the master liable for another's negligence if that other was discharging a master-like duty.

That leads me to the question, Was the failure to detect the lesion here attributable to the negligence of an employee employed by the master? Now, what I said about the negligence of the master applies to the employee. If the superintendent had been informed of the fall he might have been to blame for not having ascertained that the pulley had been injured by the fall. He may have been an excellent superintendent, but he was not informed, and I can find no evidence entitling me to impute fault to either the master or his superintendent. I accordingly think the action falls both at common law and under the statute.

LORD RUTHERFURD CLARK concurred.

LORD LEE—The view which I take of this case and of the law applicable to it would lead me to a different result from that at which your Lordships have arrived. I think it unfortunate that the Sheriff has not explained the grounds upon which he recalled the interlocutor of the Sheriff-Substitute, whose findings, though the form of them is doubtless unusual, proceed upon views which are familiar to the law.

I confess that I am unable to reconcile the judgment which is proposed with the case of *Walker* v. *Olsen*, 9 R. 946, and with that of *Fraser* v. *Fraser*, 9 R. 896, both of which cases were, I think, well decided. The facts, so far as ascertained, are clear, and I think there is no difference with regard to them. The accident occurred from the breaking of a piece of iron, which originally was fitted to bear a strain of 10,000 lbs. It broke under the strain of three or four cwt. The precise weight is not of much consequence. The probability on the evidence is, that like the rope in *Fraser's* case, this pulley had been lying about for a few days before it was put in use, that during that time it had received injury, and had become defective without the defect having been discovered. But it was part of the tackling belonging to the defenders, in their custody, and provided by them for the use of the men they employed. The defenders supplied it for the pursuer's use without having examined it, and there is no proof whatever that a reasonable and ordinary examination would not have discovered the defect. In answer to a question of my own, put during the discussion, it was admitted that there is no evidence in the case to the effect that the defect could not have been discovered by examination.

It is said that there was no obligation on the defender to examine the pulley, as it had borne heavy weights before. I think that is not conclusive at all. I think that a man of ordinary prudence would have made provision for the inspection of a pulley, on the sufficiency of which the safety of the men whom he employed to do his work depended. There is no evidence that he had any superintendent. He was his own superintendent. The question is, whether in the absence of any explanation or evidence that the defect was so latent that ordinary inspection would not have discovered it, the defenders are not responsible? The answer depends largely on the question of *onus probandi*, and my opinion is that the defence of latent defect is one which the defender must prove. That is according to well-established practice, and there is nothing to the contrary in the decision in *Weems* v. *Mathieson*, although there is an expression in the Lord Chancellor's opinion which might seem to put the *onus* of proving the negative upon the pursuer.

I agree that the *onus* is always on the pursuer to establish fault as his ground of action, but the *onus* may be shifted by proof of circumstances throwing a burden of explanation upon the defenders. The question, then, comes to be, whether that *onus* has been discharged. In this case I cannot find that this *onus* has been discharged, and my opinion therefore is that the defenders are responsible for the consequences of the accident, which happened through a defect in the tackling supplied by them, and not shown to have been undiscoverable upon ordinary examination.

The Court pronounced the following interlocutor:—

"The Lords . . . Find in fact that on or about 17th March 1888 the pursuer, when working along with a squad doing piece-work at ballasting for and on the employment of the defenders at the harbour of Dundee, was struck on the head by a falling iron pulley, and injured: Find that said pulley was the property of the defenders: Find that the pursuer has failed to prove that the breaking of the swivel of said pulley was due to the negligence or fault of the defenders: Therefore dismiss the appeal, and affirm the judgment of the Sheriff appealed against." . . .

Counsel for the Pursuer—Fleming. Agent—Robert D. Ker, W.S.

Counsel for the Defenders — Graham Murray—Macdonald. Agents—Macpherson & Mackay, W.S.

Saturday, November 30.

SECOND DIVISION.

[Sheriff of Forfarshire.

FLOOD *v.* THE CALEDONIAN RAILWAY COMPANY.

Reparation—Railway—Obvious Danger—Negligence—Verdict Against Evidence—New Trial.

A railway company by agreement with a neighbouring proprietor emptied from their waggons opposite his property quantities of waste-soil. The line was blocked for traffic while the waggons occupied it for this purpose. The first duty of the company's servants was to

clear the signal-wires at the side of the line on which the soil was discharged. When this was done the waggons left, the line was re-opened, and the proprietors' servants were allowed to remove the soil at their convenience.

A discharge of soil had been made in the evening, and the wires had been so cleared as to work. On the following morning one of the proprietor's workman was removing the soil that had been left between the wires and the line when he was killed by a passing engine.

In an action of damages by his widow against the railway company the jury unanimously found for the pursuers on the ground that there was blame attachable to the railway company's servants in leaving the soil inside the signal-wire, there being no evidence to show that the contractor's men were not forbidden to remove it.

The defenders obtained a new trial, on the ground that the verdict was contrary to evidence. The jury once more found unanimously for the pursuer, on the ground that the railway company's servants did not properly clear the space between the rails and the wire, and that the railway company should have instructed their engine-drivers to whistle and slow when approaching this particular part of the line where they knew the men were employed."

On the motion of the defenders the Court granted a new trial, on the ground that the verdict was contrary to evidence (1) as it was contrary to the deceased's duty and unnecessary for him to go between the signal-wires and the line; (2) as there was no duty on the defenders' servants to remove the soil to a greater extent than they had done; and (3) that no blame was attachable to the company for insufficient precautions, as the company had no reason to suppose that the men employed were in danger.

This was an action for damages by Mrs Bridget Flood for the death of her husband, who was killed by an engine belonging to the Caledonian Railway Company.

Bernard Flood was one of a gang of nine labourers engaged by Mr Will, contractor, Dundee, who were employed in filling up with waste soil or "spoil" a piece of ground belonging to Mr Keillor of Binrock, and adjoining the line of the Dundee and Perth Railway, the property of the Caledonian Railway Company. The "spoil" was, by agreement between Mr Keillor and the railway company, brought along the line in railway waggons, and emptied on to the embankment immediately opposite the place where it was to be used. The line was blocked to traffic on both sides while the waggons were there. The company's servants, usually helped by Will's men, immediately proceeded to clear the signal-wires on the side of the line where the spoil was thrown. When this was done the waggons were removed, the line was re-opened, and Will's men took away the earth at their convenience. On the evening of the 28th August 1888 a discharge of spoil had been made, and on the following morning Flood was clearing the wire, and was bending down with one foot on each side of the wire, his body being about 18 inches from the line, when an express train, going at the rate of thirty or forty miles an hour, struck and killed him. His widow brought this action for reparation in the Sheriff Court at Dundee.

She averred—"Although the said ground was being made up, and the line and signal-wire cleared according to arrangements with the defenders, and although it was well known to them that the deceased and the others of the squad were engaged as aforesaid on the morning in question, no precautions of any kind were taken by the defenders to warn them of approaching trains. In particular, the said express train, although it was well known by the driver that men were working at that spot, did not blow its whistle as a warning of its approach. Counter-statement denied. Owing to the nature of the ground where the deceased was working, and the work in which he was engaged, it was impossible for him to keep an adequate look-out. Further, he was not accustomed to railway work, and in assisting the defenders' servants in clearing away said rubbish, he was entitled to rely, and did rely, on their taking adequate measures for his protection, and it was the duty of the defenders, when the deceased and other labourers were engaged as above mentioned, to give warning of approaching trains, or to adopt such measures as were usual and necessary for their safety, and, in particular, to cause the whistle of such trains to be blown, but they culpably and negligently failed to do so. Counter-statement denied."

The defenders answered that it was no part of the deceased's duty to go upon the line, and that the accident was the result of his own negligence, and further, "that in any event the accident was a risk of the deceased's employment."

Upon 7th November 1888 the Sheriff-Substitute (J. C. SMITH) dismissed the action as irrelevant.

Upon 31st December the Sheriff (COMRIE THOMSON) recalled the interlocutor of the Sheriff-Substitute, and allowed both parties a proof of their averments.

"*Note.*—The averments are not quite satisfactory, but they seem to amount to this—that the deceased was entitled to be on the defenders' line of railway at the time of the accident; that the defenders' servants knew that the squad to which he belonged was working at the place, and that usual and reasonable precautions were not taken. It seems to me that the pursuer has set forth a case for inquiry as to the facts."

The pursuer appealed to the Second Division of the Court of Session for jury trial, which took place upon 22nd March 1889 before Lord Lee and a jury.

It appeared that it was the duty of the company's servants to clear the signal-wires from the fall of the spoil, and in this they were usually helped by Will's men.

John Keith, railway inspector, who had

charge of the waggons in this employment, deponed—"We had arrangements for Will's men helping to discharge the waggons. When the waggons were emptied the company's men helped to clear the line and clear the wires. This was not done while the waggons were standing. The company's men did not leave the place with the waggons. I had no right to give Will's men any instructions. The arrangements I made were that the stuff should be cleared from the line and wires at once, and a few minutes would do it. Either I or my foreman was always there to see it done. It was the company's men that were responsible for doing it. We did not count on Will's men for that, but for emptying the waggons. If spoil was left between the rails and the signal-wire, Will's men had no business to meddle with it. It was not harming anything. Our men looked after keeping the line and wire clear. I don't know that I ever observed Will's men clearing away stuff between the rail and the signal-wire. My men cleared the rails and the wire sufficiently to let it work, and then left. As the spoil between the sleepers and the wire was doing no harm we did not touch it. The spoil between the sleepers and the wire would not impede the traffic. It was always reduced every time sufficiently in a few minutes. There was no necessity for Will's men to go within the wire. To do so would have been to go out of their place. Any man outside of the wire would have been clear."

It further appeared that upon the morning of the 28th several waggons with spoil were sent to this point of the embankment, and that Will's men and the railway company's men emptied the spoil on the embankment, and afterwards cleared all spoil from the signal-wires. The line had been blocked during all this operation, but when it was done the block was removed. The deceased on the morning of the 29th was standing with one foot on each side of the signal-wires with his back to the line clearing spoil from between the wires and the line when the train struck him. He had not been ordered to put himself in that position, and it was not a usual or even necessary position to occupy. The engine-driver deponed—"I knew there were men working in the bog at Binrock. Never saw them working on the line. Never saw them working at the side line on the footway were the wire goes. If I had seen any men working between the sleepers and wire I would have whistled. It was not a place where we had to whistle regularly, but I would have whistled if I had seen a man. I was keeping a good look-out. When there are platelayers or a surfaceman working on the line, the rules of the company provide for the working of the traffic. *Cross-examined*—I had been driving that train occasionally for twelve months, off and on. I whistled regularly at Ninewells Junction, about half-a-mile off."

Some of the deceased's fellow-workmen deponed that they did not hear the engine whistle that morning.

The jury returned a unanimous verdict for the pursuer, damages £50. In answer to a question by the Judge, the jury handed in this note as containing their view of the fault to which the accident was attributable—"The jury, seeing there was blame attachable to the railway company's servants in leaving the spoil inside the signal-wire, and there being no evidence to show that the contractor's men were not forbidden to remove it, unanimously find for the pursuer, damages £50."

Upon 22nd June a new trial was granted on the motion of the defenders, which took place upon 25th July. The only additional evidence of any importance was that one witness stated that he did not hear the engine whistle at Ninewells station as it usually did on that morning. The engine-driver stated that notices of any place where men were working on the line were usually posted in the engine-house at Perth, but that no notice regarding this place was posted.

At this trial the jury were "unanimous in their verdict for the pursuer, on the ground that the railway company's servants did not properly clear the space between the rails and the wire, and that the railway company should have instructed their engine-drivers to whistle and slow when approaching this particular part of the line, where they knew the men were employed; and they award to the pursuer damages to the amount of £150 sterling."

The defenders obtained a rule on the pursuer to show cause why a new trial should not be granted.

The pursuer argued—The jury had given their verdict on fair jury questions. They had affirmed that the deceased was within his right in clearing away the spoil in the manner he did, and it was quite a fair jury question whether a man who was engaged in clearing away obstruction from the railway line, which had been placed there by the railway company's servants, was to be so constrained that he could not clear it away in the manner that seemed best. It was also a fair jury question whether the railway company had taken the proper precautions to ensure reasonable safety to the deceased. The railway company knew that men were working there, as they were also engaged in the work.

The defenders argued—There was no evidence that the deceased Flood should have put his foot over the signal-wire in the manner he did. All the evidence was to the effect (1) that it was not his duty to clear away the earth from the signal-wire at all, and (2) that if he chose to do so, he might have done it from the outside of the wire. Again, if it was the duty of the company to give orders to the engine-drivers to whistle in approaching a particular spot where men were known to be working that principle did not apply here. The railway company did not know that men were working on this part of the line. The company no doubt sent waggon loads of earth and emptied them out at this particular spot, but Will's men then took it away at their own convenience, and without intimation to the railway com-

pany. Again, in taking it away the contractor's men did not need to expose themselves to any risk, as they could work from the outside of the wire altogether. There was no evidence that any of the railway servants had done anything, or had omitted to do anything, that could make the company liable. The test was to see if any of the company's servants had individually committed some fault which led to the accident in question, and no fault was shown.

At advising—

LORD JUSTICE-CLERK—There have been two trials in this case already, and the jury have on each occasion found a verdict for the pursuer. I certainly should be most averse to having a third trial in a case of this kind, and if it were a question here of weight of evidence, as sometimes occurs in such cases in regard to questions of fact—as to whether the weight of the evidence was upon the one side or the other—I should certainly not be inclined to give a third trial, though in my own mind I was satisfied that the weight of the evidence lay with the party who had been unsuccessful. But I do not think this is a case of that kind at all. The difficulty I have in this case is in finding any evidence in the notes which are before us to justify the verdict which has been returned. The history of the case is extremely simple, and, as regards the evidence led at the last trial, does not vary in any substantial particular from the evidence that was given at the first trial. This unfortunate man Flood was engaged with a gang of labourers, whose work it was to remove certain waste soil or spoil which was thrown over the bank at a place upon the railway between Dundee and Perth, which spoil was being taken away by Mr Keillor for filling up ground upon his property near the railway. The railway, having that spoi- which they were taking out for other purl poses, and no use for it, made arrangements with him by which it was to be tossed off there, and his employees were to carry it away. Now, the mode of procedure was this—When a train arrived with the spoil in it the line was at once blocked, and no traffic allowed on that line at all until first the train had been emptied of its spoil, and then both the railway workmen and the workmen employed by Mr Keillor took in hand to clear the signal-wires so that the proper working of the signals on the line might be resumed. The moment that was done the train was removed and the line re-opened. The quantity of spoil which fell and remained between the wire and the rails was necessarily an inconsiderable quantity, and it is so stated in the evidence to have been. There was none left there of any consequence. Then that spoil which had been thrown over after the line was cleared was taken away by the employees of Mr Keillor at any time they chose, the railway having nothing further to do with it.

Now, what happened was this—The deceased man Flood when engaged in clearing away the spoil from the bank got his feet over the signal-wire—a thing which he could not have done accidentally at all—for the purpose of clearing away some of the spoil which had fallen on the inner side of the wire, which, so far as I can see, need not have been removed at that time at all. The only time it was necessary to remove that was after the last delivery of spoil, when the whole thing was cleaned up. Before that the clearing away of this small quantity would be just making room for more, which would have to be removed again. At all events, whether it required to be removed or not, it was quite contrary to Flood's duty to go at all between the signal-wires and the rails, and in addition to its not being part of his duty it was quite unnecessary for the purpose of removing that spoil. Now, in these circumstances I think it is quite plain there was no need whatever for this man putting himself, or for any of the workmen engaged there putting themselves, in circumstances of danger at all. If they did so, they were going outside their duty, and quite outside the necessities of the work in which they were engaged.

Now, if that is so, then comes the question, whether there is any evidence to justify a verdict which holds that the railway company were in fault for not having done certain things which would only need to be done upon the footing that the people employed at the side of the railway there had to put themselves occasionally in a position of danger. In my judgment it would rather invite persons to put themselves in a position of danger if they knew that precautions were taken to prevent them being in danger, in a case where neither their duty nor the necessities of the work in which they were engaged called upon them to go into any danger at all. The verdict which the jury returned gives not merely their finding for the pursuer but also the grounds of that finding. The first ground is that the railway company's servants did not properly clear the space between the rails and the wire. Now, there was no duty, so far as I see on the evidence, upon the railway company's servants to do anything of the kind. The evidence is that the stuff which might lie between the rails and the wire after the wire had been cleared was practically of no consequence, and therefore there was no duty upon the railway company's servants, so far as the evidence is concerned—and with that alone we have to deal — to clear that space between the rails and the wire.

The second ground upon which the verdict is returned is that the railway company should have instructed their engine-drivers to whistle and slow when approaching this particular part of the line where they knew the men were employed. That finding necessarily assumes that the railway company were in the position of knowing that men employed at that place who were not their own servants would be upon the line or in circumstances of danger by being so close up to it that they might be knocked down by a passing train. In the view I have taken of the evidence, which I think

is absolutely uncontradicted, if the railway company had no reason to suppose that anyone would come within reach of a passing train, then there could be no general duty on them to whistle or slow on approaching that place. If a driver going along a piece of the road sees anybody, whoever it may be—a stray child, or anybody who has no business to be there upon the line—of course as a matter of common humanity or duty he would at once whistle. But I see nothing in this case to justify the supposition that the railway company were bound to organise a special system of whistling at that place which could only be rested on the idea that they had a duty to men who were upon that line and within the wires. On the contrary, the whole evidence is to the opposite effect. Then as regards the fault which is charged, that they did not slow at that place, it is perfectly obvious that if trains are to be slowed merely because people may get on the line who have no business to do so, then the whole working of the railway system would be entirely disorganised, and the greatest possible danger might result from trains being slowed and time lost when they should keep up to their time, having no reason to suppose there would be any obstruction upon the line.

Upon the whole matter, though I very much regret it should be so, I have come to the conclusion that there is no evidence whatever to justify this verdict. It is not a question of weighing the value of testimony, or taking testimony and seeing on which side the greatest weight lies. I have found nothing in this evidence to justify the verdict at all, and therefore I think the Court has no alternative except to set it aside as being without evidence, and to order a new trial.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I am not sure that I go quite so far as your Lordship. I cannot say there was no evidence to go to a jury. I think there was evidence to go to a jury, and I think that the case was rightly left to the jury by the Judge before whom it was tried, but I concur in the result of your Lordship's opinion upon the ground—which I understand to be consistent with the view of the Judge who tried the case—that the verdict is against the weight of the evidence.

LORD YOUNG—This case was tried before myself, and I have no hesitation in saying that the verdict was against the charge, and was a surprise to me, for I agree with your Lordship in thinking that it is not merely against the weight of the evidence, but that there was no evidence at all which, in any reasonable view of it, could sustain the verdict. I say in any reasonable view of it, and the chief if not the only objection to this motion for a new trial consists in the fact that we are dealing with a second verdict pronounced in the same case upon practically and substantially the same evidence.

Now, I agree with your Lordship that we must generally defer—and generally defer at once—to the opinion of the jury upon a balance of conflicting evidence or upon the credibility and reliability of witnesses, and there are perhaps other matters, such as the amount of damages, upon which we should, and generally at once, yield our opinions to the opinion expressed by the jury. There are cases more or less exceptional, in which, although the question did turn upon the balancing of conflicting evidence and determining upon the credibility and reliability of opposing witnesses, the Court have granted a new trial, seeing ground to doubt the conclusion at which the jury have arrived—it being doubtful whether the case has been properly presented—and upon the whole matter have thought that the ends of justice required that the case should be submitted to another jury. In these exceptional cases I think the rule upon which we have proceeded is, that if a second jury agrees with the first in balancing the conflicting testimony in the same way, or determining upon the credibility and reliability of witnesses in the same way as the first, although we still doubted their conclusion, we should not interfere any further. But there are other cases in which I, for my part, should set aside the same verdict upon the same evidence just as ofen as it was returned. Let me illustrate this by just a simple example. Suppose a man crosses a railway—is crossing the line, having no occasion whatever to cross—and is run down by a train, and the jury return a verdict for his widow with damages against the railway company, that they had no right to run down the man, and must make compensation to his widow. I have seen such verdicts, and a late learned counsel, whom we all knew and respected, used to say—"Give me a widow as pursuer and a railway company as defender, and I will tell you what the verdict will be without any regard to the evidence at all," and he would state cases in his own experience for that. Well, if that not unamiable sympathy was manifested by a jury, finding that the railway company were to blame for not stopping an express train—which was an impossibility, although the possibility or impossibility might be represented as a jury question—so as to avoid running over a man who, it might be, was running away from a policeman, but who at all events was crossing the line, having no occasion to cross it at all, and running into that dangerous position carelessly and improperly—I, for my part, should set aside that verdict just as often as it was returned. One cannot censure in strong language the conduct of a widow in proceeding to trial after trial in expectation of the sympathy of the jury manifesting itself time after time in the same way, and the Court being tired at last with granting new trials, and desirous to avoid the scandal of being in conflict with the jury. But I am sure that no widow or no others would pursue such a course as proceeding to trial after trial conscious that there was no other evidence than that which the Court had, after deliberation, pronounced to be such as would not sustain

a verdict in favour of the pursuer—I am sure that no pursuer would do that, except against the advice of her legal advisers. Of course the advice of professional advisers is not always taken and followed, but if it is disregarded, and a pursuer proceeds to trial conscious of having no other evidence at all than what the Court has already pronounced to be insufficient, in any reasonable view of it, to sustain a verdict, I should not hesitate to allow such a pursuer to take the consequences, and I would not allow any such verdict to stand.

Now, I think there was here no question of credibility or reliability at all, and I think there was no conflict of evidence. It was perfectly clear that there was no evidence of fault on the part of the railway company. I do not think it a light matter to impute blame even to a railway company leading to the death of a human being. It is not a thing to be done lightly, or otherwise than upon grounds justifying in reason and conscience that conclusion. The railway company as a company is of course blameless. It is a corporation which must conduct its business through individuals employed by it for the purpose, and therefore when blame leading to the death of a human being is imputed to the railway company, it is imputed to some person or persons in its employment, who ought to take blame to themselves for the death of the man if they regard their conduct rightly. Now, who was supposed to be to blame here? The engine-driver? Ought he, if he regarded his conduct rightly, to take blame to himself for the death of this man? Nobody in his senses would say so. It would be a most unjust accusation upon any evidence that was before us. Ought any of the railway company's servants who emptied those waggons about twenty-four hours before the accident occurred—ought he, if he regarded his conduct rightly, to have taken blame to himself for the death of this man? Was any jury entitled to affirm that? Then there was something about posting a notice up at Perth. Who is the railway official that ought to have taken blame to himself for the death of this man because he had not posted up a notice at Perth?

The case was a very clear and simple one. The railway company had agreed with Mr Keillor—they had agreed with him to supply him with a quantity of earth. They brought this earth in their waggons to where Mr Keillor was desirous to have it. It had been going on for months before this, and the railway company's waggons were, as your Lordship has explained, emptied always in the same way. The railway company's men were assisted sometimes—or we may take it always—by men in the employment of Mr Will, who was contractor for Mr Keillor, to get the waggons emptied out as quickly as possible, and immediately after the waggons were emptied out, and while that was going on, they cleared the signal-wire, which was within three feet of the railway, and that was done at once, to allow the signals to work. That was always the first thing done, and it was always done upon every occasion during the several months that this work had been going on. Upon the occasion immediately in question waggons were emptied in the usual way, and the signal-wire was cleared, and the line opened for traffic by 11 o'clock on the forenoon of the 28th of August, and everything went on upon the railway thereafter just as usual from 11 o'clock on the forenoon of the 28th until this happened, between 8 and 9 on the morning of the 29th, because as soon as this stuff was out of the waggons and on to the ground, and the railway signal-wire cleared, it did not signify to the railway company when it was taken away. It might be there for a day, or a week, or a month. Their traffic went on just as before. It was in the discretion of Mr Keillor, or his contractor Mr Will, to take it away when it suited their convenience. It suited their convenience upon this occasion to proceed to take it away about twenty-four hours after—that is, between 8 and 9 on the morning of the day after it had been so laid down and the wire had been cleared.

Now, that was done upon this occasion as upon every other without any communication whatever with the railway company. The railway company did not know, and could not know, when it would suit the convenience of Mr Will and his men to come and remove this stuff and fill up the hole with it. They might do it when they pleased. Could it be done with safety? Of course it could. Is there any conflict of evidence upon that? It had been done with absolute safety upon every occasion previous to this during the three or four months this had been going on. Then, how did this accident happen? It happened admittedly—and here there is no question or dispute either—by the unfortunate deceased having without precedent put himself between the railway signal-wire and the line so as to be within reach of a passing train. That he had no occasion whatever to do so is the uncontradicted evidence in the case. That he himself had never done it before is uncontradicted. That nobody else employed by Will in removing the stuff had ever done it before is proved by uncontradicted evidence. Here we have no balancing of testimony either. Therefore the accident is attributable to this poor man having unfortunately, unnecessarily, put himself in a position of danger—of obvious danger—which he had never done before, which nobody else had ever done before, and which nobody ever had occasion to do. Well, how is the railway company to blame? I have already pointed out that there is no evidence of anybody being in fault at all on the part of the railway company, and that nobody could conscientiously say that anyone in the service of the railway company, if he viewed his conduct aright, could say "I am to blame." And I do not think the jury here can have taken that right view of their duty which would have induced them to avoid giving

to any innocent individual the pain of being held answerable for the death of this man, or to avoid the cowardly course of saying, "We will let them find out who it was."

I have therefore no hesitation whatever, although this is a second verdict, in setting it aside as unwarrantable, unsupported by any evidence which in any rational view could sustain it, and if the pursuer or her friends—contrary, I am sure, to any professional advice which she can receive—should proceed to trial again, conscious that she has no other case than that which has been presented already, and which the Court has emphatically pronounced to be insufficient to support the verdict, I for my part should set aside another verdict in the same way.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the pursuer on the rule granted by the preceding interlocutor, make the rule absolute, and grant a new trial, reserving all questions of expenses."

Counsel for the Pursuer — The Lord Advocate—A. J. Young—Hay. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defenders—D.-F. Balfour—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Wednesday, December 4.

SECOND DIVISION.

[Sheriff-Substitute of Forfarshire.

HANTON *v.* TAYLOR.

Poor—Settlement—Poor Law Amendment Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 76—*Continuity of Residence.*

Robert Malcolm lived from March to November of each year in his daughter's house in the parish of Carmyllie. His daughter kept an imbecile half-brother, and received small sums of money at intervals from her father for doing so. In winter Malcolm worked as a miller in different parishes. While there were still six months to run for him to acquire a residential settlement in Carmyllie, he became tenant of a mill in another parish for a year. He spent every Saturday night during that period in his daughter's house in Carmyllie, which he used to speak of as his home.

Held that he had not acquired a residential settlement in the parish of Carmyllie.

Hugh Hanton, Inspector of Poor for the parish of Barry, brought an action in the Sheriff Court of Dundee against James Taylor, Inspector of Poor for the parish of Carmyllie, and W. B. Spence, Inspector of Poor for the parish of Monifieth, for repayment of certain funds expended on behalf of Robert Malcolm, a pauper lunatic, and for relief of all future parochial aid required for said pauper. As the pauper was a congenital idiot, and therefore incapable of acquiring a settlement for himself, his legal settlement was that of his father Robert Malcolm senior, and the question was whether his father at the time of his death had acquired and was possessed of a residential settlement in Carmyllie parish, or still retained his birth settlement in the parish of Monifieth.

A proof was allowed, at which the following facts were established:— Robert Malcolm senior was born in the parish of Monifieth in March 1815. He worked from November 1878 to November 1882 as a quarryman in Carmyllie parish, but during the winters of 1880-81, 1881-82, and 1882-83 he avoided the exposure attendant on quarrying, and worked as a miller in different parishes. In the spring of 1883 he did not return to the quarries in Carmyllie parish, but became tenant of Craichie Mill, in the parish of Dunnichen, and continued so from Whitsunday 1883 to March 1884, when he returned to Carmyllie. He worked in the quarries there during the summers of 1884, 1885, and 1886, and as a miller in Arbirlot and Kirriemuir parishes respectively during the intervening winters. While he worked in Carmyllie parish he lived with his daughter in a house which was also in that parish, and which since 1880 had stood in her name. She kept his imbecile son, and he gave her small sums of money at intervals. He used to speak of that house as his home, and after he went to Craichie he spent from Saturday to Sunday afternoon of each week there. During the rest of the week he lived alone in a poorly furnished house belonging to the mill. He had expressed a wish that his daughter should come to Craichie and keep house for him, but this she never did. He did not return to Carmyllie parish after November 1886, and died in his daughter's house in Carnoustie, in the parish of Barry, on 27th March 1888, aged seventy-three.

By interlocutor dated 23rd April 1889 the Sheriff-Substitute (CAMPBELL SMITH) found it proved that from Martinmas 1878 to November 1886 Robert Malcolm, the lunatic's father, had his house in the parish of Carmyllie, and was possessed of a settlement therein at his death, and decerned against the defender Taylor, the inspector of that parish accordingly.

"*Note.*—[*After stating the facts*]—To get at the heart of the real matter in dispute it is necessary to put the question formulated by more than one judicial master of precision in expression. What was this man's home? and to bring that question into clear relief by the negative alternative — Had he no home at all? I do not think our law anywhere, and certainly never in the poor law, contemplates the idea that any man can be without a home. The home may be difficult to find, but it is always presumed to exist. The poor law certainly contemplates one home, and it rejects the idea of more than one, and most