not withdraw the benefit which she thereby conferred on the children of the marriage if any should be born. It is true there are none at present in existence. But however important this consideration may be as applicable to a unilateral deed, I think, for the reasons which I have already assigned, that it is not material in the case of a contract of marriage even though post-nuptial. And in so holding, I am only following the authority of the case of *Low*.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court found that the husband and wife could not validly revoke the post-nuptial marriage-contract, and that the trustees were not entitled to reconvey the trust-estate in their hands absolutely to the wife.

Counsel for the First and Second Parties—Kennedy. Agents—Macpherson & Mackay, W.S.

Counsel for the Third Parties—Wilson, Agents—Macpherson & Mackay, W.S.

Thursday, January 22.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

BARNETT *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Reparation—Culpa—Railway near Docks—Reasonable Precaution for Safety of Public—Contributory Negligence—New Trial.

A seaman who had been run over by a train when he was crossing some lines laid down on a quay in order to reach his ship, brought an action of damages against the railway company. It appeared that there were a number of lines laid down at the side of the quay, and that shunting was constantly going on. The pursuer led evidence to the effect that the defenders had omitted a precaution in use at other places of the kind, in not having a boy preceding every train to give warning of its approach, and no evidence was led by the defenders to show that such a precaution was unsuited to the nature of the traffic carried on at this place. The evidence of the way in which the accident occurred was contradictory, but in the result it appeared that the pursuer must either have stepped from behind some stationary waggons on to the line, where he was run over, without first looking about him, or must have stood on the rails for more than half-a-minute without looking round. The jury returned a verdict for the pursuer.

The defenders having applied for a new trial, the Court *held* (1) that if there had been no evidence of contributory negligence, there was a case for the jury on the fault of the defenders, but (2) that whichever of the two accounts of the accident was the true one, the pursuer had by his negligence materially contributed to the accident, and therefore *granted* a new trial.

Contiguous to the docks at the harbour of Ardrossan there was a goods and mineral station belonging to the Glasgow and South-Western Railway Company, and from this station lines of rail ran to the quays of the various docks. The *solum* of the harbour was the property of a harbour company, but the railway company had acquired rights from the predecessors of the harbour company to lay down lines along the side of the quay in connection with the harbour traffic. These lines of rail intervened between the docks and the public road leading to the town of Ardrossan, so that it was necessary for a person going from the docks to the road to cross the rails, and members of the public had a right to do so.

On 30th April 1890, Robert Barnett, a fireman on the s.s. "Blonde," then lying in the harbour, when crossing these rails on his way to his ship, was knocked down by a train and severely injured, and he subsequently raised the present action against the railway company for payment of £1000 as damages on account of the injuries sustained by him.

The pursuer averred that the accident had been caused by the negligence of the defenders in failing to warn him of the approach of the train.

The defenders averred that the accident had been due to the pursuer's own fault, in the first place, because he had not crossed the line at the level-crossings provided by them, and in the second place, because he had not used due care in crossing the lines, and denied that there had been any fault on their part.

The issue was the usual one of fault.

The trial took place before Lord Wellwood and a jury on 4th and 5th December 1890, and the jury returned a verdict for the pursuer, assessing the damages at £800.

The defenders applied for a rule, on the ground, *inter alia*, that the verdict was contrary to evidence. The rule was granted, and the pursuer was called upon to show cause why the verdict should not be set aside.

The result of the evidence appears from the opinion of Lord Wellwood.

Argued for the pursuer—The place where the pursuer met with his accident was a public place. The defenders were accordingly bound in such a place to take every precaution for the safety of the public who traversed their lines. They had failed in their duty, as they had omitted the very usual precuation of having a boy with a red cap or flag in front of each train to warn people of its approach. No explanation of the absence of this precaution was given by the company. With regard to the question of contributory negligence, the *onus* of proof lay on the defenders, and they had

failed to discharge it. According to the pursuer's account of the accident, which it was maintained was the true one, the only thing which could be said against him was that he had stood for some seconds on the rails. That did not amount to contributory negligence when he was entitled to look to the precaution of the red-cap to keep him safe.

Argued for the defenders—The defenders were not in fault, the precaution of having a red-cap in front of each train being quite unsuited to the shunting and marshalling of trains which went on in this place. Whether or not the defenders were in fault, the pursuer's negligence had materially contributed to the accident. The pursuer had been in Ardrossan for eleven days, and knew what sort of work went on on their lines. He elected not to cross at the level-crossing, therefore he was bound to take precautions for his own safety. This he did not do, for whichever of the two accounts given of the accident might be the true one, the pursuer's conduct showed a total absence of care. According to one account, he must have stood on the rails for forty seconds without looking behind him, and according to the other, he stepped straight from the cover of the stationary waggons on to the next set of rails without looking to see whether a train was coming. In either case his conduct contributed materially to the accident which happened to him.

At advising—

LORD WELLWOOD—Under this issue two leading questions were submitted to the jury—(1) Whether there was fault on the part of the railway company? and (2) whether assuming this, there was contributory negligence to a material extent on the part of the pursuer?

The jury found for the pursuer, and assessed the damages at £800, and we must therefore assume that they held that the pursuer had succeeded in establishing fault on the part of the defenders, and that the defenders had failed to establish contributory negligence to any material extent on the part of the pursuer.

The question for our decision is, whether on the evidence the jury were right or wrong in regard to both or either of these points, and if wrong, whether their verdict was against evidence?

As regards the first question, whether the pursuer has proved fault on the part of the defenders, the impression which I had at the trial, and which I still have, is, that there was a case to go to the jury on that point, and the jury having found for the pursuer, I should not be disposed to interfere with their verdict if there was nothing more in the case. The fault averred was that the railway company had not provided sufficient facilities for the safety of the public. The company are not proprietors of the *solum* of Ardrossan Harbour, but they have acquired right to lay down rails on the quay for the purposes of railway traffic connected with the harbour. It is true that certain level-crossings are provided; but an examination of the plan shows that if a member of the public desired to cross from the road to a vessel lying on the wet dock, he would, on the upper side of the railway-yard, as shown on the plan, have to cross at least two lines of rails without any safeguard whatever; and if he desired to cross at the lower side he would have to cross three or four lines of rails also unprotected before he could reach the wet dock. That being so, I think there was evidence on which the jury were entitled to hold that the railway company should have taken some means of enabling the public to cross their lines in safety while waggons were being shunted. As to the means which should have been taken, the evidence stands in this position. The pursuer adduced several witnesses to show that in other such places, such as the Glasgow, Liverpool, London, and Leith docks, it was usual to have a boy in a red cap or with a flag preceding a train while being shunted in order to give warning of its approach. The company, on the other hand, did not think fit to lead any evidence to contradict this, or to show that such precautions were not required in Ardrossan Harbour. On the evidence as it stood the jury were entitled, I think, to consider whether the defenders were not guilty of fault in not providing sufficiently for the public safety, and to hold, that if the train had been preceded by a boy in a red cap or with a flag, the pursuer could scarcely have failed to see the boy and been warned in time. I therefore think that if that had been the only question, the jury would have been entitled to decide against the company—that is to say, that such a verdict would not have been against evidence.

But then there remains the serious question, whether the pursuer was not guilty of contributory negligence to such a material extent as to disentitle him to damages? I think upon that question that the great weight of the evidence is in favour of the railway company. Curiously enough, as was pointed out by the counsel for the defenders, most of the evidence in favour of the defenders is to be found in the evidence of the witnesses for the pursuer.

The pursuer's story is, that before stepping on to the line on which he was knocked down, he looked up and down the line, and saw no train approaching in either direction, and that after standing on the line for in all about 12 seconds he was suddenly run over without warning. This is an improbable if not impossible story, because there was a clear view in the direction in which the train came for at least 85 yards, and as the train was not going faster than 4 miles an hour, it would take at least 40 seconds to traverse that distance, and must have been in sight of the pursuer for that time if he was standing on the line.

But the pursuer's statement is not substantially corroborated. The two most material witnesses (both eye-witnesses) are the boy M'Lelland and King.

M'Lelland happened to be standing at the side of a crane near the vessel "Blonde" immediately before the accident. In his

examination-in-chief for the pursuer, and re-examination, which were of considerable length, he made and adhered to the statement, that the pursuer without stopping made a straight line for his ship from the road past the end of the line of trucks, and that immediately on his coming from behind the shelter of the trucks he was knocked down by the engine.

King's evidence was given somewhat dramatically, but it is not the less convincing. He had been talking to the pursuer and Radley shortly before the accident occurred, and the pursuer, he says, went on towards his ship, and left him and Radley together. King then says that after Radley left him to follow the pursuer he saw smoke at the back of the waggons, and Radley trying to save the pursuer from being run over. His words were—"When I saw the smoke which led me to call to them to look out, I did not see the engine. There was only an interval of about two seconds between the time I saw the smoke and the occurrence of the accident." If that was the case the engine must have been close on the pursuer, who therefore could not possibly have been standing between the metals for even five seconds before the accident happened. King said further—"As soon as the pursuer came to the place where he thought to look about him he got a knock that capsized him."

Radley corroborates the pursuer to this extent, that he says that the pursuer did pause and turn round, but he calculates the length of time during which the pursuer stood between the rails at only eight seconds. Then M'Gregor says that he saw pursuer look about him on clearing the trucks, but that he did not remain long between the metals, but was knocked down as he turned.

This is the evidence of the eye-witnesses who saw most of what took place.

The only other material evidence is that of the engineer and fireman of the train. Those men say they were keeping a look-out the whole time to see if anyone was upon the level-crossing. I think that probably they were not looking ahead every second; but the evidence comes to this, that they were both looking ahead till the train passed the points, and that they saw no one on the line till the train knocked down the pursuer, at which time, they say, they were just on the point of stopping.

Taking the whole of the evidence together, the overwhelming preponderance of it is in favour of the view that the pursuer did not stand on the line for any appreciable time, but that coming out suddenly from behind the trucks, and not looking about him, he was at once knocked down. If, as he says, he stood on the line for 12 or even for 20 or 30 seconds, the train must have been in full sight the whole time, having passed the level-crossing, and he must have seen it if he looked. That is the view which I take of the evidence on the point of contributory negligence.

In regard to what the pursuer should have done, I think he was entitled to cross the line where he did, and I do not see on the plan any safer place where he could have crossed. I think it is also proved that the place selected by the pursuer is the common and usual place for sailors belonging to ships lying in the wet dock to cross. I find no evidence to the contrary. At the same time, it must have been manifest to the pursuer that the place was dangerous, and I think he was bound to keep a look-out for his own safety, and that if he paused between the metals, or went forward without looking out for approaching trains he did so at his own risk.

I therefore come to the conclusion that the accident was partly due to the pursuer's neglecting to take ordinary precautions for his own safety; and I think that the railway company have succeeded in proving material contributory negligence on the part of the pursuer. In my opinion the rule should be made absolute, and a new trial granted.

LORD ADAM—I concur with Lord Wellwood.

I think the questions we have to consider may be stated as three, namely, whether the accident was caused solely by the fault of the defenders, or whether it was caused solely by the fault of the pursuer, or whether it was caused partly by the fault of the defenders, but materially contributed to by fault on the part of the pursuer himself. This last question—whether the accident was caused by the joint fault of both parties—does or does not arise, according as we do or do not think, that there was fault on the part of the railway company in the way in which they carried on their shunting operations in the harbour of Ardrossan.

In my opinion, the safest view for the Court to adopt is, that there was joint fault on the part of both the defenders and the pursuer. The fault alleged against the defenders is, that having in view the nature of the place in which the shunting operations were being carried on—that it was a public place in the sense that members of the public were allowed to pass over it to reach the ships in the harbour, and that it was a place dangerous to cross, as it certainly was owing to the shunting that was constantly going on—there was a duty laid upon the defenders to take such precautions as might reasonably be thought necessary for the safety of the public, and that they failed to discharge this duty. The precaution specially pointed at is that of having a boy with a red cap or flag preceding the train to give warning of its approach, and we can only dispose of the question whether this was a reasonable precaution for the defenders to have taken, on the evidence produced in the case. The evidence on this point stands thus—The pursuer led evidence to show that such a precaution was taken in various harbours—the harbours of London, Glasgow, Liverpool, and Leith being mentioned—and that it was a usual precaution to take. We have had a great deal of argument to the contrary effect from counsel for the defenders, who maintained that it was not a

precaution suited to the operations carried on at this harbour. That may be the case, but we have had nothing but argument to show that it is so. No evidence on the point has been laid before us, though it would have been a most substantial point in the defenders' favour had they been able to show that the cases referred to by the pursuer's witnesses were not parallel to the case of this harbour. If the defenders meant to make such a contention, they ought to have cross-examined the pursuer's witnesses on the point, and ought themselves to have led evidence to contradict the evidence adduced by the pursuer. They have chosen not to do so, and I think on the evidence laid before us in the case we must come to the conclusion that there was negligence on the part of the defenders, because on that evidence they seem not to have taken what was a reasonable precaution for the safety of the members of the public who were entitled to be in the place where the shunting operations were being carried on—at anyrate there is plenty of evidence for the jury on this point.

Now, although there may have been fault on the part of the defenders, it does not necessarily follow that such fault contributed to or caused the accident to the pursuer. On that point, however, I am disposed to take the view expressed by Lord Wellwood, that we are not entitled to conclude that if there had been a boy with a red cap or flag preceding the train the pursuer would not have seen him, and availed himself of the warning so given, and not have run the risk he did, and therefore, if I thought that there had been no fault on the part of the pursuer, I should be disposed to come to the conclusion that the fault committed on the part of the defenders made them liable, and would not be able to disturb the verdict of the jury on that ground.

That raises the question whether or not there was fault on the part of the pursuer which materially contributed to the accident, and on this point also I concur with Lord Wellwood. There are two possible and rival accounts of how the accident happened, but it seems to me that the pursuer is on the horns of a dilemma, as, whichever account we may take to be the correct one, there appears to have been fault on the part of the pursuer which materially contributed to the result. According to one account, the pursuer while going to his ship got out from behind some stationary waggons on to the next line of rails, stood there, looked first to his right and then to his left, but saw no train coming, then turned round to call on his companion, and while doing so was struck by the engine which had in the meantime come up. On this view of the evidence the pursuer must have stood on the rails for about 40 seconds, because the evidence shows clearly that if he looked to his right when he got on to the rails he must have seen a distance of 85 yards, and that if no engine was then in sight about 40 seconds must have elapsed at the pace at which the train was travelling before it could have reached the place where he was standing. If we take this account as representing the correct view of the evidence, it shows that the pursuer stood in a place of danger for about 40 seconds without looking round during all that time, and when another step would have taken him into a place of safety, and was thus run over, and it seems to me impossible in such circumstances to say that he was not guilty of contributory negligence. If he had taken the most ordinary precaution of stepping forward, and then turned round, he would have been safe.

The other account of the way in which the accident occurred is that the pursuer crossed immediately from the shelter of the stationary waggons on to the next line of rails, and was instantly struck by the engine. I may say that I think the weight of the evidence is in favour of this account of the accident, but as the other view seems to me also to show fault on the pursuer's part materially contributing to the accident, I do not find it necessary to say that the weight of evidence is so greatly in favour of this view that the jury were not entitled to adopt the other view. If, however, this is the true account of how the accident happened, what is to be said of the conduct of a man who in crossing a place which he knows to be dangerous owing to the constant running of trains, looks neither to the right hand nor to the left, but steps at once from behind some stationary waggons on to a line of rails? Can it be said that a man who acted in this way was not guilty of contributory negligence—that it was not his duty to have looked on each side and satisfied himself that there was no danger? I do not think it can, and in this view of the evidence I think it is very clear that the pursuer was guilty of contributory negligence.

On the whole evidence, therefore, I think, in the first place, that there was fault on the part of the defenders, but, on the other hand, I am very decidedly of opinion that there was also fault on the part of the pursuer materially contributing to this unfortunate accident. I think therefore that the verdict of the jury cannot stand, as it is against the evidence in the case.

LORD M'LAREN—I concur with your Lordship in the view that this verdict is contrary to evidence. In coming to that conclusion I do not think it necessary to express any definite opinion as to whether there was fault on the part of the railway company. There is some evidence of negligence, but not such as taken by itself would satisfy my mind one way or the other. The only negligence alleged on the part of the railway company is, that they failed to have the train preceded by a man or boy to warn persons who might be crossing the line, and I think that irrespective of this warning, which may be very proper in certain circumstances, it is incumbent on everyone who crosses a railway line to look out for his own safety. I think especially where

there is no level-crossing—where the party is simply crossing the line at a point which suits his own convenience—he has a duty to himself, first, to look up and down the line to see that it is clear, and secondly, to get across the line as fast as he can. According to the evidence of the pursuer, he appears to have performed the first duty but neglected the second. He nullified the effect of his previous outlook by standing on the line and looking around and calling to his companion. I agree with Lord Wellwood that we cannot accept his statement as to the exact duration of the time he so stood on the line. If we believe the evidence of the spectators, who had the best means of observing, the pursuer did not look out, but was in the act of attempting to cross the line when he was met by the advancing engine and knocked down. In either view I think the painful accident from which the pursuer suffered is directly attributable to his own failure to take the usual precautions which ought to be taken in such circumstances.

On these grounds, and without entering further on the evidence which has been very fully explained by Lord Wellwood, I agree that the verdict cannot stand, and the rule ought to be made absolute.

LORD KINNEAR—This is a distressing case, but I have arrived at the same conclusion as your Lordships, that the accident was due to the pursuer's own want of reasonable care.

I do not think it is necessary to decide absolutely that the railway company was in fault, but I think there was evidence to go to the jury to show that they had failed to take the reasonable and proper precautions taken by other companies in similar places, and if the jury found against the railway company upon that ground, there is, I think, no evidence to satisfy us that they were wrong. Therefore I assume the jury were right in holding that the railway company had failed to take sufficient precautions for the public safety.

But the pursuer had to show further two things—(1) that the defenders' failure to take reasonable precautions was the cause of the accident, and (2) that he had not materially contributed to the accident by his own negligence.

In one view of the evidence he appears to have failed to show that the company's negligence was the cause of the accident at all, because if, in his anxiety to reach his ship, he crossed a line of rails without looking for a moment to either side to see whether there was any risk of a train coming down upon him, it appears to me that in that case he ran voluntarily into a danger, from which the precautions which the company are said to have omitted would not have saved him.

But I agree with Lord Adam that if there is another view more favourable to him, we must assume that the jury adopted it; and there certainly is evidence that the pursuer did not cross the line without looking before him; but then according to his own evidence he paused between the lines of rails for some forty seconds, and the train came down upon him while he was so standing with his back to the direction from which it came.

The question then is, whether that was a course which a man would take who takes reasonable precautions for his own safety. If the company failed to take proper precautions, and so placed the pursuer in a position of danger, the pursuer cannot recover damages, if it be shown that he might have escaped the injury of which he complains by the exercise of the ordinary care for his own safety which is to be expected of a reasonable man. Now, his own evidence shows that he was not acting with ordinary and reasonable care; and that, taking his own statement as true, his recklessness was the direct cause of the accident. I therefore concur in thinking that there must be a new trial.

LORD PRESIDENT—In expressing my concurrence with your Lordships in making the rule absolute, I desire to state in a few sentences the grounds of my opinion.

In the first place, if there had been no evidence of contributory negligence on the pursuer's part here, I think there was a case for the jury on the fault of the defenders, and I should not have been disposed to disturb their verdict for the pursuer had that been the state of the case. In the second place, I think the true ground of judgment is, that the great weight of the evidence is in favour of the proposition that the accident was caused to a material extent by the fault of the pursuer himself, by the grossly negligent way in which he attempted to cross the line. These are the two views I take of the branches of the case, and they are substantially in accordance with the opinion of Lord Wellwood.

The Court made the rule absolute, set aside the verdict, and granted a new trial.

Counsel for the Pursuer—Comrie Thomson—Shaw—P. J. Blair. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders—D.-F. Balfour, Q.C.—Guthrie. Agents—John C. Brodie & Sons, W.S.

Friday, January 23.

FIRST DIVISION.

[Lord Trayner, Ordinary.

CLARKE AND CRABB *v.* CUMMING.

Bankruptcy — Sequestration — Cessio — Action Depending before Bankruptcy Settled by Trustee—Right of Bankrupt to have Settlement made by Trustee Set aside and to Insist in Action—Process.

Clarke and Crabb raised an action of damages for £4000 against Cumming, a law-agent, for negligence when acting for them professionally. After the case was in Court, decree of *cessio* was granted