to compensation "during incapacity" it was held that his complete recovery *ipso facto* excluded him from compensation. *Nimmo* simply followed *Beath & Keay* and was treated as being exactly similar, the difference between partial and total recovery being ignored. If necessary *Nimmo* should be reconsidered. Further, a common law remedy such as a suspension was incompetent where other procedure was supplied by the Act—see *Cochrane* v. *Traill & Sons*, March 16, 1900, *2* F. 794, 37 S.L.R. 662.

Argued for the respondents—The case was directly ruled by *Beath & Keay, cit. sup.*, and *Nimmo, cit. sup.* The object of the Act was to give compensation. Accordingly a workman could never be entitled to get more than he was earning prior to the accident. The cases of *Geary* v. *William Dixon, Limited*, May 12, 1899, 4 F. 1143, 36 S.L.R. 640; *Parker* v. *William Dixon, Limited*, June 19, 1902, 4 F. 1147, 39 S.L.R. 663; *Irons* v. *Davis & Timmins, Limited*, [1899] 2 Q.B. 330, were also cited.

At advising—

LORD JUSTICE-CLERK — The case of the respondent involves the somewhat startling proposition that a workman who has been injured can be entitled under the Workmen's Compensation Act to receive compensation from his employer at a time when he is earning the full wages he received at the time of the accident—in other words, that he may be made better off pecuniarily from having had an accident than he could have been if no accident had happened, although it is the intention of the statute that the fullest pecuniary benefit he can take by it is one-half of his earnings.

Here the respondent was paid after the accident 14s. 5d. a-week, which was the full amount he could properly demand under the Act. When he came back to work he earned 18s. 4d. a-week, and received 5s. 3d. of compensation. He again became incapacitated, and by agreement he again received full compensation, the agreement being recorded. Later he returned to work and got 23s. 2d. a-week.

He now proposes to charge the complainers for a sum of £35, 5s. 6d. If this sum were paid to him, then it is not disputed that he will have been paid in wages and compensation for a period from 13th September 1906 till May 1907 a weekly sum much in excess of his full average wages prior to the accident.

I agree with the Lord Ordinary in holding that the contention of the charger cannot be given effect to. It seems on the face of it to be contrary to reason and justice, and I also agree in thinking that the authority of the cases of *Beath and Keay* and *Nimmo & Co.* v. *Fisher* is conclusive against his contention.

I am therefore of opinion that the Court must hold that the right to compensation could only subsist while the injured workman was incapacitated from earning wages up to the amount of his previous weekly earnings, and that as he has refused to accept compensation offered him which would give him his just right under the statute, the judgment suspending the charge should be adhered to.

LORD LOW concurred.

LORD ARDWALL—I am of opinion that the Lord Ordinary's interlocutor is right and ought to be affirmed. I concur with the Lord Ordinary that the present case is ruled by the principles laid down in *Beath and Keay* v. *Ness*, 6 F. 168, and followed in *Nimmo & Co.* v. *Fisher*, 1907 S.C. 890.

In the present case, as in these cases, the respondent endeavours, by making use of the machinery of the Workmen's Compensation Act, aided by certain judicial decisions and *dicta* of not unquestionable authority, to obtain for the period between 13th September 1906 and 6th May 1907 payment of a sum per week, which added to his wages would bring up his weekly emoluments to a sum considerably exceeding his average weekly earnings prior to the accident. In short, he is endeavouring, under cover of the machinery of the Act, to obtain, not compensation for his injury, but something considerably over and above the largest amount of compensation to which the general provisions of the Act entitle him. It is quite clear that this is contrary to the main purpose and object of the Act, and that accordingly the Court is entitled to interfere for the purpose of preventing an injustice to the complainer, and an abuse of the machinery of the Act.

In my opinion the Lord Ordinary has taken the proper course in suspending the charge *simpliciter*.

This case presents a complete contrast to that which immediately preceded it in today's roll—*Fife Coal Company, Limited* v. *Lindsay, supra*, p. 317. I think it unnecessary to go into more detail, as I think the whole case has been admirably dealt with by the Lord Ordinary in his opinion, with which I concur.

LORD STORMONTH DARLING was absent.

The Court adhered.

Counsel for the Reclaimer and Respondent Munro—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents and Complainers—Horne—Strain. Agents—W. & J. Burness, W.S.

Saturday, January 18.

FIRST DIVISION.

(Before Seven Judges.)

[Lord Guthrie, Ordinary.

BLACK AND OTHERS *v.* NORTH BRITISH RAILWAY COMPANY.

Process—Issue—Form of Issue—Reparation—Liability Admitted.

In an action of damages against a railway company at the instance of the widow and family of a passenger,

who had been injured in an accident and had died from his injuries, the defenders proposed an issue admitting liability and putting to the jury merely the question of the amount of damages. The defenders admitted on record their liability, but did not admit the particular faults averred by the pursuers.

Held that, in view of the practice established by and followed since *Cooley* v. *Edinburgh and Glasgow Railway Company*, December 13, 1845, 8 D. 288, and *Dobie* v. *Aberdeen Railway Company*, May 23, 1856, 18 D. 862, so far as the form of issue was concerned the pursuers were entitled to an issue in ordinary form, whether the deceased "received injuries to his person from which he subsequently died, through the fault of the defenders, to the loss, injury, and damage of the pursuers."

Reparation—Measure of Damages—Solatium—Action on Account of Death of Husband and Father—Proof of (1) *Suffering of Deceased, and* (2) *Grossness of Fault of Defenders—Relevancy.*

Opinion (*per curiam*) that in an action of damages against a railway company, brought by the widow and children of a passenger who had met his death through an accident on the railway, it is relevant for the pursuers to prove before the jury, as entering into the question of the quantum of damages, the pain and suffering of the deceased, but, contrary to the opinions in *Cooley* v. *Edinburgh and Glasgow Railway Company*, December 13, 1845, 8 D. 288, and *Dobie* v. *Aberdeen Railway Company*, May 23, 1856, 18 D. 862, not relevant to prove the grossness of the fault on the part of the defenders.

Observed (*per* the Lord President) that the English doctrine of "exemplary damages," founded on malice, cannot apply to cases where the person sued is not the actual wrongdoer, but is only liable on the ground of *respondeat superior*.

On 17th May 1907 Mrs Ellinor Wilson or Black, widow of A. W. Black, W.S., Edinburgh, M.P. for Banffshire, as an individual, and as tutrix and administratrix-in-law for J. S. Black, a pupil child of the deceased, and Miss E. I. Black, T. W. Black, and J. A. Black, his remaining children, who were in minority, raised an action against the North British Railway Company, in which they claimed £21,000—being £5000 to his widow and £4000 to each of the children—as damages for the death of their husband and father.

The pursuers averred—"(Cond. 2) On or about 28th December 1906 the said Alexander William Black was a passenger by a train upon the said railway under a first-class ticket issued to him by the defenders. During the afternoon of that day there were various conditions which affected the working of the railway traffic. A snowstorm of exceptional severity prevailed in the district, which prevented the signals from working properly, and in consequence of an engine and several waggons having been derailed at a point on the said line south of Elliot Junction the south-going line was blocked, and all traffic had for a certain distance to be worked on the north-going line. The train by which Mr Black travelled left Arbroath Station at 3·13 p.m., and arrived at Elliot Junction about 3·19 p.m., where it remained standing for some time. About fifteen minutes after it left Arbroath, and in the midst of a blinding snowstorm, another train belonging to the defenders was dispatched by their servants from Arbroath by the same line to Edinburgh. This second train, which was hauled by an engine travelling tender first, did not slacken speed as it approached Elliot Junction, and while travelling at a speed of fully thirty miles an hour, dashed violently into the rear of the first train, which was still standing at Elliot Junction, killing and injuring many of the passengers therein. (Cond. 3) The railway carriage in which the said Alexander William Black was seated was telescoped, with the result that he sustained a comminuted fracture of the left leg above the knee, and comminuted fractures of the right leg both above and below the knee. He also sustained a fracture of the pelvis, which caused a rupture of the bladder. The injuries were of a very painful character. He was conveyed to Arbroath Infirmary, where the fractures of the right leg were reduced that evening. On the following day the fracture of the left leg was treated, and two operations were performed on the injured pelvis and bladder. The terrible nature of his injuries, and the length of time during which it was necessary to put him under chloroform proved too much for his strength, and he died that night. (Cond. 4) The said accident and consequent death of Mr Black were caused by the gross negligence of the defenders and their servants in, *inter alia*, the following respects:—(*a*) That the defenders' servants in charge of the traffic at Arbroath Station, and in particular George Gourlay, the driver of the second train, started the said train with the engine travelling tender first although there was a turntable available at the station. In view of the state of the weather this was a dangerous and unjustifiable method of travelling. (*b*) That John Grant, the stationmaster at Arbroath, ordered or allowed the second train to be dispatched within an unduly and dangerously short time after the first train, and without giving Gourlay sufficiently precise instructions to proceed with caution. The said John Grant was aware that there was a block on the line, and that the signals were not working properly, and should have taken special precautions on that account. (*c*) That George Gourlay, the driver of the second train, drove his engine at an excessive speed, failed to observe the various signals which he passed, and failed to draw up his train before passing the home signal at Elliot Junction. In point of fact the said signal was at danger, but in any case the caution system of signalling which was in operation at the time requires that the home signal at any station shall

be regarded as at danger however the arm of the signal points. (*d*) That John Carnegie, the stationmaster at Elliot Junction, failed to place, in terms of No. 78 of the defenders' rules and regulations, fog-signals or detonators on the line to the north of the junction to warn drivers of approaching trains. In view of the state of the weather and the line it was his duty to do so. The said John Grant, George Gourlay, and John Carnegie were at the time of the accident in the employment of the defenders, and the defenders are responsible for their negligence. . . ."

The defenders in their answers admitted that Mr Black was a passenger in the particular train, that there was a severe snowstorm, that the train was run into by another, and that Mr Black sustained injuries in consequence of which he died. Their answer, however, to Cond. 4 was—"Denied. Explained that the defenders for the purposes of the present action admit liability for the injuries sustained by the said Mr Black." Their only plea-in-law was — "The sums sued for are grossly excessive."

The issue proposed by the pursuers was — "Whether on or about the 28th day of December 1906, and at or near Elliot Junction, a station on the Dundee and Arbroath Joint Railway, the late Alexander William Black, Writer to the Signet, Member of Parliament, husband of the pursuer Mrs Ellinor Wilson or Black, and father of the other pursuers, received injuries to his person from which he subsequently died, through the fault of the defenders, to the loss, injury, and damage of the pursuers.

"Damages laid . . . . . ."

The issue proposed by the defenders was — "It being admitted that on or about the 28th December 1906 the late Alexander William Black, Writer to the Signet, Member of Parliament, husband of the pursuer Mrs Ellinor Wilson or Black, and father of the other pursuers, received injuries to his person at or near the railway station known as Elliot Junction, near Arbroath, from which he subsequently died through the fault of the defenders—What is the amount of the loss, injury, and damage sustained by the pursuers?

"Damages laid . . . . . ."

On 23rd October 1907 the Lord Ordinary (GUTHRIE) approved of the issue proposed by the pursuers, and disallowed that proposed by the defenders.

Opinion.—"I approve the form of issue proposed by the pursuers in this case, as against the form of issue proposed by the defenders.

"In the case of *Morton* (*Cooley's Factor*) v. *Edinburgh and Glasgow Railway Company*, 13th December 1845, 8 D. 288, Lord Moncreiff stated that prior to the date of that case issues in both forms had been allowed by the Court, although it does not appear whether the question between the two forms of issues had ever been debated. But the point was carefully considered in *Cooley's* case by a Court composed of the Judges of the First and Second Divisions; and by a majority of five (Lord President Boyle, Lord Justice-Clerk Hope, and Lords Fullerton, Jeffrey, and Moncreiff) to three (Lords Mackenzie, Medwyn, and Cockburn) the form of issue proposed by the pursuers in this case was preferred. In considering the case of *Cooley* it must be kept in view, *first*, that the action involved the element of assythment, which the present case does not at least bear to do; and *second*, that whereas in this case the defenders merely admit 'negligence,' the defenders in *Cooley's* case admitted 'culpable' negligence.

"After *Cooley's* case the issue there approved seems to have been followed for ten years, without question, in cases of admitted liability. In 1856 the same point was again brought before the Court in *Dobie* v. *Aberdeen Railway Company*, 18 D. 862. None of the Judges of the First Division before whom *Dobie's* case came (Lord President M'Neill, and Lords Ivory, Curriehill, and Deas) sat on *Cooley's* case. They took the case to avizandum, and the Lord President delivered this opinion—'We have looked into the case of *Morton* to see whether there was any distinction between it and the present case, and whether it disposed of the question on its merits and on principle, and we find that in no feature is it distinguishable from the present case on the point now before us, which was very fully considered there. We cannot disturb that judgment, and therefore we approve of the issue for the pursuer.'

"Since *Dobie's* case the *Cooley* issue has been followed. See *Cunningham* v. *Duncan & Jamieson*, 1889, 16 R., *per* Lord Shand, p. 389, compared with Lord Adam, p. 390. I am informed that the point was again brought under the notice of the First Division in the recent case of *M'Bride* v. *Loudon & Inglis* (although the question was not fully debated), and an issue was approved in the same form. In these circumstances it is obviously my duty, whatever my view on the merits, to approve the pursuers' issue.

"But as I heard an argument on the merits, and as the question is one of general importance (See Glegg on 'Reparation' (1905), page 118, where a view favourable to the defenders is stated), it is right that I should express my opinion. During the discussion my impression was with the defenders. I have now arrived at an opposite conclusion, and think that the decision of the majority in *Cooley's* case was right in principle.

"The real question, underlying the point now at issue between the parties is whether the quantum of the defenders' negligence is relevant for the jury to consider in estimating damages. Had the defenders admitted *simpliciter* the whole averments of the pursuers as to negligence, and had the case gone to trial on the defenders' issue, the same point would have arisen for the judge's decision at the trial, when the pursuers' counsel proposed to read and found upon the defenders' admissions. In this case, the defenders make a bald ad-

mission of 'negligence,' and deny all the pursuers' averments relating to negligence, with the result that the case might be one of a merely technical fault. Now, it must be observed that in *Cooley's* case the minority differed from the majority only on the question of whether the jury should be asked in the issue to consider and decide what was really not matter of dispute between the parties. None of the three Judges—Lords Mackenzie, Medwyn, and Cockburn — denied the relevancy of the quantum of negligence (*culpable* negligence admittedly in that case) as an element to be considered by the jury. Lord Medwyn expressly affirmed it—'I am inclined to think, that since the defenders admit their liability, theirs is the proper form of issue. But as I could not exclude the whole circumstances from being gone into, my opinion practically comes to the same result as if the pursuers' issue were adopted. The wealth of a defender is an element always taken into consideration. I think that the degree and amount of culpability stands in the same situation.'

"The defenders point out that it is inaccurate to say that the whole circumstances in a case can be relevantly laid before the jury, and they dispute Lord Medwyn's proposition and analogy—'the wealth of a defender is an element always taken into consideration. I think that the degree and amount of culpability stands in the same situation.' I agree with them in this. If the defenders' wealth can be considered, then it would form proper matter for averment and inquiry, which, so far as I know, has never been allowed, and, if this view were sound, I suppose a certain great Scotch railway company would have escaped cheaper at the historic period when some of its engines were pointed than it would do now. I equally doubt the view suggested by Lord Fullerton's question — 'Could it be maintained that the *solatium* should be the same in an action at the instance of a son of a proprietor of £20,000 per annum, and that of a person in humble life?' I should have supposed that no distinction could be drawn between the *solatium* in the two cases, arising from grief for the loss of a father, but that the elements referred to by Lord Fullerton would be relevant, because the patrimonial loss, arising from injured prospects of superior education and advancement in life, would be different in the two cases.

"But Lord Medwyn's and Lord Fullerton's conclusions may be sound on the question of the quantum of culpability, although their analogies are false.

"The relevancy, in a question of damages from personal injury, of the quantum of negligence may be justified on either or both of two grounds—*first*, because gross negligence may aggravate the injury to the feelings of the injured person, or. in the case of death, to the representatives; or, *second*, because gross negligence may warrant damages which, although payable to the injured person or his representative, are partly penal in character, as being imposed in the public interest, to deter the defenders and others from similar disregard of public safety. The first only of these grounds is founded on in *Cooley's* case. It is, I imagine, a fact in human nature that grief may be aggravated and loss embittered by the knowledge that the slightest care on the part of those causing the injury would have prevented the accident. On the other hand, if the case is only by a technicality outside the category of inevitable accident, the situation is accepted with greater resignation and the mind sooner recovers calmness.

"For the second ground above stated there is authority in the law of England—see Bevan on Negligence, vol. i., pp. 49-50. In Scotland, so far as the cases go, the element seems to have been expressly admitted only in cases where the element of malice was involved. These cases are noted in Glegg on Reparation (1905), p. 119. I should not suppose the Court would be inclined to extend the principle to cases where there is legal liability without personal fault."

The defenders reclaimed. They also gave notice of motion to vary the terms of the issue allowed, with a view of making it correspond with the issue (*supra*) proposed by the defenders.

On 9th November 1907 the First Division appointed the case to be heard before Seven Judges.

At the hearing, argued for reclaimers—The issue proposed for the defenders should be allowed. (1) Fault was admitted, and therefore the only question for the jury was, How much ought the pursuers to be paid?—*i.e.*, what was the loss suffered? *Esto* that the cause of the accident might be relevantly proved, the scope of the inquiry ought to be determined *ab ante*, otherwise "exceptions" would be taken. *Esto* that the practice since *Cooley's* case (*cit. infra*) had been to allow a pursuer to lead evidence as to the whole circumstances of the case, that practice was inapplicable here, where there was no duty on the defenders' part towards the pursuers, and therefore no *culpa quoad* them. The duty, and therefore the *culpa*, were towards the deceased. The present action was based, not on fault towards the pursuers, but (*a*) on their nearness of relationship to the deceased; and (*b*) on his liability to support them. The loss of their husband and father was the sole loss suffered by the pursuers. That being so, any *culpa* or carelessness on the defenders' part towards the deceased was not a relevant subject of inquiry. It would not be relevant, for example, for the widow to prove that the deceased was badly treated by the defenders, or that he suffered great pain owing to their neglect, or that their treatment of him caused her considerable suffering. (2) In the present circumstances no claim could be advanced for *solatium*. The law could not, and did not, assess compensation for mere laceration of feelings. The early cases in which reparation for injury to feelings was allowed were really actions of assythment—*e.g.*, *Black* v. *Caddell* (*cit. infra*). Neither Stair nor Erskine dealt

with *solatium* as an element distinct from reparation for the loss suffered —*e.g.*, Stair, i. 9, 4; i. 9, 6; i. 9, 7; Erskine, iii. 1, 14 (the only mention of *solatium* there being in a footnote, viz., note 13). The earliest use of the term was in *Brown* v. *Macgregor and Others*, February 26, 1813, F.C. That, however, was an action of assythment pure and simple; so also was *Black* v. *Caddell*, February 9, 1804, M. 13,905, *aff.* February 20, 1812, 5 Pat. App. 567. *Solatium* as something *sui generis*, distinct both in nature and origin from assythment, was first recognised in *Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860; and *Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, 7 S.L.R. 638. The case of *Cooley* v. *Edinburgh and Glasgow Railway Company*, December 13, 1845, 8 D. 288 (relied on by the pursuers) was really founded on assythment. No doubt *Cooley's* case had been followed in *Dobie* v. *Aberdeen Railway Company*, May 23, 1856, 18 D. 862, and *Cunningham* v. *Duncan & Jamieson*, February 2, 1889, 16 R. 383, 26 S.L.R. 316, but in both these cases *solatium* was really used as equivalent to damages, and meant nothing more. It was so used in *Dow* v. *Brown*, January 27, 1844, 6 D. 534, and *Elder* v. *Croall*, March 16, 1849, 11 D. 1040. Reference was also made to *Darling* v. *Gray & Sons*, May 31, 1892, 19 R. (H.L.) 31, 29 S.L.R. 910; and to *Hillcoat* v. *Glasgow and South-Western Railway Company*, November 1, 1907 (*v.* note *infra*). (3) As to the practice in England reference was made to *Blake* v. *Midland Railway Company*, 1852, 18 A. and E. 93 (21 L.J.Q.B. 233). In assessing damages under Lord Campbell's Act (9 and 10 Vict. cap. 93) the jury were confined to the pecuniary loss sustained, and could not take into consideration mental suffering. Exemplary damages, as known to English law, could not be awarded here, for that principle of assessment applied only to actions against wrongdoers, and not to actions against those who were only consequentially liable —Bevan on Negligence, 8th ed., p. 42-3.

Argued for respondents—The Lord Ordinary was right. (1) The degree of *culpa* was a relevant subject of inquiry. (As to its degrees reference was made to Bell's Com. i. 483, note.) The degree of negligence would affect the amount of compensation —*Auld* v. *Shairp*, December 16, 1874, 2 R. 191, 12 S.L.R. 177. That being so, the circumstances of the injury and the degree of fault fell to be laid before the jury—*M'Master* v. *The Caledonian Railway Company*, November 27, 1885, 23 S.L.R. 181—and therefore the respondents were entitled to prove their averments in cond. 4. This was a motion to vary an issue, a question of procedure, and on a question of procedure the practice of the Court was conclusive. The rule in *Cooley's* case, which was also sound in principle, had become so settled in practice that it was now part of our law. (2) There were two elements for which our law gave compensation, pecuniary loss (for which damages were given) and injury to feelings (for which *solatium* was given)—*Dow*, *cit. supra*; *Horn* v. *North British Railway Company*, July 13, 1878, 5 R. 1055, 15 S.L.R. 707. A claim for *solatium* was known to the law of Scotland, and even if founded on nothing better than usage and inveterate custom, was firmly fixed in practice. As to its history not much was really known. It was used in the Roman law as equivalent to compensation (Dig. 8, 4, 13; 26, 7, 33). It was recognised as fully known to our law in *Neilson* v. *Rodger*, December 24, 1853, 16 D. 325, and in such recent cases as *Clarke* v. *Carfin Coal Company*, July 27, 1891, 18 R. (H.L.) 63, 28 S.L.R. 950, and *Darling* (*cit. supra*). Cases of assythment proper were clearly distinct, for they involved the element of crime (Bell's Prin. 2029) (3) The English practice was not adverse, for though Lord Campbell's Act (*cit. supra*) only allowed compensation for pecuniary loss, in actual practice the elements considered in assessing damages were the same as were considered here — *Phillips* v. *London and South-Western Railway Company*, L.R., 5 Q.B.D. 78. *A fortiori*, therefore, by our law, which allowed both elements to be considered, both ought to be remitted to proof. It was immaterial whether the injury suffered had been caused by the defender or those for whom he was responsible. Gross negligence, if proved, would entitle the pursuers to a larger measure of damages (Bevan on Negligence, 8th ed., 42-3; Sedgwick on Damages, 7th ed., i. 53, ii. 330). As to the elements involved in damages for seduction, reference was made to Fraser, Husband and Wife, pp. 500, 505, 1204.

At advising—

LORD PRESIDENT—This is an action raised by the widow and children of the deceased Mr Black, against the North British Railway Company. The deceased gentleman lost his life owing to injuries received in a collision while travelling as a passenger in a train of the defenders; and the summons concludes for very considerable sums of money to each of the pursuers. The condescendence sets forth that the collision in question was caused by the gross negligence of the defenders, the specification of said negligence consisting in setting forth alleged faults of the driver of the train which ran into the train in which Mr Black was seated, and of the stationmasters at two stations. The sums concluded for are said to be due to them as reparation and *solatium* for the injury done to them by the death of Mr Black through the fault of the defenders. The defenders, while not admitting the particular fault condescended on, put in the following statement—"Explained that the defenders for the purposes of the present action admit liability for the injuries sustained by Mr Black."

Technically the only question raised in the case is the form of the issue. But really the controversy between the parties goes deeper, and is concerned with the question of what are, if I may so express it, the true ingredients of the damage suffered by the pursuers; and the form of

the issue is only material in so far as it lends itself to the proper or improper admission in evidence of circumstances which, according to the one view or the other, are relevant to the question of what the damage amounts to.

Viewed as upon authority I do not think we could, so far as form is concerned, go back on the case of *Cooley*, 8 D. 288, followed by the case of *Dobie*, 18 D. 862. The defenders, however, have frankly stated that they wish to take the opinion of the House of Lords on the subject, and it therefore seems right that we should not send up the case without considered opinions. But besides that, there is another reason why I think it desirable that we should state our views apart from authority. Though *Cooley's* case has ruled the form of the issue, I cannot say that I think the opinions of the majority in *Cooley's* case have ruled the directions given by judges to juries. Further, I think there has been the unfortunate effect that directions in the matter have varied according to the views of individual judges. The Lord Ordinary has called attention to this by comparing what was said by Lord Shand and by Lord Adam in the case of *Cunningham*, 16 R. 383. It seems expedient, therefore, that true principles should be laid down by the Court of highest resort, and that they should then be followed in all cases.

There is no question as to the liability of the defenders to compensate for direct patrimonial loss which the widow and children have suffered by the death of the husband and father viewed as the breadwinner of the family. The question in dispute arises in considering what are the matters which it is relevant to consider in estimating what is due in name of *solatium*, and they really resolve into two points — First, Are the pursuers entitled to enhanced damages if they show that the deceased was subjected to pain and suffering before his death? Second, Are they entitled to enhanced damages if they show that the negligence of the company was gross negligence? If they are, then it is evident that the pursuers are entitled to insist on proving, first, the circumstances of the collision so far as they affected Mr Black, and second, the circumstances of the collision as far as showing the causes which led to it.

I cannot say that I have been able to find any authoritative pronouncement on what is the true definition of *solatium*. The word occurs in the Digest in two places—viii, 4, 13, and xxvi, 7, 33—but not in a sense which is in the slightest degree technical or calculated to throw any light on the subject. In the first passage it is used for the payment which must be made if one wishes to take stones out of another man's quarry. In the second it is used as an equivalent to "solarium," which in fact is the word in some of the MS. There seems therefore little doubt that the word had not a technical origin, but was used, as was often the case, by the old Scottish lawyers as a convenient Latin tag to express what might have been expressed, but with less conciseness, in English. We were told at the Bar that the first time the word appears is in the case of *Brown* v. *M'Gregor*, February 26, 1813, F.C., the case which may be, I think, taken as the first instance of the modern *actio injuriarum* (I quote the words of Lord President Inglis in *Eisten*, 8 Macph. 980), as contrasted with the older action of assythment. This is, however, not so. The word is used as far back as 1741 in a case of *Moodie* v. *Sir James Stuart*, reported by Monboddo, and to be found in 5 Brown's Supplement, p. 709. The report is so short and to the point as to be worth quoting—"The question here was about the quantity of an assythment, whether it contained only the expenses laid out by the relations of the defunct in the prosecution of his death, together with an aliment to those of his relations who stood in need of being alimented and whom the defunct would have been obliged to aliment, or whether it did not likewise contain something in *solatium* to the relations for the loss they had sustained. This last the Lords found." And the word is also used by Lord Kames in his Law Tracts discussing assythment.

It seems therefore tolerably certain that it had its origin in the action of assythment, and probably without very much consideration found its way into the action of damages. As to the modern action I do not think I can add to what is said by Lord President Inglis in the case of *Eisten*. Originally I take it the two actions stood side by side—at least that is what I should gather from the way in which Stair treats the subject in book i, title 9, secs. 4, 6, and 7. And probably the change from the old to the modern practice was not very well marked. The civil action could of course be in the Session alone, while assythment might be in Justiciary or modified in Exchequer or by action in the Session. But Justiciary and Exchequer came to be abandoned—see Lord Deas in *Greenhorn* v. *Addie*, 17 D. at p. 862. The transition stage is I think well marked by comparing *Black* v. *Cadell*, M. 13,905, which seems to go on assythment alone (and is accurately reported in Morison under the heading of assythment), with *Brown* v. *M'Gregor*, which, although professedly based on *Black* v. *Cadell*, is clearly an *actio injuriarum* and not assythment. For the test I think is not doubtful, being that laid down in *Eisten*, viz., Was the act complained of a crime? In *Black's* case conceivably the defender might have been indicted for culpable homicide, though I infer that the chances of a conviction would have been remote. In *Brown's* case it would have been impossible. The end of it all is that I think *solatium*, borrowed from the action of assythment, has in the *actio injuriarum* come to mean reparation for feelings —in short, all reparation which is not comprehended under the heading of actual patrimonial loss. And as such it is I think a legitimate ingredient to consider the laceration of the feelings of the widow and family in contemplating the pain and suffering to which the deceased was ex-

posed before death actually supervened. This answers the first question put, in the affirmative.

Turning now to the second question, I first inquire what are the supposed grounds on which the contention for enhanced damages rests, and I find they are two. Certain Judges in *Cooley's* case countenanced the idea that damages are partly imposed *in pœnam*, and that consequently if the fault is gross the penalty ought to be great. I do not think this view will bear a moment's examination. Take an accident like the present, where there were over a score of sufferers. What is to be the province of each particular jury? Are the rights of each set of pursuers to depend upon the accident whether the defenders have been already sufficiently mulcted by a former jury? The whole argument seems to me so faulty that, if it were not that it has had the sanction of very eminent men, I should have used the term absurd.

The other ground is that where fault is great, damages ought to be what is termed "exemplary." I am bound to say I find no authority for any distinction between damages and "exemplary damages" in the law of Scotland. The very heading under which it is treated in our older books, "Reparation," excludes the idea. There is, however, a great deal of authority in the law of England. I do not feel entitled, sitting in this Court, to review the English judgments. But I will permit myself two remarks. In the first place, I will take as a specimen what is said in a well-known work, Mayne on Damages—"If, then, malice can render an innocent act wrongful, it must therefore render a wrongful act more wrongful, and therefore be provable in aggravation of damages." It seems to me that the basis of this reasoning needs to be reconsidered in the light of the House of Lords' decision in *Allan* v. *Flood*, [1898] A.C. 1. In the second place, it seems to me that malice is the foundation of the doctrine, and that its application to the present class of cases is because *culpa lata dolo aequiparatur*. If, then, malice is the foundation, it surely cannot apply to cases where the person sued is not the actual wrongdoer, but is only held liable on the ground of *respondeat superior*. In the present case there is no averment of fault of system which could be laid at the door of the directors of the Railway Company. The "gross negligence," as alleged, is negligence of three separate officials, as to none of whom is it said that they were improperly selected for their posts.

I should like to add that I cannot agree with the Lord Ordinary when he says—"It is, I imagine, a fact in human nature that grief may be aggravated and loss embittered by the knowledge that the slightest care on the part of those causing the injury would have prevented the accident. On the other hand, if the case is only by a technicality outside the category of inevitable accident, the situation is accepted with greater resignation and the mind sooner recovers calmness." It seems to me that this all depends on the particular mind. To many it might be as the Lord Ordinary says. But to others it might be different. They would feel more acutely such a case as, *e.g.*, when a loosened brick from a bridge happened to fall on the head of a passenger at that moment looking out of the window. At any rate I do not think there is any general consensus of feeling on which a rule for awarding increased damages could be founded.

I therefore come to the conclusion that it is not relevant to inquire whether the accident was caused by gross or by ordinary negligence—in other words, that if the defenders admit negligence, no more proof on the subject of the cause of the accident should be allowed, as to do so would tend to confuse the jury. If this is clearly understood by the presiding judge, I think the form of the issue immaterial—I mean as between the two competing forms before us. Were the slate absolutely blank I might perhaps prefer that tendered by the defenders, and the reasons for doing so are well stated in a judgment of Lord Johnston in the case of *Hillcoat* (*v.* note, *infra*). But, as I have already said, I think we are bound by authority to adopt the form proposed by the pursuers; and that form will not prevent me, if I am trying the case, from giving effect to the views I have already expressed on the admission or rejection of evidence. It will be for the House of Lords to approve or disapprove of these views, and I need scarcely say I shall hold myself bound to follow what is laid down by them, whether it does or does not agree with the opinion I have just delivered.

LORD M'LAREN—I agree with your Lordship's exposition of the principles upon which damages should be assessed in this case. With reference to the form of the issue, if we were not bound by precedent I should be disposed to prefer the form suggested by the defenders—what is the damage—on this ground, that I think that in our system of sending a question for the consideration of the jury it is always an advantage if the form of the issue comes as near as possible to the actual question which the jury have to try; first, because the form of the issue itself fixes the attention of the jury upon the precise question submitted to them, and also because it may have a restraining effect in preventing the jury from taking into account any extraneous considerations which they might imagine to be covered by an issue of a more general form. But I agree with your Lordship that the practice has been in favour of the issue proposed by the pursuers, and that the advantage of altering the form would not be sufficient to outweigh the general objection to altering forms that are well established.

LORD KINNEAR—I concur.

LORD LOW—I had the advantage of considering the opinion which has been read by your Lordship in the chair, and I entirely concur.

LORD ARDWALL—I concur in the judgment delivered by the Lord President, and have little to add.

I think that the degree of negligence or fault in cases of the class presently under consideration ought not to form an element in arriving at the amount of damages. It would be considered wrong that any judge should direct a jury who are trying an action of damages in respect of the death of a man killed in a railway accident, to the effect that they should find small damages because the fault which led to the accident was a slight one; and I think it would be equally wrong if, on the other hand, the judge should direct the jury that because there had been gross negligence on the part of the railway company's servants the amount of damages to be awarded ought to be increased. But while this is my opinion, I do not think it necessary or expedient to change the form of issue which has been found to work well in practice since 1845.

I may be allowed to add that in the course of thirty-five years' practice at the Bar it so happened that I was engaged at first as junior and latterly as senior counsel in a large number of actions of damages for injuries or death caused by alleged fault on the part of the defenders in such actions; in the great majority of these cases I acted for the defenders, and I cannot recal any case where, an admission of liability having been made on record but not in the issue, time was wasted in the leading of unnecessary evidence. The usual course in such trials where the liability was admitted was that the narrative of how the accident occurred—which I think the jury are always entitled to hear so as to enable them to know the circumstances out of which the action arose—was allowed to be taken from one or, if necessary, more witnesses, and thereafter the judge stopped all further examination on the matter. If this be recognised as the proper practice, I think the want of an admission in the issue will not lead to any unnecessary prolongation of trials or waste of time in their conduct.

Further, I cannot recal any trial where the judge, if it was suggested by the pursuer's counsel that the jury should take into consideration in fixing the amount of damage the gravity of the fault on the part of the defenders or their servants, did not direct the jury that that was not a matter for them, but that what they had to assess was simply the loss, injury, and damage caused to the pursuer. It may be that the experience of others may have been less fortunate than mine, but if that has been so, and if there has hitherto been any dubiety as to the judge's duty in this matter, that will be set at rest by the judgment in this case.

Further, I may point out that it is by no means impossible that if a rule such as the defenders contend for regarding admissions being inserted in issues were adopted, it might lead to some undesirable consequences. I may illustrate this from the present case. The issue proposed by the defenders contains an ample admission of fault, but as I read their answers on record there is no such admission of fault on record, but only an admission of liability for the purposes of the present action, and I would not approve of an issue consisting of a mere admission to the effect that the defenders admitted liability for the purposes of the action, followed by the bald question of amount of damages being sent to a jury; and it is possible that if the rule as to admissions proposed by the defenders were adopted there might be frequent disputes and discussions as to the form that the admission should take. In the next place, I think that an issue in the form proposed by the defenders might have the effect of leading to captious objections to the admissibility of evidence which might be led for the legitimate purpose of putting the jury in possession of the facts out of which the action arose, and that the time of the Court and of the jury might thereby be wasted. I prefer that the issue should be kept in the established form, and that the judge presiding at the trial should, whenever necessary, direct the jury in the manner pointed out in the opinion just delivered by the Lord President.

The LORD PRESIDENT intimated that LORD STORMONTH DARLING and LORD PEARSON, who were absent at advising, also concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—Scott Dickson, K.C.—Constable. Agents—Cadell, Wilson, & Morton, W.S.

Counsel for Defenders (Reclaimers)—Clyde, K.C. — Cooper, K.C. — Grierson. Agent—James Watson, S.S.C.

Note.—The case of *Hillcoat* v. *Glasgow and South-Western Railway Company* was reported by LORD JOHNSTON (Ordinary) to the Division, but was settled by joint minute (authority interponed by the First Division, 1st November 1907). His Lordship's note when reporting the case, which gives the facts, was—"This action is raised by Mrs Hillcoat against the Glasgow and South-Western Railway Company to recover compensation for the injury occasioned to her by an accident which occurred to one of their trains in which she was travelling at Saltcoats Station on 18th August 1906. The circumstances were that the train in which the pursuer was travelling was standing at Saltcoats Station when another train of the defenders' company ran into it from behind, causing a collision in which the pursuer was injured. I do not touch upon the allegations of fault which led to or caused the collision, because the defenders admit the occurrence of the collision and the pursuer's consequent injury, and accept liability for the accident which caused it. They cannot accept liability without, for the purposes of the action, admitting fault for which they are responsible.

"The nature of the injuries alleged are serious internal injuries occasioned by the twisting of the pursuer's body in the collision and shock to her nervous system.

"I am called upon to adjust issues for the trial of the case. The pursuer has proposed the ordinary issue in cases of personal injury, viz., whether on or about Saturday, 18th August 1906, at or near Saltcoats Railway Station, the pursuer while a passenger in a train of the defenders was injured in her person through the fault of the defenders, to her loss, injury, and damage.

"While on the authorities as they at present stand the pursuer is entitled to demand this form of issue, the propriety of granting it has been much canvassed in the profession, and the question has been brought into prominence by the recent serious accident to a North British Railway train at Elliot Junction in the County of Forfar. There have been several actions arising out of that accident, in one of which I myself and in another one of my brethren in the Outer House had determined to report the point to the Inner House. But these and other actions arising out of the same accident have been settled with the exception of that at the instance of *Black and Others* v. *North British Railway*, in which Lord Guthrie has after mature consideration granted the ordinary issue. That case, however, has been taken to the Inner House, and will afford an opportunity of reconsidering the question should that Court think it proper to do so.

"In these circumstances I hesitate to adjust an issue, as I may well adopt one of which the Inner House may be found to disapprove by their judgment in *Black's* case, and at the same time I think it doubtful whether I have any right to delay adjusting an issue. I therefore report the case to the Inner House that they may have it before them along with that of *Black*. I do so the more readily as *Black's* case is one in which the death of a father occurred, giving rise to an action at the instance of his widow and dependants, while in the present case there was nothing but a personal injury not resulting in death, and the action is directly at the instance of the injured party. The Court will therefore have the matter before them from both points of view.

"I must add that had *Black's* case not occurred I should have taken the course of reporting this question, because I could not take upon me to disregard a practice founded as after mentioned on an Inner House decision however I might think that it ought to be altered. Where a matter of practice is a matter upon which parties in their dealings have come to rely and pecuniary interests are affected, though the practice may be a bad one, every Court would hesitate to disturb it. But where, as here, the practice is not one upon which any person has relied to the affection of patrimonial interest, if the practice is now seen to be wrong, I conceive that the Court will not hesitate to reconsider it, and it is in that view that I should have ventured respectfully to submit it for the reconsideration of the Inner House. I should have done so because I think the practice to be founded on unsound principle, and to be liable to be unfair and dangerous in result. The question was first considered in 1845 in the case of *Cooley* v. *Edinburgh and Glasgow Railway Co.*, 8 D. 288, where, in a consulted judgment of the two Divisions, it was determined, in an action of assythment and damages by the children of a party killed in a railway accident, that though the defenders admitted the death, and that it was caused by fault, negligence, or want of skill on the part of their employees, and for whom they were responsible, and that there was consequent loss, injury, and damage to the pursuers, the Court found that the pursuers were entitled to put all these matters in issue just as if there had been no admission.

"The matter came again before the Court in the case of *Dobie* v. *Aberdeen Railway Co.*, 18 D. 862, when the First Division had come to be entirely differently constituted, and the Court found that they could not distinguish *Cooley's* case from the one before them, and refused to disturb that judgment. There is therefore no indication of whether they approved it in principle or not.

"These two cases have regulated the practice in adjusting such issues down to the present day. But although the form of issue has remained the same, I have very grave doubts whether the principle upon which the majority of the Inner House in *Cooley's* case determined it has been allowed, at anyrate for a considerable time, to influence the presiding Judge in admitting evidence and directing the jury. If I am right in this, it is manifest that a false issue has been in use to be presented to juries, the continuance of which ought not to be perpetuated.

"For the principle on which the issue was adopted and must now be defended there is no support but the case of *Cooley* already referred to. If the opinions in that case be examined it will be found that while there was manifest doubt in the minds of some of the Judges, those who were clearly in favour of the issue as allowed based their judgment entirely upon the principle that in arriving at the measure of damages the degree of negligence is a material matter for the consideration of the jury. With very great respect for the learned Judges who held this opinion, I conceive that principle to be unsound when applied to cases of personal injury. It would justify the same verdict for the loss of a finger under circumstances of gross negligence and for the loss of a hand under circumstances of very slight negligence. I think that the error in adopting it arose from allowing the somewhat scholastic distinction between *culpa lata* and *culpa levis* to intrude itself into the consideration of a class of cases to which it is inapposite. It is true that there are cases arising out of contract in which the degree of negligence affects the liability, but that is no justification for maintaining that in these or any

other class of cases the degree of negligence is to affect not the liability but the measure of damages. In the case of injury from negligence where no question of contract is concerned, liability depends upon negligence, and where negligence is established liability follows independently of the degree of negligence, and it is not the negligence but the liability to compensate which determines the damages. In such cases Lord Cranworth's dictum in *Wilson* v. *Brett*, 1843, 11 M. and W. 113, that "gross negligence is ordinary negligence with a vituperative epithet" holds good, and Lord Willes's further dictum in *Lord* v. *Midland Railway Company*, L.R., 2 C.P. 339, that "any negligence is gross in one who undertakes a duty and fails to perform it," is equally applicable.

"I think that the judgment in *Cooley's* case is also open to this criticism, that it is inconsistent with itself. It accepts the position that the jury may not give vindictive damages, and that it is the duty of the presiding Judge so to direct. If by vindictive is meant the satisfaction of the legal analogue of the natural vendetta, the statement may be justified in relation to the principle adopted. But if, as I think it must be, the expression means punitive or exemplary, I do not see how it is possible to avoid giving such damages if the jury are entitled, and if entitled bound, to take into consideration the degree of negligence.

"When I say above that I think the issue has become a false issue, because presiding judges, or many of them, do not subscribe and give effect to the principle which underlies it, I have the support of Lord Shand and Lord Adam in the case of *Cunningham* v. *Duncan & Jamieson*, 16 R. 383, where Lord Shand says, at page 389—'I do not for myself say that I should recommend a jury to make the nature and extent of the company's fault an element in determining the amount of damages to be awarded;' and Lord Adam adds (page 391)—'No doubt the question of fault is laid before the jury, but in my experience a jury is never asked to enlarge or diminish the amount of damages on the ground of the extent of fault on the part of the defender. That has not been, in my experience, the nature of the inquiry in actions of damages for fault or negligence.'

"If Lord Adam is right the customary issue is a false issue. It is liable to hamper the judge and to mislead the jury. The issue which I should, but for the practice following on *Cooley's* case, have approved is—It being admitted that on or about 18th August 1906, and at or near Saltcoats Railway Station on the line of the defenders, the pursuer, while travelling in a train belonging to the defenders, was injured in her person through the fault of the defenders or those for whom they are responsible, to her loss, injury, and damage—What is the amount of compensation to which the pursuer is entitled in respect thereof? Damages laid at £1500.

"If the pleas-in-law are examined it is found, as might be expected, that it is compensation for injury which is the subject of the action, and that what the parties have joined issue about is whether the compensation sued for is reasonable or excessive. These pleas are consistent with the right and the liability that arise out of the circumstances.

"I am not apprehensive that the form of issue which I would adopt would exclude any relevant matter from proof. There are (1) circumstances relating to the position of the individual party injured, as for instance occupation and prospects in life; (2) circumstances surrounding the accident to the individual injured — where shock must always be a factor in the consideration it is an essential to know the circumstances surrounding the occasion of the injury to him or her; (3) circumstances surrounding the cause of the occurrence which occasions the injury. To establish liability proof on the last two heads is relevant and necessary. But where liability is admitted proof on the first two is all that is required. And it would be admissible though fault is not formally put in issue. Whereas if it is formally put in issue, I do not see how the presiding judge can either exclude or restrict proof on the last head."

Thursday, January 23.

SECOND DIVISION.

DUFF'S TRUSTEES AND OTHERS *v.* LEIGHTON'S EXECUTOR.

Succession—Trust—Vesting—Survivorship Clause—"Without Issue"—Direction to Sell Heritable Subject and Divide Proceeds on Death of Liferentrix.

A testator directed his trustees to convey a certain heritable property to his sister M. in liferent, and directed them after her death to sell the property and divide the free proceeds equally among his nephews and nieces *nominatim*, "and, failing any of them without issue, to the survivors and survivor of them equally if more than one."

Held that "without issue" here meant without leaving issue at the period of division, and consequently that nothing had vested in a niece who had survived the testator but predeceased the liferentrix leaving a child, or in the child, who had also predeceased the liferentrix.

Thomas Garland, merchant and shipowner, Dundee, died on 25th December 1878, leaving a trust-disposition and settlement dated 17th January 1872, whereby he conveyed to trustees his whole estate, heritable and moveable, including, *inter alia*, "in the second place," certain heritable property in Blackness Terrace, Dundee.

The sixth purpose of the trust-disposition and settlement was—"*In the sixth place*, my said trustee shall, as soon as convenient after my death, convey the foresaid property belonging to me at Black-