by which a particular specific thing must be done, the general rule being that the railway must be so constructed and so managed as to provide reasonable security for the safety of the public. If you have not that which may be said to be absolute security, you must observe the next best means of security and provide for that. The want of a bridge is not a ground of liability, but it is a ground of responsibility for taking other mean

of securing the lives and limbs of the passengers. Well, that was the first duty of the Railway Company. Another circumstance—slight it may be of its own nature—was an element in the case. There was on the north side of this railway a waiting-room, there being another waiting-room on the south side along with the booking-offices. Now, in the waiting-room on the north side there was no fire that evening of the accident. I do not say it was the bounden duty of the Company to have a fire there any more than it was their bounden duty to have a bridge; but it is impossible not to see that the want of a fire on the north side, and the existence of a fire on the south side, was, if not an invitation, at least a temptation to go to the warm side instead of the cold one. There are many persons to whom cold is an extreme evil—a very great cause of suffering—and often a cause of very great danger to health; and with a detention of an hour or two by reason of the unpunctuality of the trains, it may be a very serious matter to have to wait in a room as cold as ice in the middle of winter. Therefore I think it is very unfortunate if the Railway Company make it the duty or interest of people to go to the wrong side, and they ought to be all the more careful that every precaution is used for the safety of passengers. I do not know what amount of money is saved by not having a fire in that room during the winter. Some railway companies are exceedingly economical in such matters; but possibly when the damages and costs in this case are summed up it may be found not to be a very great saving to induce the passengers, by the temptation of keeping themselves warm, to go to the wrong side. Well, if these be things that are not in themselves grounds of liability, but circumstances which affect the position of parties on that occasion, then comes the question whether there was neglect on the one side or fault on the other? Now, I cannot help thinking that here a great deal is to be left to the jury. The considerations that affect a case of this kind are not always considerations that may be made matter of evidence. A great deal depends on human feelings, human tendencies—what a reasonable man may expect in such circumstances, and what he can complain of if he does not get. Now, without going the length of saying that the ordinary judicial tribunals are less likely to inquire whether people are protected against these dangers by special care, I think that the common feeling of humanity for those who are travelling by railway—what they are entitled to ask, and what they will naturally expect in point of safety—is better known and more appreciated by a jury than by anybody else. Upon the whole, you are entitled to look to that quarter for a due appreciation of the duties the public are entitled to expect, and of the want of which they are entitled to complain. Well, if we look to the circumstances of the case, we find that this was a dark winter evening; the utmost confusion prevailed with respect to the trains; everything was out of joint and order. Then there was a matter which of itself was calculated to produce embarrassment, and that was the division of the 4·15 train into two parts, so as to make people think that the whole of that train had passed, when in point of fact only the first half of it had passed and the other half was still to come. Other trains were hours too late, and at last the time comes when this unfortunate man's train should be expected, and when it was time he should bestir himself. The stationmaster said it was not his business to go about telling people as to the trains. Perhaps not; I do not say it was. But he admits it was his duty to call out in some way—and it is a part of the jury question here whether he called out timeously or not, and distinctly or not—to warn those who intended crossing that they should not go across in that manner. They could not tell—at least not every one of them could tell—and it was no great crime not to know—all the distinctions between the bells and the arrivals of one train and another; and when the stationmaster says that he called out, it does not clearly appear on the evidence that he called out timeously. Upon that point I think Rutherford's evidence was very material, for surely if he had heard the call of the stationmaster not to cross he would not have crossed; but he did cross. He says now that it was rash in him to do so. I cannot say I have much confidence in that. It is possible he thinks his future tenure of employment with the Railway Company will be better secured by his taking the same view that they now take than by taking the view he took at the time. Considering the confusion and the darkness of the night, even though this man was not on duty, it is inconceivable that it could have been so palpably a wrong thing to cross when he did it; and it occurs to me that, being there, he might have been quite easily utilised to warn those on the platform that they were not to attempt to cross, and that the approaching train was not the train they were to go by. Now, all these are jury questions to consider—what the Company might have been expected to do? what was proved? what was not proved?—and, upon the whole, they were entitled to arrive at the conclusion at which they did arrive, viz., that there was fault on the part of the Railway Company—which they did with the concurrence apparently of the Judge himself.

But then there was the other question of contributory negligence. Now, that is a very different question, and I confess I think the jury were as much entitled to judge upon it as they were upon the other. I do not take Rutherford's evidence as conclusive upon that question; but I say this, that it is not clear that Thomson was warned. The stationmaster admits there was a duty of warning, because he says he did it, and he did it in consequence of his sense of duty; but it is a question whether it was timeously and efficiently done? When he saw an official there who might be misled, or might mislead others, he ought to have been particularly careful about giving warning; but, again, that is a question for the jury—Was it done in such a manner as amounted to a clear and distinct and sufficient warning to the people who were on the south side not to go across to the north side at that time because the approaching train was not a stopping train? The jury, I think, were better judges as to that than I am, and therefore I am not disposed to set aside their verdict. I think it all the more important that there was a division amongst the jury, and also that it appears that the Judge who tried the case thought there was a doubt on that question. That gave the greater security that the difficulties would be considered, and therefore there is every reason to believe that the case was fairly tried, and to hold that the decision should not be overturned.

Lord Gifford—I am entirely of the same opinion. No more difficult or delicate duty is ever laid upon the Court than to decide whether the verdict returned by a jury is or is not to be overturned; and if that duty is difficult and delicate in all cases, it is peculiarly so in a case like this, for the two questions which the jury had to decide can hardly be stated without shewing how very difficult they are, and how easily the balance may be turned one way or the other in reference to both those questions.

The first question was, Whether the Railway Company had provided at this station and at this time reasonable means of enabling the public to cross the line in safety? The very word "reasonable," which we can hardly escape using, shews how the jury had a vast variety of circumstances to look at in order to see whether reasonable means were taken, and reasonable precautions employed by the Railway Company to secure the safety of the public whom they invited to use the line at that place. Now, I agree with both your Lordships that it is impossible to lay down that the Railway Company were bound to erect a bridge here. The Board of Trade have not prescribed that; the statute has not prescribed it; and it is a question of circumstances. But then it is equally unquestionable that if a foot-bridge for passengers who had occasion to cross the line were not provided, a great deal more burden and onus lay upon the Company, through their officials, to take care that accidents did not happen to persons necessarily crossing the line of railway upon the level-crossing. Now, the circumstances have been so fully considered by both your Lordships that I do not think it necessary to enlarge. The slow train past due, an express train an hour late, of which the passengers could know nothing, and which might come sweeping past at any moment at the rate of fifty miles an hour, make a very serious danger, and a danger which laid the Railway Company under obligation to take great precautions, through their servants, that it should not lead to fatal accidents. Surely that was a question for the jury—and a question so entirely special, and depending so entirely upon common-sense considerations, that I would not interfere to upset the jury's verdict upon it unless it were made perfectly plain to me that no reasonable man could upon the evidence have reached the result which was reached by the jury. Now, we cannot say that. I myself would feel extremely nervous if I knew that an express train was past due and I had to cross in front of it, my own train being past due also, and I had no means of knowing which would come first or what would happen. It is true that in point of law the Railway Company are not bound to provide a bridge, and that the want of it will not *per se* make them liable; but it is surely a matter for the serious consideration of railway companies whether they should not even do things they are not bound to do in order to secure abundant safety to the public; and seeing that all that was wanted here was a light foot-bridge for passengers to cross when an express train was about to pass without stopping, it is surely matter for consideration whether it was not a mistake that such a bridge had not been provided.

The same considerations apply to the second question, Whether there was such rashness on the part of the late Mr Thomson in crossing at the time he did, that the jury could say he had fairly and materially himself contributed to the fatal accident? Here we must use an indefinite and flexible expression—"material contribution"—and here again it is just such an expression as the jury must deal with on a view of the whole circumstances of the case. The fact of the crossing of the line by a railway servant, who, though not on duty at the time, was dressed in uniform and had on a uniform cap—that and the other circumstances which have been already adverted to are so much for the jury to consider that I could not reach the conclusion I would need to reach in order to set aside the verdict, viz., that the jury, acting as sensible and intelligent men, had no evidence to go upon, and went right against the evidence in holding that Thomson did not materially contribute to the accident. Therefore I am of opinion that the rule should be discharged.

Lord Justice-Clerk—I entirely concur in that result. Your Lordships have very clearly expressed the grounds upon which it has been reached, and I shall only make a very few observations. The question is one full of interest and importance both for railway companies and for the public. In the first place, I should be very slow to have disturbed this verdict, even if my own opinion had been otherwise, seeing that the Judge who tried the case is of opinion that the verdict is not contrary to the evidence he heard. Where a motion is made for a new trial on the ground of the verdict being contrary to evidence, I think that such a circumstance would of itself be an insuperable objection. But I entirely concur in the views which have been expressed, and indeed I think I may say that, on the whole the balance of my opinion is in favour of the verdict. It seems to me that the evidence justified the verdict, and that the verdict is not only not contrary to the evidence, but, on the whole, is in accordance with the evidence.

There are two questions here—first, Whether the Railway Company were guilty of negligence in not providing a safe mode for the passengers to cross this line from the south to the north side? and secondly, Whether the deceased was guilty of negligence which materially contributed to the result—the result, I mean, that he was run over by this express train and killed on the spot.

Now, in regard to the first point, Whether the Railway Company took reasonable precautions to secure the safety of their passengers in crossing this line from the one side to the other—that they are bound to provide reasonable means is perfectly certain; the question is whether they did so? and that, I think, was a question entirely for the jury. The jury are the judges of what are reasonable means, and I think it would be very difficult for us, on a body of evidence of this kind, to assume to ourselves the right to take that question out of the hands of the jury.

I may mention there was a case a few days ago in the Court of Appeal—*Robson* v. *The N.-E. Railway Company*, 10th November 1876—where that very question arose. It seems that in the Common Law Courts in England there had been a practice of considering this question of negligence or sufficient precaution as one for the

Court; and in that case—which was the case of a train overrunning a station, and a woman getting out of one of the carriages and being materially injured—the presiding Judge took the case from the jury, and held that there was no evidence of negligence to go to them. The whole question came up before the Court of Appeal, and was very fully argued, and the result was that they held that the case of *Bridges* v. *The N.-W. Railway Company*, in the House of Lords Reports last year, has settled that the question of sufficient precaution is entirely a question for the jury, and accordingly they upset the ruling of Justice Archibald in the case of *Robson*.

In regard to the question What are reasonable means of crossing? it is said that the Company are not bound to provide a bridge, and the case of *Stutley* is referred to as having settled that point. But it is manifest that that case was entirely different from the present one. We are dealing here with a station upon a line with a great deal of continuous traffic, and I must say I do not entirely sympathise with all the observations which were made by Baron Pollock in that case. My impression is that there is a very great obligation laid upon a Company where there is a line with a large through traffic, and many express trains not stopping at the station but going on; it is their duty to provide sufficient means of crossing; and it is no answer to say that that is encouraging individuals not to look out for their own safety, because a very large proportion of those who travel by passenger lines consist of aged and infirm persons, women, and children—persons of whom you would not expect that in the darkness of a winter evening they shall have all their presence of mind that a man in health and strength ought to have. You must provide for them, and accordingly the question for the jury was whether sufficient means of crossing had been provided? What "sufficient" means, I have been quite unable to ascertain from the evidence in this case. I find that when the unfortunate man arrived at the station there were at least two express trains from the west overdue. Whether he knew anything about them or not I do not know. But this I do know, that until the accident occurred there was never one moment in which he could have set his foot upon the permanent way with any assurance of safety. It is said he should have waited until his own train came up, and then crossed the line behind it. Now, I doubt greatly that that was incumbent upon him. The Company were bound to afford him means of crossing in safety at the time his train was due. But supposing he had done that, and his own train had come up and stopped there, and an express from the east (for we have no evidence how they stood) had come up at the rate of 50 miles an hour before he crossed—is that a safe mode to enable passengers to cross? The result is there was no mode of enabling him to cross in safety that night, because the trains were entirely out of order, and no one could calculate upon when they might come up.

It is said that notice was given—and that is a very important element—and if notice had been given this case would have been entirely different. One of the very worst features against the Company is that no notice whatever was given. The stationmaster says he was bound to give notice, and there was nothing easier than to have given that notice to the passengers assembled. But he did not open his mouth until the unfortunate man was in the very act of springing from the platform. Nothing can be more clear on the evidence than that; and therefore on the first of the questions I have referred to I have no doubt at all.

As regards the question of contributory negligence, I have only to say that with the traffic in such a condition as it was, and with such an utter want of disclosure to the passengers of that which should have been disclosed to them, the state of matters that evening was really a trap for contributory negligence; and that the jury have not found that this man was guilty of contributory negligence when he attempted to cross the line under the belief that the approaching train was the train by which he was to travel. I do not think he was, and the jury did not think he was.

I shall only say in conclusion that I agree with what your Lordships have remarked about the bridge. A bridge is a safe mode of crossing at such a station, and if the Company were wise they would adopt the precaution and take that mode, which is certainly a safe mode. That they are under a legal obligation to do so I am far from saying, but so long as they do not they will be exposed to actions of this kind. We discharge the rule.

The Court accordingly discharged the rule, and applied the verdict.

Counsel for Pursuer — Fraser — C. Smith. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Defenders — Balfour — Jameson. Agent—Adam Johnston, S.S.C.

Friday, November 17.

SECOND DIVISION.

[Sheriff of Banff.

CHARLESON *v.* CAMPBELL.

Interdict—Trade-Mark.

Circumstances in which *held* that the proprietor of a hotel called the "Station Hotel" was not entitled to interdict the proprietor of another hotel in the same town from changing its name from "Royal Hotel" to "Royal Station Hotel."

This was an appeal from a decision in the Sheriff Court of Elginshire in a petition presented by Hector Charleson, hotel-keeper, Station Hotel, Forres, against James Campbell, hotel-keeper, Royal Station Hotel there. The petition *inter alia* set forth—"That in an advertisement in Bradshaw's Time Tables and Murray's Time Tables, published for the months of June, July, and August, the respondent has wrongfully and illegally used and appropriated the name or title of the petitioner's hotel by inserting the word 'Station' between the words 'Royal' and 'Hotel,' and thus naming his hotel as the 'Royal Station Hotel.' That the respondent's servants, when soliciting customers on the arrival of the trains at the railway platform, wrongfully, fraudulently