from an early stage that the interest of the whole police administration was involved in a way which made it more natural for the Corporation to undertake the defence than in the ordinary class of case of an approved servant believed to be free from blame in which the Corporation have been in the habit of undertaking the defence. Indeed this probably explains why, when the only request made was that the Corporation should find the money necessary for the employment of counsel, the defenders, instead of merely acceding to this request, resolved in any case to have to do with the case not only as it then stood but in all its subsequent stages.

When we look at the terms of the minute of 23rd March 1911 it will be found that the preamble as to the reasons for the Corporation intervening are precisely those stated in the minutes of 22nd August 1912 and 17th January and 30th April 1913 as the cause why the Corporation resolved to defend these actions raised against other constables, except that the minute of 23rd March 1911 contains a reason which would naturally lead to this result, not present in the other minutes, namely, the approved service of the constables Stirling and Sturgeon in the force.

It was at first attempted to justify the defence on the ground that the defenders in the course resolved on by them were acting under their common law rights, and could have charged Stirling and Sturgeon's expenses against the common good. The pursuer's answers seem to me conclusive—first, that the defenders in fact charged the said expenses against the police rate, which they were entitled to do only if they were acting under the Police Act of 1866; and second, that the Town Clerk, Mr Lindsay, admitted in his evidence that they were so acting. The same admission was given in the original defences, but the admission was withdrawn for a denial at adjustment. The question is reduced by Mr Lindsay to this—Were the Corporation acting under the first of the two courses specified in section 134, in which case the pursuer is admittedly entitled to succeed, or under the second, in which case they will already have discharged their obligations. But if the case is in the one position or the other, the pursuer says that the second course is excluded because its application is limited to the case where the Magistrates' Committee resolve not to defend the action, which they did not do in this case, and to a case where the defender called in the summons resolves not to defend the action and does not do so, whereas Stirling and Sturgeon resolved to defend and did defend. If this be so, and if the defenders acted as Mr Lindsay says under section 134 of the Act, it follows that they must have adopted the first of the two courses specified in the Act.

But, at the best for the defenders, their minute of 23rd March 1911 is ambiguous, and its construction will be determined by their actings. These seem to me only consistent with the defenders having assumed the defence of the action as principals. I am not putting out of view Mr Lindsay's duty under the minute of 23rd March 1911 to watch the case as representing the committee, nor his personal interest in Mr Mackenzie, who conducted the litigation until on his retirement from legal practice he handed it over to Mr Rosslyn Mitchell, nor his personal interest in the particular constables. I refer to the Lord Ordinary's opinion, in which Mr Lindsay's active control of the litigation is fully dealt with. I do not think he overstates the effect of the evidence when he says—"Mr Lindsay, who was then Depute and is now Town Clerk, although not nominally in charge, directed and controlled the defence from beginning to end." I gather from the agents' accounts that while the agents had two meetings with Sturgeon and four with Stirling, they had twenty-seven with Mr Lindsay, eighteen of which were subsequent to the minute of 23rd March 1911.

In the view I take of the case it is unnecessary to consider the pursuer's contention that the defenders were responsible apart from the Statute of 1866.

I am therefore of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD HUNTER, who was present at the advising, gave no opinion, not having heard the case.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer and Respondent —Sandeman, K.C.—Paton. Agents—Tait & Crichton, W.S.

Counsel for the Defenders and Appellants —Cooper, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Friday, March 5.

SECOND DIVISION.

[Sheriff Court at Stirling.

FERGUSON *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Negligence—Railway—Master and Servant—Statutory Duty—Prevention of Accident Rules, sec. 9—Railway Employment (Prevention of Accidents) Act 1900 (63 *and* 64 *Vict. cap.* 27)*—Fulfilment of Duty.*

The Prevention of Accident Rules passed by the Board of Trade on 8th August 1902 in virtue of the Railway Employment (Prevention of Accidents) Act 1900, sec. 9, provides—"With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of keeping a good look-out or for giving warning against any train

or engine approaching such men so working; and the person employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out."

Held (1) (*dub.* the Lord Justice-Clerk) that replacing old wedges with new ones is "repairing" the permanent way; (2) that the rule does not require men to be appointed whose sole work is to act as look-out men, but it is sufficient if men capable of doing such work are available when required, and when so acting are "expressly instructed," *i.e.*, set apart for that duty alone; (3) that the company can delegate the statutory duty, and can properly do so to the foreman of a gang; and (4) that their is no duty imposed on the railway company to inform such foreman of the time at which every train will pass.

Master and Servant — Railway — Common Employment.

Application of the defence of *common employment* where a railway company was sued for damages for the death of a foreman platelayer on alleged faults in the failure to stop a light engine, running tender first, in the employment of an unqualified fireman, and in the look-out.

Process — Sheriff — Jury Trial in Sheriff Court — General or Special Verdict — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 32—*Sheriff Courts (Scotland) Act* 1913 (2 *and* 3 *Geo. V, cap.* 28), *sec.* 6.

Observations per Lord Anderson on the procedure in jury trials in the Sheriff Court, and *opinion* that "the purport of this amending section" (*i.e.*, 1913 Act) "was to assimilate the procedure in the sheriff court to that which regulates trial by jury in the Supreme Court. . . . It would seem to be appropriate to obtain from the jury either a general or a special verdict, but not, as in the present case, both."

Process — Sheriff — Jury Trial in Sheriff Court — Appeal — Competency — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 31.

Opinion per Lord Anderson in an appeal against a verdict in a jury trial in the Sheriff Court—"In my opinion it is incompetent for this Court to consider the question of relevancy after a verdict has been returned. . . . Under the provisions of the 1907 Act there is no general ground of challenge under which it would be open to the Court to consider the question of relevancy."

The Prevention of Accident Rules passed by the Board of Trade on 8th August 1902, in virtue of the Railway Employment (Prevention of Accidents) Act 1900 (63 and 64 Vict. cap. 27), enact—section 9 (*quoted in rubric*).

The rules and regulations of the North British Railway Company provide—Rule 273—"When men are working singly or in gangs on or near lines in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the foreman, ganger, or leading man must in all cases where any danger is likely to arise provide one or more persons as may be necessary to maintain a good look-out and to give warning of any train approaching. The 'look-out' man or men must be expressly instructed to act for such purpose, and must be provided with all appliances necessary to give effect to such look-out."

The Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V, cap. 28) enacts—Section 6—"Where a jury trial has been ordered, the Sheriff . . . at the trial may, or if required by either party shall, after the conclusion of the evidence, propone to the jury question or questions of fact to be answered by them, and the jury shall in their verdict give specific answers to such question or questions."

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts — Section 31 — "*Jury Trial in Sheriff Court.* — In any action raised in the sheriff court by an employee against his employer concluding for damages under the Employers Liability Act 1880, or alternatively under that Act or at common law, in respect of injury caused by accident arising out of and in the course of his employment, where the claim exceeds fifty pounds, either party may so soon as proof has been allowed, or within six days thereafter, require that the cause shall be tried before a jury, in which case the sheriff shall appoint the action to be tried before a jury of seven persons. The verdict of the jury shall be applied in an interlocutor by the sheriff, which shall be the final judgment in the cause, and may, subject to the provisions of this Act, be appealed to either Division of the Court of Session but that only upon one or more of the following grounds: — (1) That the verdict has been erroneously applied by the sheriff; (2) That the verdict is contrary to the evidence; (3) That the sheriff had in the course of the trial unduly refused or admitted evidence or misdirected the jury; (4) That an award of damages is inadequate or is excessive. Upon such appeal the Court may refuse the appeal or may find under head (1) that the verdict was erroneously applied, and give judgment accordingly, or under the other heads before mentioned may set aside the verdict and order a new trial, provided that if the judges are equally divided in opinion the verdict shall stand." Section 32—*Sheriff to State Questions for Jury.*—"Where jury trial has been ordered the sheriff shall, after hearing parties, if he shall think that necessary or desirable, issue an interlocutor setting forth the question or questions of fact to be at the trial proponed to the jury and fixing a time and place for the trial, being not sooner than fourteen days from the date of the interlocutor."

Mrs Ferguson and others, the widow and children of the deceased John Ferguson, foreman railway surfaceman, *pursuers*, brought an action in the Sheriff Court at Stirling against the North British Railway

Company, *defenders*, for damages for the death of the deceased, who was run down and killed while working on the defenders' line.

The following *narrative* of the *facts* is taken from the opinion of the Lord Justice-Clerk *infra*—"This case, which relates to the death of a foreman of platelayers on the North British Railway, is stated at common law, there being no question under the Employers Liability Act. In the Court below the case was tried by the Sheriff with a jury, and the present inquiry is whether the verdict in favour of the pursuers, whereby fault is found against the defenders, can stand upon the evidence led. The circumstances are that the deceased with his gang of platelayers was engaged at a diamond crossing in substituting new wedges for old ones in a number of rail-chairs. While they were engaged at this work a light engine approached and the deceased was run over and killed. The line was visible in the direction in which the engine was travelling for a distance of a quarter of a mile, and there was no obstruction to the view for that distance. There was a signal-box about 40 yards up from the place where the men were working, being the signal-box of Causewayhead Station, and the signal at a short distance further up was the home signal of the station. These arrangements were all according to usual practice, and are not impugned as being in any way faulty. The fault alleged relates entirely to the working of the line as distinguished from the line itself. What took place was that a light engine approached the station; that the signalman kept the home signal at danger until the engine had been slowed down, but did not require it to stop, as he lowered the signal when the engine came near to allow it to come forward to the signal-box, which was beyond where the men were working, and the engine coming forward at a very slow speed, the deceased being in the way was thrown down and killed. The pursuers allege several faults against the defenders, maintaining (1) that the engine was coming along the line at an unusual time, when there was no cause to expect it, and that it was a fault to send it on without special notification; (2) that it was travelling with the tender in front, which, as this made it less easy to observe the line, created a special danger; (3) a look-out man should have been provided to watch and warn the men working on the line of any approaching train or engine, and that the failure to provide such a look-out was in breach of the company's rules, based upon the Board of Trade Regulations; (4) that the equipment of the engine was faulty, in respect that there was no qualified fireman on it to aid in observation of the line when the engine was running; (5) that the driver did not keep a proper look-out; (6) that the signalman was in fault in allowing the train to pass his home signal without its being brought to a standstill, he having kept the signal at danger till the engine came near."

The defenders pleaded, *inter alia*—"The pursuers' averments are irrelevant."

On 7th March 1914 the Sheriff-Substitute (MITCHELL) dismissed the action as irrelevant.

The pursuers appealed to the Sheriff (LEES), who on 7th April 1914 recalled the interlocutor of the Sheriff-Substitute and allowed a proof before answer.

On 5th May 1914 the Sheriff-Substitute, granting the crave of a minute for the pursuers, appointed the action to be tried by a jury of seven persons in terms of the Sheriff Courts (Scotland) Acts 1907 and 1913 on 11th June 1914.

At the trial the pursuers' counsel asked the Sheriff-Substitute to propone the following questions to the jury—"(1) Was the death of John Ferguson caused by the fault of the defenders in respect of (1) a breach by defenders of rule 9 of the Board of Trade Regulations 1902, made in terms of the Railway Employment (Prevention of Accidents Act 1900, or (2) Was the death of John Ferguson caused by the fault of the defenders in respect of their failure to provide proper supervision, or a proper system of work, or a competent staff, and which? (3) If not, was the death of John Ferguson caused by the fault of a fellow-servant of his? (4) Was Ferguson guilty of contributory negligence?"

Counsel for the defenders objected, in respect the questions were not altogether or only questions of fact. The objection was sustained. Pursuers' counsel took exception to the ruling.

The defenders' counsel asked that the following questions be proponed to the jury—"(1) Was Ferguson foreman of this squad of surfacemen? (2) Was he instructed by defenders to place a look-out in all cases where danger might arise to the squad of which he was foreman? (3) Had Ferguson men put under his command by the defenders whom he could place as look-out? (4) Did he appoint a look-out for the squad at the place of the accident on 9th April 1913? (5) Would the accident have occurred if Duncan Ferguson, the signalman, had obeyed the regulations, kept the home signal at danger until the engine stopped and whistled there, and then released her to draw her up at the signal-box? (6) Was Cook engaged in performing the duties of a certificated fireman up till the time of the accident from the time the engine left the siding near the Shore Road box? (7) Did Roy [the engine driver] sound the whistle for the distant signal? (8) Did Roy sound the whistle for the home signal? (9) Had Roy received instructions to keep a proper look-out? (10) Did Roy keep a proper look-out between the Shore Cabin and the Causewayhead Cabin having regard to the action of Duncan Ferguson in lowering the home signal? (11) Was the engine going at an excessive speed?"

The Sheriff-Substitute directed the jury to answer the questions for the defenders and to find a verdict either for the pursuers or the defenders on the whole case. Counsel for the defenders excepted to the latter direction and moved that the questions of fact only be proponed to the jury. The motion was refused.

The jury gave their answers to the question for the defenders as follows—"(1) Yes. (2) Yes. (3) Yes. (4) No. (5) Consider it improbable. (6) Yes. (7) Not clearly brought out in the evidence. (8) Not clearly brought out in the evidence. (9) Received instructions through the book of rules. (10) Consider the evidence on this point inconclusive. (11) No.'

Counsel for defenders then moved the Sheriff-Substitute to direct the jury that the answers actually given involved a verdict for the defenders.

The agent for the pursuers opposed the motion and moved the Court to direct the jury again to retire and to bring in a verdict either for the pursuers or for the defenders, and if for the pursuers, to assess the damages.

The Sheriff-Substitute refused the motion for the defenders and directed the jury to return a verdict in accordance with pursuers' motion and as formerly directed.

The jury returned a verdict for the pursuers and assessed the damages.

The Sheriff-Substitute then, with the consent of both parties, requested the jury to bring in categorical answers "yes" or "no" to questions 5, 7, 8, and 10, but the jury, through their foreman, said that they were unable to give any other answers to these questions than they had already given.

On 18th August 1914 the Sheriff-Substitute refused a motion for the defenders "to fix a diet for a debate on the defenders' pleas against the relevancy of the action, and further, but without prejudice to the said pleas, the defenders hereby move the Court to apply the verdict of the jury as a verdict for the defenders and to assoilzie them from the conclusions of the action," and on the motion of the pursuers applied the verdict of the jury and decerned against the defenders for payment of the damages assessed by them.

The defenders appealed to the Court of Session upon the following grounds:—"(*a*) That in the interlocutor complained of the verdict was erroneously applied. (*b*) That the verdict returned by the jury was inconsistent and incompatible with the specific answers given by them to questions proponed. (*c*) That the Sheriff misdirected the jury in charging them to return a verdict for the pursuers or the defenders on the whole case instead of proponing to them questions of fact only. (*d*) That the Sheriff ought to have directed the jury in accordance with the defenders' motion to return the answers 'yes' or 'no' to questions 5, 7, 8, and 10. (*e*) That the answers given by the jury to questions 1, 2, 3, 4, 9, and 11, imported a verdict for the defenders, and the Sheriff ought to have directed the jury in accordance with the defenders' motion to return a verdict for the defenders. (*f*) That the verdict of the jury was contrary to evidence in respect that it was proved—(1) That there was no fault or negligence on the part of the defenders. (2) That the special Board of Trade rule referred to on record had been duly complied with by the defenders. (3) That there was no defect in the defenders' system, and that they had provided sufficient and competent men of all grades for the working thereof. (4) That the accident to the deceased John Ferguson was caused by, and in any event materially contributed to by, the deceased, in respect that he failed personally to keep a due look-out, and, on the assumption that a special look-out should have been detailed from the squad, that he failed in his duty to detail a man. (*g*) *Esto* that there was fault on the part of any of the defenders' employees other than the said John Ferguson, they were fellow-servants of the deceased, and the defenders are not liable. (*h*) That no relevant case is stated on record against the defenders. (*i*) That the Sheriff by his interlocutor of 7th April 1914 having allowed only a proof before answer, the case should not have been sent to a jury."

Argued for the appellants—1. The verdict was contrary to the evidence and should be set aside. (1) With regard to the alleged failure of duty on the part of the fireman, that in no way contributed to the accident. In any event the company was not responsible for fault on the part of the fireman because he was a fellow-servant of the deceased. (2) With regard to the alleged breach of the statutory rule which required the provision of persons to keep a look-out. The rule only applied where men were "relaying or repairing the permanent way," and the deceased's gang were not so employed. Moreover, it only applied "where any danger is likely to arise." That meant "special" danger, but the running of a light engine did not amount to a special danger. Even if the statutory rule applied, the company was entitled to delegate to the deceased as foreman of the gang the duty of setting a look-out when necessary. The company's own rule sufficiently warned the men against the danger, and there was no additional duty on the company to notify the foreman of the running of light engines. It was his duty to set one of the gang to act as look-out when a look-out was required. The men themselves must be presumed to be quite fit for the job, and in any event the evidence showed that they were fit for it. *Black* v. *Fife Coal Company, Limited*, 1912 S.C. (H.L.) 33, 49 S.L.R. 228, only decided that there was a duty on employers to employ competent persons. *Watkins* v. *Naval Colliery Company* (1897), *Limited*, [1912] A.C. 693, was distinguishable. That was a case of insufficient machinery. The Court should enter judgment for the defenders under section 2 of the Jury Trials Amendment (Scotland) Act 1910 (10 Edw. VII and 1 Geo. V, cap. 31), as was done in *Mills* v. *Kelvin and James White, Limited*, 1913 S.C. 521, 50 S.L.R. 331. 2. The pursuers' averments on record were irrelevant, and the action should be dismissed.

Argued for the respondents—1. The verdict was not contrary to the evidence. (1) The accident would not have happened had the fireman kept a proper look-out. He failed to do so because he was incompetent, being an unqualified man. Accordingly the company was in fault at common law in failing to employ a competent staff. (2) The

company was also at fault at common law in failing to provide a special look-out man in circumstances like the present, where an engine was being run backwards—*Cairns* v. *Caledonian Railway Company*, March 19, 1889, 16 R. 618, 26 S.L.R. 485. Further, it was in fault because it had broken a statutory rule. The rule applied to the circumstances of the present case. The men were engaged in "relaying or repairing the permanent way," and danger was "likely to arise," because danger was always likely to arise where traffic was passing. In any event the jury had so found, and it was a question of fact. The company could not delegate to a foreman the duty which the statutory rule imposed on it, and even if it could it was bound to "instruct" him specially about the traffic which he might expect. Passing a general rule was not a sufficient compliance with this duty of special instruction. In any event the jury were entitled to find that the company had failed to comply with the usual railway practice in such matters, for that was just a question of fact. Breach of a statutory rule was of itself sufficient to infer liability—*Baddeley* v. *Earl Granville*, 1887, 19 Q.B.D. 423. It was not necessary to prove negligence in addition to breach of the rule—*Black* v. *Fife Coal Company, Limited* (*cit.*), *per* Lord Kinnear; *David* v. *Britannic Merthyr Coal Company*, [1909] 2 K.B. 146, [1910] A.C. 74; *Watkins* v. *Naval Colliery Company* (1897), *Limited* (*cit.*). Where a statutory rule had been broken there could be no defence of common employment—*Bett* v. *Dalmeny Oil Company, Limited*, June 17, 1905, 7 F. 787, *approved per* Lord Kinnear in *Black* v. *Fife Coal Company, Limited* (*cit.*); *Pringle* v. *Grosvenor*, February 3, 1894, 21 R. 532, 31 S.L.R. 420—or of contributory negligence—*Groves* v. *Wimborne* (*Lord*), [1898] 2 Q.B. 402. 2. It was incompetent for the defenders to object to the relevancy after the jury had returned their verdict.

At advising—

LORD JUSTICE-CLERK—[*After narrating the facts*]—Keeping in view that this is a case founded on the common law only, it would seem to be very plain that the most of the grounds of fault detailed above are not such as can be relevantly founded on to fix liability upon the defenders. To the first point, viz., that a warning should have been forwarded when traffic was to be sent along the line at an unusual time, it seems to be a sufficient answer to say that the general instruction to the company's servants is that a train may come at any time. In any view, the sending of a train along the line is, and must be, a matter of detail working, and left to the discretion of those servants who have authority to regulate traffic, and if any such employee fails in his duty and his fellow-servant is injured the employer can only be made liable if he has failed to appoint men competent efficiently to fulfil their respective duties, or to organise a proper system of working, or to provide suitable plant for the use of their employees in doing their respective duties. This first allegation, therefore, being that the engine was coming along the line without previous intimation is plainly untenable. There is an instruction to all employees on a railway line that, while the regular trains are run according to a time-table, traffic may be sent along the line at any time, and that it is for those working on the line to guard their own safety where there is no obstruction to view or exceptional danger. The next objection, that it was a fault to have the tender of the light engine in front, is equally untenable. It cannot be possible under all circumstances that the engine should travel in front. In many cases an engine travelling along a line, and having to come back in the opposite direction, can only do so reversed. If "engine first" were imperative, every engine having to go to a small station, or to a public works siding, or a local coal or manure siding, would require to be provided with an engine turntable, which, of course, is out of the question. No authority was quoted by which such mode of travelling in the case of a light engine is forbidden, and it is matter of common knowledge that this is in accordance with regular and necessary practice. In any view, if it were assumed that running tender first was wrong, this would be the fault of the engine-driver, for whom the company are not responsible if he commits a fault.

Then it is maintained that a look-out man should have been provided to warn the deceased and his gang of platelayers, and the failure to do this was in breach of the company's own rules based upon the Board of Trade Regulations. The rule on which the contention is founded is rule 273. [*His Lordship quoted the rule.*] It was contended that the meaning of this rule was that the company should provide a special set of men to act as look-out men, and that as they had failed to do so the company was liable for the accident. I do not so read the rule. Upon the face of it it appears that the duty lies upon the foreman or ganger, where any danger is likely to arise, to appoint a man as look-out and to instruct him to act for that purpose, *i.e.*, that that is to be his sole duty for the time being. In so ordering the foreman to make such arrangement the company fulfils its duty under the Board of Trade Regulations, and if the foreman neglects his duty, and any of the gang is killed or injured, there can be no claim against the company at common law. In saying this I assume that the case we are dealing with was one to which the regulation would apply, but the facts of the case do not lead me to any such conclusion. Two things are necessary to bring the rule into force—(1) it must be a case of "relaying or repairing the permanent way," and (2) the place must be one where danger is "likely to arise." As regards the first point, I understand that your Lordships are of opinion that the work being done, namely, replacing old wedges with new ones, constituted a "repair." I am inclined to think that this may be doubtful. Such work is the ordinary work of a platelayer, to keep the rails properly wedged up to the chairs, but I shall assume that it can be held to fall under the head of

"repair." But that is not enough to make it a breach of the rule regarding the look-out man, to provide no such man. It must be a case where danger is likely to arise. Now this is not the ordinary danger which there is on every line and the whole extent of it. If it did, then in every case it would be a duty to put out a man specially to look out, which, of course, is not intended. Platelayers, whether working singly on the line or in gangs, are expected to take care of themselves in ordinary circumstances, such as where the view is open for a considerable distance, and where the special work they are doing does not call upon them specially to keep on the line while working, or to place themselves so that they cannot clear the line quickly. Here there was no case of that kind. The work was of the most ordinary kind, knocking out old wedges and knocking in new ones—work which did not call for their remaining on the line except for a few seconds at a time as each wedge was dealt with. Nor was it a case of danger from obstructed view, as the men were able to see up the line for a considerable distance. But lastly, if it was a case calling for the setting of a man with instructions to keep a look-out, the failure to do so lay with the foreman, whose duty it was to judge of that matter, and there could be no fault found against the company at common law.

Next, it is said there was fault because there was an unqualified fireman on duty, the driver having consented to allow a lad only under instruction at the cleaning shed to take the place of his own fireman, and that therefore there was not an efficient fireman's look-out on the engine. Apart from the fact that the evidence establishes that the acting fireman was doing fire-feeding duties at the time of the accident and therefore could not then look out, it is plain that whatever fault there might be in his acting as fireman was the fault of the driver and not of anyone for whom the company are responsible, as by delegation of duty. It is not said that any person in superintendence knew of the driver's action, and his breach of rule cannot therefore make the company responsible.

Then it is said that the driver did not keep a proper look-out. It seems pretty clear that he did not, for as he approached the place his engine was moving on a right-handed curve, and therefore he should have had no difficulty in seeing the men on the line. Apparently he moved across to speak to the signalman, and so failed to observe them. But this, if a fault, was plainly a fault of a fellow-servant, for which the company are not liable.

Lastly, it is said that the signalman was in fault, in that he lowered his home signal before the engine had come to a standstill at that signal, and allowed the driver to come forward towards his box. The signalman himself thinks he made a mistake when he lowered his home signal before the engine had been brought to a stand. I do not think he is right in this. As I read sections 39*b* and 40 it is not necessary that the train should be brought to a stop before he allows it to move forward.—[*His Lordship quoted the sections.*] This seems to me to make it clear that a moving on slowly without stopping is permissible where the home signal is some distance outside the station, as it was in this case. But however that may be, what was done at that signal-box on the occasion in question was the act of a fellow-workman of the deceased. It is a pathetic feature of the incident that the signalman was the son of the unfortunate foreman who was killed.

I come to the conclusion that all the grounds stated in support of the verdict in this case fail. Before stating my view of how the case should be dealt with now, I say just in a word how extremely unsatisfactorily—as it appears to me—this case has been dealt with throughout in the Court below, and how it illustrates the apparently unworkable character of Sheriff Court jury trial procedure. Lord Anderson, whose opinion I have had an opportunity of reading, has gone very fully into this matter, and I content myself with expressing my entire concurrence with the views he expresses in that opinion.

Finally, the question has to be considered how the case is to be dealt with. I am clearly of opinion that the course of allowing a new trial should not be followed in this case. There is, and indeed can be, no suggestion that any further evidence could lead to any different result by providing ground for a similar verdict to that which will now be set aside. I would move your Lordships to bring the case to an end by setting aside the verdict and by assoilzieing the defenders.

LORD SALVESEN—On 9th April 1913 the late John Ferguson was run over and killed by a railway engine which was proceeding tender first in the direction from Stirling to Causewayhead. The exact place of the accident was some 44 yards to the west of the down home signal and between that point and Causewayhead Station. The deceased, who had for many years been in the service of the defenders, was a foreman surfaceman, and was at the time in charge of a gang consisting of two other men—Thomson and M'Gregor. They were all three engaged in taking out worn keys in the railway chairs and replacing them with new ones. None of the men observed the approach of the engine. Thomson was slightly injured by the hammer he was carrying coming in contact with it, and M'Gregor managed to escape without injury.

The question in this case is whether the defenders are liable to pay damages to the widow and grown-up family of the deceased man, who are the pursuers in this case. The averments which the pursuers make on record were held irrelevant by the sheriff-substitute, but his interlocutor was altered on appeal to the sheriff, who allowed a proof before answer, and, as I think, unfortunately in view of the difference between him and the sheriff-substitute, refused leave to appeal. It is plain that the sheriff contemplated that the proof would proceed before a judge, but the pursuers took ad-

vantage of their statutory right to have a trial by jury. This has resulted in a general verdict for the pursuers. Both parties, however, availed themselves of their right to tender specific questions to be answered by the jury. Unfortunately those tendered by the pursuers' counsel were not allowed by the sheriff - substitute to be answered, apparently on the ground that they involved questions of law. As regards the first three of these questions I think they were properly disallowed, not so much on the objections stated as that they were not sufficiently specific. A series of questions propounded by the defenders' counsel was answered, but they were plainly not exhaustive of all the questions of fact which have been raised. The result is that we are left entirely in ignorance of the grounds on which the jury found a verdict for the pursuers, but it may be implied that the jury negatived the plea of contributory negligence. The defenders now move us to set aside the verdict of the jury on the ground that there was no evidence on which they were entitled to hold that they were liable for the death of their servant; or alternatively that the verdict was contrary to evidence.

At first sight it is difficult to understand how this regrettable accident could have occurred without negligence on the part of one or more of the defenders' servants. The railway line at the point where the accident occurred is on a flat curve, but for a distance of some hundreds of yards the deceased and the two men who were working under him must have been clearly visible to the driver of the engine if he was keeping a good look-out on his own side of the engine, which as it was proceeding tender foremost was the right-hand side in the direction in which he was moving. Moreover, the engine was not proceeding at a high rate of speed, but according to the evidence of the pursuers' own witnesses had been brought almost to a standstill at the down home signal. It is easy enough to understand how from that point to the place of the accident the engine-driver did not see the deceased, because he had crossed over to the left-hand side of the engine, and as the tender is said to have been heaped with coal, could not from that position observe the men on the line. It is, however, hard to understand how the three men who were working on the line should have failed to notice the engine's approach if they were reasonably careful of their own safety. That they did not hear the whistle which he sounded somewhere in the neighbourhood of the down distance signal may be explained by the circumstance that it was a windy day, and I think it is in accordance with the bulk of the evidence that the engine-driver did not again whistle when he passed the down home signal. If he had done so I think the deceased and his fellow-workmen would certainly have heard such a whistle. It is also not without importance that the deceased's own son, who was in charge of the signal-box at Causewayhead, admitted that he was in breach of the rules in not bringing the engine to a stop at the down home signal and permitting it to pass on although at a slow speed. Had he stopped the engine there, as he ought to have done, it would have been the duty of the engine-driver to sound a whistle when he again started; and in any event the act of stopping and restarting the engine must almost certainly have attracted the attention of the deceased and given him sufficient time to get clear of the permanent way.

The faults to which I have adverted would have been sufficient to have rendered the defenders liable in damages to any member of the public who had been run over at the spot where Ferguson was killed, assuming he was legitimately there and was not chargeable with contributory negligence. But these faults as in a question with the deceased were the faults of fellow-servants for which the defenders are not liable in damages to his representatives. The pursuers have accordingly sought to elide this special defence on two grounds—(1st) they say that one of the causes of the accident was the failure of the fireman to keep a good look-out; and that the defence of common employment is not open to the defenders in his case because he was not qualified to act as fireman, not having been registered as such; and (2ndly) they say that the accident in whole or in part resulted from the breach of a rule which has the force of statute, and to which I shall afterwards advert in more detail.

It appears that the person who was acting as fireman at the time in question was a young man named Cook, who was employed as a cleaner and had not been registered as a fireman. Firemen are for the most part appointed from amongst young men who have previously acted as cleaners, but before being registered as fit for the duties of firemen such persons must, according to the defenders' regulations, pass an examination mainly with regard to eyesight and their capacity for distinguishing colours. Until they have passed this examination they ought not to be employed as firemen. It is proved, however, that Cook did not act as fireman on the engine in question with the consent of the defenders or any of their superior officials. A man named Malley was acting as fireman and had been duly registered as such, until Cook took his place at Stirling cleaning sheds, where Cook, who was resident at Alloa, had been employed on that day. Malley applied to the engine-driver Roy for permission to leave the engine at Stirling and go home, on the footing that Cook took his place and proceeded with the engine to Alloa, for which it was bound, and to this Roy agreed. There is no evidence that Howie, the locomotive foreman, permitted this exchange or was aware of it, or that he had ever connived at similar practices. Roy and Malley and Cook were all in breach of rule 3 of the general rules applicable to this particular Railway Company, which provides, *inter alia*, that no servant is allowed to exchange duties with any other servant without the special permission of his superior officer. Cook may be excused as he did not know the rules, but the other two men were aware of the rules and acted in

breach of them. It is therefore apparent that the defenders did not employ an unqualified person to act as fireman on the engine which caused the accident, but had taken reasonable means for preventing such employment. On this ground alone, therefore, it seems to me that the defenders are not deprived of the defence of common employment. If Cook was not to blame for acting as fireman, Roy and Malley, who were certainly responsible for his being there, must be held to blame, but their fault does not infer liability against the defenders for the accident which happened to Ferguson.

I am further of opinion that even if it were otherwise there is no evidence that the fact that Cook was not qualified as a fireman had any causal connection with the accident. His evidence is that from the time that he joined the engine until it was past Causewayhead Station he had no time to keep a look-out as he was continuously engaged in his primary duties as fireman. In any case his proper place would have been on the left-hand side of the engine in the direction in which it was going, and owing to the curve he would have had little opportunity of observing the surfacemen at work. The fireman's duty to keep a look-out only comes into operation when he does not require to attend to stoking and other similar duties. There was nothing as it happened to prevent Cook from keeping as good a look-out as any qualified fireman, because he was later able to pass the necessary test with regard to eyesight. It was suggested in argument that a more experienced fireman would have got through the operations which occupied Cook until the engine had passed Causewayhead Station in less time, but this was a mere suggestion unsupported by evidence. There was no obligation on the defenders to employ a fireman of any given experience, and in point of fact Malley had scarcely more experience than Cook, though he had been registered as a fireman a couple of days earlier. The duties of a fireman are of a simple nature, and railway companies rely far more on the engine-driver than on the fireman for the purpose of seeing that the line is clear in the direction in which the engine is travelling. In this case I am quite satisfied that it would have made no difference if Malley had been acting as fireman instead of Cook, and that no fault whatever is imputable to Cook in the matter of keeping a good look-out.

The second question is one of more difficulty, and turns on section 9 of the prevention of accident rules made by the Board of Trade under the Railway Employment (Prevention of Accident) Act 1900. This rule was intended to provide protection to surfacemen when relaying or repairing the permanent way, and it has the force of statute. It is to the following effect— [. . . *quotes, v. sup. in rubric* . . .] Various questions of construction were raised on this section as applying to the facts of the present case — (1) Whether Ferguson and his squad were engaged in repairing the permanent way when they were taking out worn-out keys and substituting new ones? I answer this in the affirmative. (2) What is meant by the limitation "in all cases where any danger is likely to arise?" The pursuers' counsel maintained that danger is likely to arise in every case where there may be traffic at the place where the men are working; and that the only case where a look-out is dispensed with is where no traffic can approach the men while they are at work, irrespective of the circumstances under which they are working. I cannot so read these words. I do not think that they were meant entirely to absolve surfacemen from keeping a look-out for their own safety, or that they apply to a part of a railway line along which there is an unobstructed view for hundreds of yards because there may be some engine or train of which they are not aware which may pass along the line where they are working. All the witnesses say that in such circumstances they do not consider there is any danger, and that it is not the practice to station a man on the look-out. The words seem to me to point to certain special cases, some of which at all events were already covered by the railway companies' regulations, as, for instance, when men require to work on a curve where they have no clear view for any considerable distance of an approaching train, or in fog or the like. On an open stretch of railway sufficient protection would normally be given to the men by its being the duty of the engine-driver to warn them of his approach, and by the men themselves casting an occasional eye in the direction from which traffic might be expected. Assuming, however, this not to be so, Mr Sandeman maintained that it was the defenders' statutory duty to consider in each case whether danger was likely to arise to one or more surfacemen employed on the permanent way, and if so to provide a special look-out man; and that this duty was not one which they could delegate so as to escape the consequences of a failure on the part of their delegate to comply with the rule. I am unable to assent to this view. The duty of the company is to provide persons for the purpose of maintaining a good look-out, and if they provide such persons, then they fulfil their statutory duty, and are not responsible for the negligence of the persons so employed if properly qualified for their task. It may well be that if the defenders here had taken no notice of this rule, but had conducted their repairing operations on the permanent way exactly as they did before it was passed, they might have been open to attack, but this is not the case. By rule 273 of their own rules and regulations they enjoin the foreman of any gang of surfacemen to provide one or more persons to maintain a good look-out in the circumstances defined in section 9. He did so provide himself on this occasion, for one of the men under him could quite well have been detailed for duty as a look-out man had the deceased considered that necessary. It was he and he only who could judge of the circumstances of the particular case, and I cannot see how anything but general instructions can be issued in order to comply with

the section in question. The repairs which fall to be made may be discovered only by the foreman surfaceman in the course of passing along the line, and one or more look-out men may be required or none at all, according to the character of the work which has to be done, and the situation and surroundings of the part of the line which needs to be repaired. Where the statutory duty consists in providing a person to do a certain thing the individual or corporation on which the duty is laid cannot be answerable for the negligent act of such persons to a fellow-servant, and still less can they be answerable to the agent whom they appoint to perform the duty for his failure to fulfil it. It is true that what is properly an employer's duty — that is, such a duty as an employer who personally manages his business would ordinarily discharge—such as the provision of proper plant, the selection of proper servants, or the fencing of machinery, cannot be delegated to any person, however competent, so as to free the employer who, because he cannot or does not personally manage his business, must act through others. That is a proposition that has been long established and is well illustrated in the various cases to which we were referred. But these cases have no application where, as here, the employers' duty is only to provide one or more persons to discharge a given function, and the person so provided by the employer possesses the requisite qualifications. It was further urged in explanation of Ferguson's conduct that he had received no notice of the anticipated run of the engine in question, and was therefore unaware that any danger was likely to arise in consequence. This is true, but it is not shown how it would be practicable for a railway company to give notice of every train or engine to surfacemen engaged in repairing portions of a line at a distance from any station. It is true that a general time-table is given to the foreman surfaceman, but it would be obviously highly dangerous if they were to rely on each train arriving up to time and on the passage of any particular train to take no thought of their own safety till the next was due. This cannot have been the contemplation of the authority who framed section 9 of the Board of Trade rules, for if surfacemen need fear no danger except from trains of whose expected arrival they had previous notice no outlook man would ever be required even at points where the view was obstructed. The truth is that no railway system can be so worked that the times at which trains or engines are due to arrive at any particular point of a line can be previously notified to the men at work there, and surfacemen must act on the footing that trains may be delayed, and that there may be occasional traffic apart from that which is set forth in the general time-tables.

It does not in the least follow that section 9 of the Board of Trade rules does not provide valuable protection to surfacemen from the risks to which they are unfortunately exposed. Thus if a man is sent alone to repair a portion of the line at any place where danger is likely to arise because no look-out man is available, and suffers injury in consequence of there being no look-out man to protect him, I think it very probable that he would have a good claim for compensation. Again, where a look-out man is employed he must be expressly instructed to act for such purpose, and must be provided with all appliances necessary to give effect to such look-out. The foreman or other person to whom this duty is committed is thus apprised of what is considered necessary for the protection of himself and the other members of his gang. If notwithstanding he fails to appoint a look-out man from a number at his disposal, or the look-out man himself is negligent in the performance of his duty, the railway company cannot, in my opinion, be liable in damages to a fellow workman of the delinquent who suffers from his negligence.

I accordingly reach the conclusion that the evidence discloses no case of liability against the defenders, and that the verdict must be set aside. I further think with your Lordship that as we are satisfied that no further evidence is available which could have any bearing on the questions at issue, it is not desirable that we should order a new trial, but that we should, in terms of the Act 1 Geo. V, cap. 31, sec. 2, enter judgment for the defenders. I cannot help stating that I think it regrettable that this litigation should have been entered into in view of the admitted liability of the defenders to pay compensation under the Workmen's Compensation Act, the amount of which was not appreciably less, so far as the widow was concerned, than what she obtained by the verdict of the jury.

LORD ANDERSON—The procedure in this case has been of so extraordinary a character that I think it right at the outset to make some observations on that topic.

The action originated in the Sheriff Court at Stirling on 14th October 1913. The questions to be determined were these very ordinary ones—(1) Did the deceased John Ferguson meet his death through the fault of the defenders? and (2) Was the deceased guilty of contributory negligence? No difficulty is experienced in the Supreme Court in deciding questions of this character with despatch and precision, but the determination of the present case has occupied the attention of the sheriff and sheriff-substitute during the greater part of a year, and it cannot be affirmed that when the cause came to an end in the sheriff court a satisfactory result had been attained. The first contentious matter between the parties arose in connection with the defenders' motion to have one of the six pursuers, who was resident in Australia, ordained to sist a mandatary. After a reclaiming petition on this point had been considered by the sheriff he decided it in favour of the pursuers. The relevancy of the pursuers' averments was the next subject of debate. The sheriff-substitute dismissed the action as irrelevant. The sheriff, on appeal, recalled this judgment and allowed a proof before answer. Undoubtedly

many of the averments of the pursuers are irrelevant, but it seems to me they stated a relevant case against the defenders with reference to the two points which were ultimately debated in this Court — the alleged appointment by the defenders of an incompetent fireman and the suggested failure on the part of the defenders to provide a look-out man to give warning.

The defenders then attempted unsuccessfully to induce the sheriff to grant leave to appeal his judgment on relevancy to the Supreme Court, and the sheriff-substitute granted the motion of the pursuers to have the case tried in the sheriff court by a jury of seven jurors under the provisions of the Sheriff Courts Acts of 1907 and 1913. The jury trial took place on 11th and 12th June of last year.

Under the Sheriff Courts Act 1907, section 32, the prescribed practice was that the sheriff-substitute, prior to the trial by jury, had to frame the question or questions of fact to be at the trial proponed to the jury. On a consideration of the answers returned by the jury to these questions it was the duty of the sheriff-substitute to determine whether the verdict fell to be entered for the pursuer or the defender. This procedure, so novel to our legal system, was the subject of adverse judicial criticism in the cases of *Adamson* v. *The Fife Coal Company*, 1909 S.C. 580, 46 S.L.R. 459, and *Taylor* v. *Sutherland*, 1910 S.C. 644, 47 S.L.R. 541. In the latter case the Lord President (Dunedin) expressed the opinion that it was competent for the sheriff to propone a general question to the jury as is done in Court of Session issues.

The procedure set up by the 1907 Act was altered by the amending Act of 1913. Section 32 of the 1907 Act was repealed, and in lieu thereof section 6 of the 1913 Act provided that at the jury trial the Sheriff may, or if required by either party shall, after the conclusion of the evidence, propone to the jury question or questions of fact to be answered by them, and the jury shall in their verdict give specific answers to such question or questions. Now it seems to me that the purport of this amending section was to assimilate the procedure in the sheriff court to that which regulates trial by jury in the supreme court. In the ordinary case a jury in this court returns a general verdict on the issue appointed for the trial of the cause; but it is also competent for the jury to return a special verdict in the shape of special findings in fact, without a general finding in favour of either party, leaving it to the Court to determine as matter of law which party is entitled to the verdict. An example of such a special verdict will be found in the report of the case of *Macfarlane* v. *Morrison*, 4 Macph. 257.

If, then, it was intended by the provisions of the 1913 Act to assimilate procedure in the supreme and inferior courts, it would seem to be appropriate to obtain from the jury either a general or a special verdict, but not, as in the present case, both. Further, as special verdicts are now almost unknown in this court, practitioners in the sheriff court would, it seems to me, be well advised to avoid special verdicts in the shape of answers to questions put to the jury. The experience of the supreme court shows that under proper judicial direction almost every case of this nature may be expeditiously and satisfactorily decided on a general issue. If, however, the parties choose to have the case determined by the jury by way of answers to specific questions of fact, it is the duty of the sheriff to put these questions to the jury. The language of the section is imperative—the sheriff "shall" if required propone the questions. The sheriff, it is true, is not bound to put to the jury questions of law or of mixed fact and law, nor questions of fact which are indeterminate and non-specific, and the first three questions proponed by the pursuers were probably open to objection on these grounds. The last question suggested by the pursuers appears to me, however, to be unexceptionable, and ought to have been put to the jury. To submit to the jury a series of questions from one only of the parties and to refuse to put any question proponed by the other party is to invite disaster in the result.

A further debate took place before the sheriff-substitute as to the import of the verdict returned by the jury, and he ultimately applied the verdict as a verdict for the pursuers. The defenders took a note of appeal against this judgment, and have set forth grounds of appeal under nine distinct heads, one of these being divided into four sub-heads. It seems to me that the defenders have gone far beyond the statutory provisions in the statement of their grounds of appeal. This matter is regulated by section 31 of the Act of 1907, Rules 139 and 148 of the First Schedule, and Form M of the Third Schedule of that statute. The statutory grounds of appeal are exhaustive. They limit the rights of appellants in this matter and circumscribe the powers of this court in reviewing a verdict. I entirely agree with what Lord Ardwall said on this point in the case of *Adamson* (1909 S.C. 580 at 589, 46 S.L.R. 459 at 464). After reading section 31 of the 1907 Act Lord Ardwall said—"Now these are the words of the Act of Parliament, and they are perfectly distinct—it is 'only' upon one or more of the four specified grounds that an appeal to the Court of Session is allowed—and they appear to me to preclude the Court from taking up any question whatever as a ground for upsetting the verdict of a jury except the four there mentioned." We were asked by the defenders' counsel to consider the question of the relevancy of the pursuers' averments, and to dismiss the action as irrelevant. In my opinion it is incompetent for this Court to consider the question of relevancy after a verdict has been returned. In the supreme court, where under the 6th section of the Jury Trials (Scotland) Act 1815 a verdict may be challenged on the general ground of "such other cause as is essential to the justice of the case," no such judgment as the defenders desired in this case on relevancy has ever been pronounced. Even when the judgment on review has in effect been one

on relevancy, as it seems to me was the decision in the case of *Russell* v. *Macknight*, 24 R. 118, 34 S.L.R. 73, the formal interlocutor has invariably been that the verdict was contrary to evidence. Under the provisions of the 1907 Act there is no general ground of challenge under which it would be open to the Court to consider the question of relevancy.

In considering the merits of the question raised by the appeal the Court is guided by the same principles as regulate the determination of the like question in connection with a supreme court case. The appellants' opening speech is equivalent to that made in support of a motion for a rule, and the appellants' task is so far accomplished if a *prima facie* case is made against the validity of the verdict. The *onus* then rests upon the respondent in the appeal, who has to show cause as in a debate on a rule why the verdict should not be set aside as being contrary to evidence. The duty of the Court is not to re-try the case but to ascertain whether or not there is a sufficiency of competent evidence to support the verdict. The pursuers' counsel accepted this position and maintained that there was evidence justifying a verdict for the pursuers on these two grounds—(1) that it had been proved that the defenders employed an incompetent fireman; and (2) that it had been proved that the defenders failed to fulfil their statutory obligation to provide a look-out.

As to the first point, assuming that Cook was incompetent in respect that he was not a registered fireman, the evidence negatives any connection between his alleged incompetence and the occurrence of the accident. The primary duty of a fireman is to attend to the coaling of the engine, and he is only required to keep a look-out when he is not so employed. The evidence establishes that at the time the engine was approaching the squad of platelayers Cook was engaged in the performance of his primary duty and was not available for look-out purposes. A properly qualified fireman would have been at that time in the same situation, and accordingly the conclusion I have arrived at on this point is that there was no evidence to warrant the jury in connecting the alleged incompetence of Cook with the death of Ferguson.

As to the matter of the regulation providing for a look-out, there is greater difficulty. The first thing is to determine what obligation the regulation imposes upon the defenders. That is a question for the Court. The sole purpose of the regulation is to ensure the protection of men working on the lines, whether singly or in gangs, at work of relaying or repairing the permanent way of the lines. In the present case the squad was engaged in renewing the keys or wooden blocks which keep the rails firm in the chairs. I think this may fairly be described as an operation of repairing—a minor repair, it is true—but appropriately described by that term. The duty of the defenders was to provide persons or apparatus for maintaining a good look-out or for giving warning against an approaching engine or train. The defenders maintain that they discharged their statutory obligation by providing platelayers who could be appointed to act as look-out men and who were competent so to act. There were a foreman and two men at the place where the accident occurred, and, under rule 273 of the defenders' rules and regulations, one of the two men might have been appointed to act as look-out. It was suggested that the regulation contemplated the provision of men whose sole duty was to look out. This seems to me to be an extravagant suggestion. It would throw upon the railway company the burden of providing for every gang of platelayers, and indeed for every platelayer working singly, at least one look-out man. The language of the regulation negatives this suggestion. The proviso that "the persons employed for such purpose shall be expressly instructed to act for such purpose" implies that specially qualified and appointed look-out men need not be provided. If such were provided, there would be no need for express instructions to act as look-out men; that would be their sole duty. The meaning of these words is just this, that when a platelayer is told off as a look-out he is to be specially ordered or directed to cease platelaying and to devote all his energies to keeping a look-out. The defenders, however, are not bound to provide a look-out at all times, but only "in all cases where any danger is likely to arise." As the defenders are an incorporation, they must delegate to a servant the duty of determining when it is appropriate to appoint a look-out. By their rules they have delegated this duty to the foreman, ganger, or leading man of the squad This seems a most appropriate choice, because the special danger can only be gauged by the man who is on the spot. The pursuers' counsel accepted this view, but maintained that it was the duty of the defenders to put the foreman in possession of all necessary information to enable him to determine whether or not special danger would be likely to arise. I do not think the defenders were under obligation so to act. If they were, then there would be no need to appoint a look-out. The workmen would be apprised of all coming engines or trains and would have no need to take precautions by way of look-out. The language of the regulation, "for giving warning against any train or engine approaching," implies that the object of appointing a look-out is to prevent surprise by an engine or train not on the scheduled tables. The platelayer is bound to conduct his work in such a way as to keep a look-out for unexpected engines or trains, and the defenders are not bound to warn him of the approach of every train and engine—indeed it would not be practicable to do this. Accordingly it was for the foreman Ferguson to determine whether or not it was proper to appoint a look-out in the circumstances in which his squad was working at the time of the accident. If those circumstances pointed to a danger being likely to arise, Ferguson was in fault

in not having appointed a look-out, and the pursuers are thus debarred from recovering damages in respect of his death.

I have reached the conclusion, however, that the circumstances were not such as to call for the appointment of a look-out, and that accordingly the provisions of the regulation do not apply. The fact of a fatal accident having occurred does not necessarily imply that there was special danger in connection with the work which was being done. The fatality was due to the almost inexplicable carelessness, first, of the engine-driver Roy, and secondly, of the platelayers themselves. There was a straight or but slightly curved stretch of line approaching the place where the gang was working, it was broad daylight on an afternoon in April, and the engine was travelling at a slow rate of speed. The platelayers were working near a railway station at a point where siding rails left the main line. It was the duty of the engine-driver in approaching the station to keep a look-out. If he had done so he was bound to have seen the platelayers in a situation of danger, and he could then have warned them or drawn up his engine. I am satisfied that the engine-driver entirely failed in his duty to keep a look-out. Again, it is extraordinary that none of the platelayers saw the approaching engine. The work they were doing was not of an engrossing character and such as to call for concentration of attention. If either the engine-driver or any of the platelayers had been keeping an ordinary look-out there would have been no danger whatever. I accordingly hold that there was no evidence on which the jury was entitled to find that this was a place of special danger calling for the appointment of a look-out.

Of the authorities referred to by the pursuers on this branch of the case it is only necessary to refer to three decisions, viz., *Black* v. *Fife Coal Company, Limited*, 1912 S.C. (H.L.) 33; *Britannic Merthyr Coal Company, Limited* v. *David*, [1910] A.C. 74; and *Watkins* v. *Naval Colliery Company* (1897), *Limited*, [1912] A.C. 693.

In *Black* the House of Lords decided that the owners of a coal mine were responsible for the death of a miner who had lost his life through inhaling carbon-monoxide gas in respect that they had been in breach of a statutory obligation imposing on them the duty of appointing mine officials who were competent to deal with the dangers arising from the presence of poisonous gas. In the present case the defenders maintain, as I think rightly, that they did provide persons competent to keep a proper look-out. It seems to me that it must be assumed that men who are competent to do the work of platelayers are competent, in the circumstances with which the present case is concerned, to note and give warning of the approach of an engine.

The case of *David* decided that where injury has resulted from breach of a statutory duty, the burden of proof as to whether those who were under statutory obligation had done their duty was not on the party complaining of the breach. The defenders accept this *onus* and maintain, again, as I think, conclusively, that it is proved not only that they have taken all reasonable precautions to observe the statutory rule, but that they have in point of fact fulfilled their obligations thereunder by providing competent men to keep a look-out.

The ground of decision in the case of *Watkins* is plain and intelligible if regard be had to the facts of the case and to what is said by Lord Atkinson in his judgment. There was a statutory obligation on the mineowners to provide raising and lowering apparatus with sufficient brake power. Provision was made for the safe raising and lowering of twenty miners at a time. The manager of the colliery altered this safe system of working, and by notice published at the pithead substituted therefor a system whereby twenty-six miners were raised and lowered at a time. This improper system was continued for some two months until the fatality occurred which gave rise to the litigation. The presumption arising from these facts was that the change of system was known to and sanctioned by the mine-owners, who were therefore properly made responsible for the fatality which resulted from that change having been made. In the present action no case of defective system is made by the pursuers, and *Watkins* does not therefore seem to be applicable.

On the whole matter I have reached the conclusion that there is no evidence to support a verdict for the pursuers, and as no further evidence may reasonably be expected to be obtained, I agree with your Lordships that we should put an end to this litigation by entering judgment for the defenders under the provisions of section 2 of the Jury Trials Amendment (Scotland) Act 1910.

LORD DUNDAS was absent, being engaged in the Extra Division.

LORD GUTHRIE was absent.

The Court pronounced this interlocutor—

"On the motion of counsel for the defenders and appellants, and of consent of counsel for the pursuers and respondents, Recal the interlocutor of the Sheriff-Substitute dated 18th August 1914, set aside the verdict found by the jury, assoilzie the defenders and appellants from the conclusions of the action, and decern."

Counsel for the Appellants (Defenders)—Cooper, K.C.—W. T. Watson. Agent—James Watson, S.S.C.

Counsel for the Respondents (Pursuers)—Sandeman, K.C.—Paton. Agent—Peter Ferguson, Solicitor.