LORD BUCKMASTER—The appellant in this case is a farmer who has a farm at Dunmore. Upon this farm he has a considerable quantity of stock and horses. Among his animals he possesses a stallion known by the name of "Prince Ossian." This stallion he has been in the habit of using for the service both of his own mares, six in number, upon the farm, and also for the service of the mares of adjacent farmers who desire to get the benefits of the horse. It is not the only stallion which serves his farm; he has another which he also keeps upon the premises. The service of the stallion "Prince Ossian," apart from its use in connection with the farm, is so much sought for and is of such value that the appellant received in the income tax year 1915 the gross sum of £290 in respect of its use. The Income Tax Commissioners sought to assess the appellant to income tax upon £250, part of this sum of £290, and he thereupon required them to state a Special Case raising the question as to whether or no the use of this stallion in the manner that I have described did or did not render him liable for the tax. That Special Case, which was stated on the 21st June 1917, was referred to the Court of Session for decision, and the Judges of the First Division have unanimously decided that the assessment was correct.

The question which arises for determination is one which not infrequently occurs in connection with the Income Tax Acts, and which in the result always becomes the determination of a simple question of fact. It is well known that by Schedule B of the Income Tax Act of 1853 provision is made for taxation in respect of the occupation of lands in the United Kingdom, and there then follow provisions in Schedule D, which secure that further duties under that schedule are to be exacted in respect either of any trade, adventure, or concern in the nature of a trade not contained in any other schedule, or in the case of duties to be charged in respect of annual profits or gains not falling under any foregoing rule. There can be no question therefore that these profits are liable to taxation unless it can be properly asserted that they arise for and in respect of the occupation of the lands which the appellant holds as his farm.

It is quite possible that an entire horse may be used by a farmer in connection with his farm in such a manner that its use outside will in relation to its use for his own purposes be so trivial and unimportant that there would be no tax exigible in respect of profits received for its services. Or on the other hand it may be that the real use and purpose of the animal and its real advantage to its possessor lie in the moneys which can be obtained by the use of its services outside. This question is essentially a question of fact. The Commissioners in this case have decided that the use by the appellant of this stallion is a use that provides a profit which does not arise in respect of the occupation of his lands. There seems to me no reason whatever why that finding of fact should be investigated more closely. Had it been found in terms it would have been outside the competence of a court to discuss it further. It is not found in exact language, but it is found inferentially, and the facts to which I have referred, namely, the number of mares on the appellant's farm, the number of entire horses that he possesses, and the extent of the profits which this horse has earned, are in my opinion abundant to justify the conclusion which has been reached.

For these reasons in my opinion this appeal fails and should be dismissed with costs.

LORD FINLAY—I am of the same opinion. Every case of this kind really depends upon questions of fact, and very largely in most cases it resolves itself into a question of degree. I see no reason whatever which would justify us in overruling the conclusion at which the Commissioners have arrived, and it seems to me that the appeal must be dismissed.

LORD DUNEDIN—I concur.

LORD ATKINSON—I concur.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellant—Condie Sandeman, K.C. — Watson. Agents — Guild & Guild, W.S., Edinburgh—Thorne, Priest, & Company, London.

Counsel for the Respondent—Lord Advocate (Clyde, K.C.) — R. C. Henderson. Agents — Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue for Scotland—H. Bertram Cox, Solicitor of Inland Revenue for England.

COURT OF SESSION.

Tuesday, January 14.

FIRST DIVISION.

[Lord Anderson, Ordinary.

WATT *v.* CORPORATION OF GLASGOW.

Reparation — Negligence — Tramcar — Absence of Conductress on Roof at Stop-if-Required Station — Passengers Going on Platform of Car to Request Conductress to Stop — Passengers Thrown off by Car Swinging on a Curve.

A girl and her infant brother, passengers on a tramway car in Glasgow, desiring to alight at a stop-if-required station went upon the rear platform of the car to request the conductress to stop. The conductress was upstairs for no reason arising out of her duties. The car did not stop, and the passengers in question were carried on the platform past the station about 77 yards where there was a curve. The car took the curve without diminution of speed, which caused a swing on the rear platform by which the passengers were thrown off. *Held* (*dis.* the Lord President) that the conductress was negligent in being absent from the platform without cause at the stop-if-required

station, that the driver was negligent in taking the curve in question without reducing speed and so causing an unusual swing or jerk, which was the proximate cause of the accident, that there was no contributory negligence on the part of the passengers, and that they were entitled to damages for the personal injuries sustained by them.

Opinion per Lord Skerrington that the defenders' liability did not depend on proof that the speed of the car was excessive and dangerous.

Frances Watt, with consent and concurrence of Thomas Watt, her father, as her curator and administrator-in-law, and Thomas Watt, as tutor and administrator-in-law of his pupil child Robert Watt, *pursuers*, brought an action against the Corporation of Glasgow, *defenders*, concluding for decree for £100 in favour of Frances Watt and £250 in favour of Robert Watt as damages for personal injuries.

The defenders *pleaded, inter alia*—"2. The accident condescended upon not having been caused by the fault of the defenders, they should be assoilzied. 4. The accident condescended upon having been caused or materially contributed to by the fault of the female pursuer, all as condescended upon, the defenders should be assoilzied."

On 12th June the Lord Ordinary (ANDERSON), after a proof, found that Frances Watt and Robert Watt had been injured by the fault of the defenders and were entitled to reparation, and assessed the damages to each at £50.

Opinion, from which the *facts* of the case appear—"In this action the pursuers are (1) Frances Watt, a young girl of sixteen years, who sues with the consent and concurrence of her father Thomas Watt, a dock labourer in Glasgow, and (2) the said Thomas Watt, as tutor and administrator-in-law of his pupil child Robert Watt. The action is brought against the Corporation of the City of Glasgow as owners of the tramway system in that city, and damages are claimed by or on behalf of the pursuers by reason of personal injuries which they sustained by being thrown from a tramway car in Glasgow.

"The legal basis of the action is that the servants of the defenders who were in charge of the car were in fault, and that the accident resulted from that fault. The allegations of fault which are made against the two servants are, as set forth in condescendence 5—that the conductress of the tramcar, whose duty it was to have been in her position on the rear platform as the car approached a certain stopping-station, or at least to have been in such a position on the car as to have seen whether a passenger wished to alight at said stopping-station and to have stopped the car at the stopping-station, was not on the platform, but was on the roof of the car. As regards the other servant Russell, the motoress, the allegation of fault is that in proceeding round a certain curve, instead of slowing down and driving the car round the curve at a moderate speed not exceeding four miles an hour, she recklessly and negligently approached the curve and took it at a high rate of speed.

"The accident happened about 1 p.m. on Friday, 19th October 1917, and the place where it occurred was where a street called Byres Road joins another street called Church Street, along which latter street the tramway car had come. The children were thrown from the tramway car opposite a boot shop tenanted by a man named Paterson at 103 Byres Road. There is an uphill gradient in Church Street approaching the curve which I have alluded to, slightly rising in the direction in which the car was travelling, and the curve in question is one of a somewhat easy curvature, the radius being from 140 to 150 feet.

"Now two accounts of the accident are given by the witnesses called for the respective parties, and the first thing is to determine which of those accounts is the true one. That depends in great measure on the view which is taken as to the credibility of the witnesses. As regards the girl Frances Watt I must confess that I was quite favourably impressed with the way in which she gave her evidence. She is a young girl of intelligence, and she gave her testimony with candour but at the same time with carefulness, and I considered she gave it with perfect truthfulness. I formed the same opinion as to three independent witnesses who were called by the pursuers—Miss Mohan, Mrs Cullen, and Mrs M'Shane. These three women have no concern with this action. They are not acquaintances of the pursuers or of any members of their family, and they came here, and so far as I can judge, to state with perfect truthfulness what they witnessed on that occasion.

"No attempt was made to impeach the credibility of Miss Mohan, but two suggestions were made by the defenders by way of attacking the credibility of Mrs Cullen and Mrs M'Shane. The first was based on the evidence of Mr Grierson, the tramways engineer. Mrs M'Shane and Mrs Cullen when they first saw the tramway car which was carrying the two children were standing on the pavement at the junction of Wood Street and Byres Road, and in order to see the car when it first appeared coming along Church Street they had to look across a school-yard which is contained within two small parapet walls surmounted by railings, and in which yard a number of trees are planted. It was suggested by Mr Grierson that it was impossible for anyone looking from the point where the two women were stationed to see at all events the platform of a car in Church Street or anyone of the height of the two children stationed upon the platform. But his evidence was given on the basis that the wall I have alluded to containing the school-yard was 3½ feet in height. Now the height of the wall was actually measured by the witness Boyce, an engineer who was brought by the pursuers, and it appears that on the Byres Road it is 2½ feet high, and on the Church Street side it is 2 feet high, the difference being accounted for by the fact that Byres Road is on a lower level. Accord-

ingly I have no difficulty in holding that it was possible for two people standing on the Byres Road side to see two children on the platform of the car, which platform is 2 feet above the level of the street. Those women depone that when the car did emerge from behind the school buildings and got opposite the yard they did see the platform and the children standing on the platform, and I have no doubt that in point of fact they are speaking the truth.

"The other suggestion which was made by way of impeaching their credibility depends upon the evidence which was given by a police sergeant named White, who stated that when he interviewed those two women shortly after the accident they gave him a different account, which he says, he noted at the time in his book, from that which they gave in the witness-box, and in fact it came to this, that the two women are said to have told the police sergeant, (first) that the car was not travelling at a dangerous rate of speed, and (second) that the driver was not in any respect to blame for the accident. I am satisfied that the police sergeant must have misunderstood what was said by those two women, because they denied yesterday that they gave any such statement to the police sergeant, and I quite accept their testimony on that point. Accordingly the view I take as to these four witnesses is that they are perfectly credible, and I approach a consideration of the evidence on that footing.

"The account which the girl Frances Watt gave of the occurrence was this. At that time her little brother Robert, who is two years old, was attending the Glasgow Western Infirmary to receive treatment for one of his hands. Sometimes he was taken there by his mother in the car, but more frequently it was his sister Frances who took him to the infirmary in a car. Her invariable practice was to get off at the stop-if-required station, which is exactly opposite the infirmary gate. It is plainly the nearest station to the infirmary and her evidence is—and it is in accordance with the probabilities of the case—that she always got off at that station. She never went to the next station, a compulsory stopping-station in Byres Road, and no reason is suggested why she should go to that station on the day in question. This young girl was accustomed to travelling in cars, and she says that on this occasion, when the accident occurred, following presumably her usual practice, she, being inside with her brother, began to prepare at Thomson Street to leave the car when it was approaching the stop-if-required station opposite the infirmary gate. She says that she came out just about that point because the conductress was not on the rear platform but was on the roof of the car, and her story is—and it seems a perfectly credible one—that she got out at that point because she knew she was coming to the stop-if-required station, and she thought that if she was to get out she had better take steps to look out and see where the conductress was and give her instructions to get the car drawn up.

"But the conductress was not there, and the car ran past the stopping-place opposite the infirmary gate and approached the curve which is a little further on. Now the evidence of the girl is that she and her brother up to this point were standing apart on the platform, she holding his hand, but as the car began to take the curve it was going so fast and began to rock and jolt so vehemently, that she let go the rod which she had been holding to steady herself, and made to take up the boy in her arms, thinking he would be safer in that position. She had just got him into her arms when a more than usually violent jolt occurred, and both were thrown on the street.

"As to the speed of the car her evidence is that it had been going more than usually fast when approaching the curve, and the jolts on that curve were more than usual in excess of jolts which she had experienced on other curves. That is her evidence, and she is corroborated in all essential details by the witnesses Mrs Cullen, Mrs M'Shane, and Miss Mohan. The two former witnesses, Mrs Cullen and Mrs M'Shane, deponed that when they first saw the car as it emerged from beyond the school buildings, the two children were standing on the platform. The conductress was not on the platform, but was upstairs, and they say that later on they saw her coming downstairs after the accident occurred. They also corroborate the pursuer as to the high rate of speed at which the car was travelling as it approached the curve, and the recklessness with which it was being driven round the curve. Miss Mohan also spoke to having seen the children alone upon the platform, and she also says that the conductress was not there when the children were thrown off. On the matter of speed, the only other evidence which seems to me to be of importance is a statement which was made by the conductress to Mrs Cullen, and was heard by Mrs M'Shane, to the effect that the accident was caused by the speed at which the car was taking the curve.

"The account of the accident given by the defenders—and they depend on the conductress alone for a contradiction of the pursuers' case—is that, as the car approached the first-mentioned stopping-place the conductress was not on the roof but was on the rear platform making up her book. She says the children emerged, the girl carrying the boy, and that the girl had the boy in her arms all the time till they were thrown off. The conductress says, and the driver corroborates her on this point, that the speed was not excessive but quite moderate.

"The defenders' counsel referred to certain physical circumstances which rather pointed to the view that the speed of the car could not have been excessive, to wit, that the car was going up a slight hill and that there was an insulator just before the stop-if-required station which had to be negotiated. The way in which these insulators are negotiated is this, that the power is completely shut off dnring the momentary period of time which elapses while the car passes the insulator, but once the insulator is passed the power may be immediately

put on to the car. The third physical peculiarity of the *locus* which was alluded to by the defenders' counsel was that the car was approaching a curve and also a compulsory stopping-place, and therefore it was unlikely and improbable that it would be travelling at a high rate of speed at that time. I have taken all these considerations carefully into account, but I nevertheless prefer the direct testimony which I have received from four credible witnesses to the effect that, despite all those tendencies pointing to retardation of the speed of the car, it was nevertheless going at a rate of speed which in the circumstances I consider to have been excessive. Accordingly I think the pursuer has proved, (first), that the conductress was not on the car platform at this critical time, and (second), that the car was going at an excessive rate of speed.

"As to the conductress, I think it is patent that her absence was causally connected with the accident. If she had been there I think it is plain that the accident would not have occurred, because the girl from her position inside the car close to the door could, and would, have instructed the conductress to stop the car opposite the infirmary gate, and she and the little boy would have descended there in safety. Similarly, the rate of speed is of course causally connected with the accident. It was really the efficient cause of the accident, and the cause most intimately concerned with the occurrence.

"But then the defenders' counsel maintained that it was not negligence in law for the conductress to be on the roof when the car approached and passed a stop-if-required station, and this ground of defence raises an important and interesting question as to the proper discharge of her duties by the conductress. It is plain that the conductress must go at times upon the roof of the car. She must do that to collect fares from passengers who may be there and who have not paid their fares before ascending to the roof. There is no difficulty as to the proper discharge of her duties in connection with compulsory stopping-places. There is no reason why she should not be upon the roof of the car doing her work there when the car approaches and leaves a compulsory stopping-place. The duty of passengers intending to leave the car at a compulsory stopping-place is to keep their seats until the car stops and then proceed to leave it, and the conductress, if on the roof, is in a position, by looking over the side of the car, to see whether passengers have left it, and when people desire to board the car, if all have entered it. All this being done she then—and in ordinary practice we all know this is done—gives the signal to the driver by ringing the bell or blowing her whistle.

"But, then, the stop-if-required station seems to me to be in an entirely different position. The contract of carriage with reference to the stop-if-required station between the corporation and the passenger is this, that, 'if required,' the car will be stopped at that station either to allow a member of the public to get on it or to allow a passenger to leave it. This implies a 'requirement' or a 'request' made to someone. In the case of a person on the street at a stop-if-required station desiring to board the car, a request or requirement is given to the driver of the car by way of a signal from the street to have the car stopped, and this being done the person leaves the street and boards the car. But in the case of a passenger on the car, what happens? There is the passenger on the roof and the passenger downstairs. The passenger on the roof, if the conductress is on the rear platform, who desires to leave the car at a stop-if-required station, must necessarily descend the stair of the car to the rear platform in order to make his request or requirement known to the conductress and have the car stopped.

"The passenger downstairs, if the conductress is on the platform, can, of course, make his or her request known to the conductress when there. But if the conductress is not on the rear platform, and a passenger downstairs in the body of the car wishes to get off, what then? Now the conductress admitted in answer to a question I put to her, that she ought to discharge her work in this way, that she should be on the rear platform of the car when it approaches one of these stop-if-required stations. She said that it was her duty to be there at that time, and I am of opinion that that is her duty in law.

"The opinion I have formed of the legal situation created by the existence of these stop-if-required stations in Glasgow is just this, that the corporation as carriers are under contract to stop the car if 'required,' and must instruct the conductors or conductresses to be on duty on the platforms to receive requests for stoppages as the cars approach these stations, or they must make their minds up to stop the cars compulsorily at all stations. Accordingly I think there was fault in law on the part of the conductress in being absent from the rear platform as the car approached from Thomson Street to the infirmary gate and as it went past that stop-if-required station.

"The defenders' counsel further maintained that, assuming fault on the part of the conductress, assuming reckless driving on the part of the motoress, there was contributory negligence on the part of the girl Frances Watt in going upon the platform and remaining there for a period of time. Plainly, if it was negligence on her part to go there, it was contributory negligence, because it was continuous negligence as it continued down to the happening of the occurrence and was therefore contemporaneous with any reckless driving on the part of the motoress. But was the pursuer negligent in what she did? The legal proposition which I understood to be maintained by Mr Blackburn for the Corporation was that in all circumstances a passenger going upon the platform of a moving car is guilty of contributory negligence. I was asked to affirm that proposition as sound in law, and I was asked to do so because that had been authoritatively decided. The decision relied upon was the case of *M'Sherry* v. *The Corporation of Glasgow*,

1917 S.C. 150, 54 S.L.R. 178, and three Irish cases which are alluded to in the report of M'Sherry, to wit, *Murphy*, 1908, 43 Ir. L.T. 11; *Martin*, 1909, 2 Ir. R. 13; and *Breslin*, 1911, 45 Ir. L.T. 220.

"Now *M'Sherry* undoubtedly laid down a most useful general rule as to contributory negligence, and that rule will be found in the sentence from the Lord Justice Clerk's opinion which is quoted in the rubric—'I do not think that any passenger on a car is entitled to ride on the step.' That is a clear general rule universally applicable, and in my humble judgment a most useful rule and a very proper rule, and I am glad the Court made that perfectly plain and went that length. It is now accordingly conclusively settled that anyone travelling on the step of a car does so at his own risk, and if injury occurs he is debarred from recovering damages by his own contributory negligence. But I do not think the case of *M'Sherry* decided anything more than that, and I am not going, as I was asked to do, to assimilate the rear platform of a car to the step of a car.

"I have already pointed out one set of circumstances in which, in my judgment, a passenger might perfectly legitimately go to the platform of a moving tramway car, to wit, when he descends from the top of the car by the stairway to the rear platform to get the conductress there and have the car stopped at a stop-if-required station. It may very well be, as I think was decided in one of the Irish cases, that if a passenger boards a car that is full with the intention of travelling on the platform, and remains there for the purpose of travelling, that passenger takes all risks, both ordinary and extraordinary, in connection with his journey. It may also be, as was decided in another of the Irish cases, that if a passenger comes from the inside of the car to the platform in the absence of the conductor with the object of pulling the bell and getting the car stopped, he takes the ordinary risks of transit, although it may be that he is not to be held as taking extraordinary risks in these circumstances.

"But the present case is different in both respects from those cases. This girl did not come to the platform with the intention of travelling there and taking risks, but for a different purpose altogether. She was precipitated from the car not by an ordinary risk but by a risk which in my judgment was extraordinary. Accordingly I do not think I am bound by any authority to hold as a general proposition that a passenger going upon the platform is necessarily guilty of contributory negligence and I do not think that such can be laid down as a general proposition. Each case must be determined on its own special circumstances.

"In the present case, what is the suggestion of the defenders? Apparently it is this, that if a passenger desirous of getting to the Glasgow Infirmary—perhaps in the quickest possible time because the case may be vital—finds the conductress absent when the car has reached the point opposite the stop-if-required station, that passenger is to sit in the body of the car without taking any steps to have the car brought to a stop. In the present case there was a compulsory stopping-station at a very short distance away from the stop-if-required station, but it might have been a quarter of a mile away, But the contention is that that passenger must sit still, or, if the platform is approached, it can only be so approached under the burden of the passenger so acting being held guilty of contributory negligence if anything untoward happens. I must say I cannot assent to that suggestion. I think this girl did as she was entitled to do, and, as the pursuers put it in their pleadings she was 'properly and justifiably' at the time of the occurrence on the rear platform. She went there for a proper and legitimate purpose, viz., to find the conductress to get the car stopped as speedily as possible. She took all reasonable precautions for her safety while she was on the platform, as I have stated, by holding on to the rod which was in the centre of the dash-board, and she only let go that safeguard when the excessive jolting imperilled the safety of her little brother. Accordingly I hold on this part of the case, the burden of proof being on the defenders, that they have failed to prove that the girl in doing what she did was guilty of contributory negligence.

"The result is that she has proved fault causally connected and directly leading to the accident, and the defenders have failed to prove that she was in any respect to blame. The pursuers must therefore get damages. Fortunately this accident has had a fairly happy sequel. It might have been very serious. Both children might have lost their lives, but they are both, so far as I can see, recovered,—the boy fully recovered, and the girl, if not absolutely recovered, will be so, in my opinion, in quite a short time. The girl has suffered some patrimonial loss. Young as she is she was a machinist earning 15s. a week at the time she was injured, and she was unable to earn any wages for a number of months. She resumed work again last month, but her earning capacity has diminished to the extent of 5s. a week, the reason being that she says she is unable yet to work where machinery is in motion, and she is at present engaged in folding handkerchiefs.

"The claim, however, is in both cases practically for *solatium*, and plainly it is not a case for large damages. I propose to award each child £50.

The defenders reclaimed, and argued—There was no fault upon the part of the conductress in not being on the platform to stop the car at the stop-if-required station. She was not bound to remain on the platform, but was only bound to be on it if she reasonably could. Further, a passenger was only entitled to get off the car at a stop-if-required station if he had made a request to have the car stopped. Till such a request had been made there was no fault in the conductress being absent. But if there was fault in the absence of the conductress it was immaterial, for it was not the cause of the accident. The absence of the conductress merely frustrated the pursuer's intention to alight. The sole

invitation to the pursuers to go to the platform was to get in touch with the conductress; when the stopping place was passed that invitation was spent, and they should have regained their seats. If they chose to go on on the platform thereafter for 80 yards they took the risk of such incidents as the cause of the accident, viz., a jerk. The pursuers were therefore guilty of contributory negligence even if there was fault in the absence of the conductress. In any event, it had not been proved that the conductress was absent without reason. Further, it was not proved that the car took the curve at an excessive speed. Consequently the accident was due to the pursuers being jolted off the platform. Even if there was negligence on the part of the defenders, the pursuers were also negligent in being on the platform, and their negligence contributed to the accident—*Martin* v. *The Dublin United Tramways Company*, 1909, 2 Ir. Rep. 13; referring to *Roscoe* v. *The Dublin United Tramways Company*; *Murphy* v. *The Dublin United Tramways Company*, 1908, 43 Ir. L.T. 11; *Breslin* v. *The Dublin United Tramways Company*, 1911, 45 Ir. L.T. 220; *Hall* v. *London Tramways Company, Limited*, 1895, 12 T.L.R. 611; *M'Sherry* v. *Glasgow Corporation*, 1917 S.C. 156, 54 S.L.R. 178; *Flockhart* v. *Leith Corporation*, June 1917, n.r.

Argued for the pursuers (respondents)—The evidence showed that the driver took the curve at too great a speed. The conductress was negligent in being absent when the pursuers wished to alight, and that negligence continued and was the cause of the accident. The defenders' duty was to perform their contract with the pursuers, whose tickets entitled them to get off at any station either "all stop" or "stop-if-required" within the limits of the journey for which the tickets were valid. Accordingly the conductress ought to have been available when the pursuers were ready to request her to stop the car. If, however, she might be absent for a reasonable cause, there was no such reasonable cause in the present case; she was on the roof where it was proved there were no passengers, and she gave no reasonable explanation of her absence. Her absence caused the accident; it could not be successfully maintained that the pursuers were not entitled to go upon the platform as a preliminary to alighting. If so, negligence on the part of the pursuers could only have begun after the stopping place was passed, and it consisted in remaining on the platform. But the interval between passing the stop-if-required station and the jerk was almost momentary, and during it the girl pursuer was taking the boy in her arms. Such a short delay was altogether different from riding on the platform, and was too short to lead to any inference of negligence. Further, the car was travelling too rapidly to give the children a reasonable chance to regaining their seats before the jerk occurred. *Breslin's* case was distinguishable, for in it the plaintiff was travelling on the step. In *Murphy's* case there was no evidence of a change of speed at the time of the jerk. *Martin's* case would cover the present case, but it was wrongly decided.

At advising—

LORD PRESIDENT—The Lord Ordinary has, I think, erred in finding the defenders liable for the injuries suffered by the pursuers. I am unable on the evidence to find that any fault has been established against the defenders inferring liability for the accident which befell the pursuers. I reach this conclusion without determining questions of credibility or balancing conflicting testimony. I accept without demur the account of the accident given by the pursuer Frances Watt, who favourably impressed the Lord Ordinary by the way in which she gave her evidence. She is sixteen years of age, accustomed to travel in tramcars, and on the day of the accident she was taking her little brother, two years of age, to the Church Street entrance of the Western Infirmary. She had often travelled by car to the same place, and her habit was to alight at a "stop-if-required" stopping-place at the Infirmary gate. On the day of the accident this was her intention. She and her brother were travelling inside the car, and when it had reached a street called Thomson Street they rose from their seats to go out to the rear platform. This was about 100 yards from the stopping-place at the Infirmary gate, and when they got out upon the platform the car had not reached the station. The conductress was not then on the rear platform; the car was not stopped at the station; the pursuer made no effort to stop it, and just stood where she was with her little brother on the rear platform. The car, she says, was "going at an awful speed." It suddenly gave a jerk, apparently when going round a gentle curve, and the pursuer and her brother were thrown off and sustained the injuries for which compensation is claimed. The curve at which the lurch is said to have taken place is according to the evidence "a flat curve as far as tramway work goes. A car could easily negotiate that curve at a speed of up to 16 miles an hour;" and it is likewise true according to the evidence that "you always get a lateral sway on a car on every curve, no matter how slight the curve is. That lateral sway is of course more appreciable at the extremities of the car." The place at which the accident occurred was about 177 yards from Thomson Street and 77 yards from the "stop-if-required" station. The fault complained of is that the conductress ought to have been on the rear platform and to have stopped the car at the "stop-if-required" station at the Infirmary gate. I assume for the purposes of this case that the conductress was not on the platform at the time, and had no duties to perform which called for her being elsewhere on the car. But I fail to see what connection there is between this alleged failure of duty on the part of the conductress and this accident. The latter was the direct result of the voluntary act of the pursuers in standing upon the platform when the car was travelling round a curve. The absence of the conductress from the plat-

form formed no excuse or justification for the pursuers travelling on the platform. Passengers who so travel travel at their own risk. It may not be a great risk. Indeed, if they are minded to hold tight it is practically no risk at all, but such as it is it must be borne by the passenger and not by the company. It is doubtless very inconvenient and annoying to be carried past the stopping-place at which one desires to alight. But the inconvenience must be endured rather than get upon a place which is only provided for persons entering and leaving the car, but not for persons who choose to travel upon it. I am quite unable to agree with the Lord Ordinary in thinking that the fact that the conductress was on the roof and not on the platform when the accident occurred had any causal connection with the accident. It may be true, as the conductress in this case says, that her proper place is on the rear platform of the car when her duties do not demand her presence elsewhere. But the breach of that duty does not justify a passenger in taking his stand on the platform of the car when it is travelling. If he does so it is at his own risk; and if when approaching a "stop-if-required" station the conductress is not upon the rear platform a passenger who chooses to step on it when the car is in motion does so at his own risk and not at the risk of the company. In the present case it is not said that anything unusual and unexpected happened while the pursuers were on the platform. It is true that it is charged against the driver that she failed to slacken speed when going round the curve, which caused the car to jolt unduly. But it is proved that there is always a certain amount of jolting or swinging when going round a curve even at a moderate rate of speed, and there is nothing to suggest that it was any unusual or excessive lurch which threw the pursuers off the rear platform. But on a careful examination of the evidence it will be found that there is nothing to support the charge that the speed was excessive. A comparison between the distance travelled by the car when in view of the witnesses Mrs Cullen and Mrs M'Shane and the space covered by these two witnesses as they walked slowly up Byres Road demonstrates that the car was travelling at a very moderate speed; and the facts proved —(1) that it was going uphill, (2) that it was drawing near an "all-stop" station when the pursuers were thrown off, and (3) that it was brought to a standstill within a distance of about 15 feet from the place of the accident — all demonstrate that its speed was moderate. The direct evidence on the question of speed given on behalf of the pursuers is vague and indefinite. "I cannot judge speed, but it was going very fast," says Mrs Cullen. But she adds—"The speed of the car was the same when the children were thrown off as when I first saw the car." Says Mrs M'Shane—"I cannot judge speed, but it was going very fast. . . . It was not its pace which attracted my attention. I did not pay much attention until I saw the girl pitched out on to the street." And Miss Mohan, who was standing near at hand and had a complete view of the accident, says—"I saw the electric car coming along, and I saw it going round the curve there. It was going fast. . . . The cars usually go fast round that corner — faster than they should go. This car was just going in the same way—faster than I thought was safe." Now this is all the evidence on the question of excessive speed. It is obvious, I think, that it cannot fairly be set against the real evidence in the case, reinforced as it is by the clear and precise testimony of the driver of the car, whose credibility has not been impugned. I shall read a few sentences from her evidence which seem to me to be conclusive on this question of speed. She says—"The first intimation that I had that there was anything wrong was getting three bells for an emergency stop. I applied the hand-brake immediately I got that signal. The car stopped at once; it stopped in a distance of about 5 yards. It depends on the speed of the car whether you put on the hand-brake or the magnetic brake. I put on the hand-brake on this occasion because I had a slow speed on going up-hill. If the car had been going at a fast speed I would have put on the magnetic brake. . . . I know that there is a halfpenny station near the corner of Byres Road and Lawrence Street. I was approaching that stopping-place at the time when I got the emergency signal. All cars stop at that halfpenny station. I was preparing to stop there at the time. When I was going to make a stop at a car station I always slowed down the car some distance before I came to the stopping station. At the time I got the emergency signal I had slowed down with a view to stopping the car. . . . I know this curve well. I had frequently been round it before. (Q) What is the practice of cars going round that curve with regard to speed?—(A) You generally go round slowly; you have got to go round slowly coming to the halfpenny station. My car was following its usual practice of going round slowly on that occasion. I drove my car at half-power coming from the stop-if-required station, opposite the entrance gate to the Infirmary, to the next stopping-place at Lawrence Street. It was always my practice to do that. (Q) Were you driving on half-power on that occasion?—(A) I had just switched off power altogether at the curve when it had happened. It is not exactly what I would call a sharp curve. I know that there are sharp curves in Glasgow where you are bound to travel at not more than 4 miles an hour, but this was not one of those curves. I had never had an accident of any kind while I was acting as a motoress. . . . There is always a certain amount of swing on a car when it is going round a curve like that. So far as my experience goes, that cannot be prevented. If anyone is standing on the platform and not holding on to anything there is a danger of their being thrown off by the sway of the car. . . . It is not the case that the car was going very fast after we passed the insulator and after I put on power. If several people have stated to-day that at the time of the accident the car was going very fast, that is not the case. (Q) At what rate do you say

the car was going at the time of the accident?—(A) It was not over 4 miles. I know the Board of Trade Bye-laws in the Book of Instructions given to us by the Corporation, in which they say that no car shall pass round curves at a greater speed than 4 miles an hour. It is not the case that on that date I infringed that rule by driving at a much greater speed. (Q) If you had been driving round the curve at 4 miles an hour, do you say there would have been any chance of the car lurching in such a way as to throw children off the platform?—(A) Yes. (Q) It must be a very dangerous curve?—(A) No. There will be a lurch on the car at any speed going round a curve. . . . I do say that I drew up my car within 5 yards of getting the emergency signal of three bells. . . ." Then there is the evidence of the witness William Morrison, who is an inspector in the service of the Corporation of Glasgow Tramways Department, who says—". . . . The car I was on was travelling southwards. I remember it was passing along Church Street, I know the curve which is there. The car I was on had come round the curve all right. When we were just past the curve we passed another car running in the opposite direction. There is a gradient at that place which was against the car which passed us. (Q) At what speed would that car be travelling when it passed you?—(A) I did not take particular notice of the car just as it passed me. It was not going at any extraordinary speed, otherwise my attention would have been drawn to it. There was nothing to draw my attention to the speed of the car, and if it had been going at a very fast rate I would have noticed it. . . . I know the Book of Rules and Regulations which was issued by the Corporation in June 1903. . . . I know that there is in that book a rule that no car should pass round curves at a greater speed than 4 miles per hour. . . . (Q) Are you aware that under the Board of Trade Regulations the speed of 4 miles an hour does not apply to a curve of this nature?—(A) That is so. (Q) It applies to curves of 1 chain radius or less?—(A) Precisely; we call them dangerous curves. This is not one of these dangerous curves. *Cross.*—There was nothing about the car that passed me to direct my special attention to it. (Q) And you do not profess to give any definite idea of the speed at which it was travelling?—(A) Just about the ordinary rate that the cars are going at that part. It is not the case that the ordinary rate at that part is a very fast rate. . . . (Q) Miss M'Donald told us to-day, with reference to the place where the car was drawn up, that it was drawn up just a few yards from the Lawrence Street stopping-place. Do you agree with that?—(A) The front of the car was a few yards from the Lawrence Street stopping-place; the rear end was a few yards from where the children were standing." It was not argued to us that the accident was due to any sudden and unexpected movement of the car in going round the curve. The evidence to the effect that there will be a lurch on a car going round a curve at any speed was not challenged. It is indeed common knowledge. Nor was it contended that it was any unusual or exceptionally violent lurch which threw the pursuers off the platform. There was no restriction on the speed at which cars might pass round the curve in question, although the driver depones that she generally went round it slowly. Nor was it disputed that the evidence is reliable to the effect that the platform of a car on any curve is not so stable or rigid as the interior part of the car, and the effect of the car going round a curve is to cause a lateral swing on the platform when the curve is being traversed. The lateral swing will have a tendency to make any person standing on the platform lose his balance. But whether the speed be moderate or excessive signifies nothing so long as it remains quite plain that nothing unusual or unexpected took place after the pursuers got upon the platform. It was their travelling there which was the direct and proximate cause of their injuries, and not any act or neglect on the part of the defenders' servants. On the question of speed, little was said in the debate before us by the pursuers' counsel, and certainly no attack was made on the trustworthiness of the evidence given by the driver of the car, or of the other witness to whose evidence I have referred.

Certain Irish decisions were very strongly relied on by counsel for the reclaimers, and rightly so, for they have close bearing on the question of law raised in this case. Indeed, it was frankly conceded by the counsel for the pursuers that the second of the decisions I am about to examine, if sound, is fatal to the judgment now under review. It is not of course binding on us, and although its correctness was challenged no criticism of it was offered, nor was it said to be in conflict with any English or Scottish authority. The decisions to which I am about to refer are four in number. The earliest in date is *Roscoe* v. *The Dublin United Tramways Company, Limited*, November 1905, reported in a note to *Martin* v. *The Dublin United Tramways Company*, [1909] 2 I.R. 13. It was an appeal from the King's Bench Division (Andrews, Gibson, and Boyd, JJ.), and was heard by Fitzgibbon, Walker, and Holmes, L.JJ. The plaintiff was a passenger in one of the defendants' tramcars. He left his seat in order to request the conductor to stop the car at a stopping-place. The conductor was not on the platform, but when the plaintiff reached it the car's speed was increased, it gave a sudden lurch, and the plaintiff was thrown off and injured. The Court of Appeal, affirming the judgment of the King's Bench Division, held that on the facts I have stated there was no *prima facie* evidence of negligence on the part of the company. "There is," said Lord Justice Fitzgibbon, "no evidence of anything unusual or improper or negligent in the manner in which the service was being conducted. The only evidence is that the conductor was not on the platform, and that the car gave a sudden lurch and the plaintiff was thrown off. . . . Dealing with the tram service as it exists I cannot hold that there is *prima facie* evidence of negligence in the mere fact that

the conductor is not on the back platform at the moment when a passenger wants to alight, or that the car while in motion gives a lurch." The question of contributory negligence was not considered, for the facts, which bear a striking resemblance to the material facts disclosed in the present case really revealed no negligence on the part of the company. The second of the Irish decisions to which I refer is *Martin* v. *The Dublin United Tramways Company, Limited*, [1909] 2 I.R. 13. The head-note to that case undoubtedly justifies the concession given by the pursuers' counsel in the present case. It runs thus—"A passenger on a tramcar who, while the car is in motion, leaves his seat, and in the absence of the conductor goes upon the platform for the purpose of stopping the car by ringing the bell, does so at his own risk, in regard to an accident caused by the ordinary motion of the tramcar." The facts were as follows:—A passenger on one of the defendants' cars went out on to the platform to stop the car at a "stop-by-request" stopping-place by ringing the bell. The conductor was not on the platform at the time. When the passenger was there the car swerved and jerked him off the platform on to the road. The Court of King's Bench (Andrews, Boyd, and Wright, JJ.) held that, assuming the negligence both of the driver and of the conductor in not stopping the car, such negligence was not the proximate cause of the accident to the plaintiff. In giving judgment Andrews, J., said—"In order to save himself from this temporary inconvenience (being carried some distance beyond his destination) the plaintiff left the interior of the tram—not to escape from any danger—and without invitation went out upon the platform and commenced to ring the bell, thereby tending to unsteady himself and place himself in a position of danger. I think that even if there was negligence on the part of the defendants' servants it could not be regarded as a natural and reasonable consequence of such negligence that the plaintiff would place himself in the position of danger to which he voluntarily and without invitation exposed himself to avoid the temporary inconvenience of being carried some distance beyond where he wished to alight." Boyd, J., said—"Instead of waiting till the conductor came down from the top of the tram, the plaintiff chose to run the risk of an accident by doing what he had no right to do, namely, leaving the interior of the car and going on to the platform for the purpose of ringing the bell." And Wright, J., said—"Assuming there was evidence of negligence on the part of either or both of these servants of the defendants, I am of opinion that the plaintiff—a passenger in the car—had no right in the absence of the conductor, who was on the roof collecting fares, to leave the inside of the car and come out on to the platform—to exchange a position of safety for one of insecurity—and attempt himself to regulate and check the progress of the car. I am of opinion that there is no proper logical connection between the absence of the conductor on the roof and the accident whereby plaintiff fell to the ground and sustained injury. It (the accident) is not the natural necessary consequence of the negligence (if any) of defendants' servant. The injury was the consequence of plaintiff's own act, natural perhaps under the circumstances but voluntary, and one for the results of which he alone is responsible." I agree with the views expressed by these learned Judges. They appear to me to be directly applicable to the case before us, and are decisive against the right of the pursuers to recover damages for the injuries suffered. The third case is *Murphy* v. *The Dublin United Tramways Company*, 43 I.L.T. 11, December 1908. There the car failed to stop at a "stop-by-request" stopping-place where it was the custom of the plaintiff to alight. She came down the car on to the platform when, as she alleged, the car was being driven furiously and she was jerked off. The Judge who tried the case—Dodd, J.—directed the jury to return a verdict for the defendants as he "was of opinion that the injury was caused by the plaintiff's own fault solely." An appeal was taken, and it was urged that "the answer to the plea of contributory negligence was that it was the violent jerk which threw the plaintiff off." The King's Bench Divisional Court (O'Brien, L.C.J., Gibson, Madden, and Kenny, JJ.) refused to set aside the verdict, and the Court of Appeal (Sir S. Walker, L.C., and Fitzgibbon and Holmes, L.JJ.) affirmed the judgment. The Lord Chancellor said—"The plaintiff came on to the platform—necessarily a place of danger—at her own risk. . . . I think the plaintiff was guilty of negligence in going on to the platform, and her negligence was the sole and effective cause of the accident." Lord Justice Fitzgibbon said—"The plaintiff was standing on the platform at her own risk;" and Holmes, L.J., said—"I say it was an entirely negligent thing on the part of the plaintiff to go out on the platform when she saw the conductor was not there and that the tram was going at a furious rate." The fourth case to which I refer is *Breslin* v. *The Dublin United Tramways Company*, June 1911, 45 I.L.T. 220. There, about 15 yards from a stopping-place, a passenger came down from the top of a car on to the platform. When the car was about to stop he got from the platform on to the step. The car suddenly stopped, gave a jerk backwards, and the plaintiff was thrown off. The Court of the King's Bench held (Madden, Kenny, and Wright, JJ.) that there was no evidence of negligence to go to the jury, affirming the direction of Dodd, J., who presided at the trial; and the Court of Appeal (Sir S. Walker, L.C., and Holmes and Cherry, L.JJ.) was of opinion that this judgment was correct. The conclusion I draw from these cases is that a passenger who chooses to go on to the platform of a moving car does so at his own risk, and has no cause of action if he is thrown off even if the car is being driven at a rapid speed or if it gives a violent jerk; and certainly the absence of the conductor from the platform does not infer negligence on the part of the company, nor does it excuse the passenger's voluntary act in travelling on the platform. In our own Courts the

case of *M'Sherry* v. *Glasgow Corporation*, 1917 S.C. 156, 54 S.L.R. 178, appears to me to harmonise with the Irish decisions. It is true that there the passenger was on the step and not on the platform of the car when she was thrown off. But as I read the opinions of the Judges of the Second Division that made no real difference. We were referred in the course of the argument to the unreported case of *Flockhart* v. *The Corporation of Leith*, where Lord Anderson held that if "a passenger chooses to get out on the rear platform at the time that the conductor is absent, he or she is there at his or her own risk." His interlocutor, which was affirmed by the Second Division, is dated the 8th day of June 1916. Having in view these two decisions in this Court, with which I entirely agree, I rather think the present action fails on relevancy. At all events I hold that on the evidence no fault leading to the action is established against the defenders. I am therefore for recalling the interlocutor of the Lord Ordinary and assoilzieing the defenders from the conclusions of the action. But as the majority of your Lordships think otherwise I now move that we adhere to the Lord Ordinary's interlocutor.

LORD MACKENZIE — The fault alleged against the defenders is twofold: (1) that their conductress was not in her proper place as the car approached a stop-if-required station—it is said she ought to have been on the rear platform, or at least to have been in such a position as to have seen whether any passenger wished to alight, and to have stopped the car when requested; and (2) it is said the driver was in fault in not lessening speed and driving slowly round a curve, with the result that there was sudden and violent jolting of the car due to the excessive speed, and that this caused the female pursuer and her little brother who were on the rear platform to fall off.

That there was negligence on the part of the conductress and the driver as averred is, in my opinion, established. The conductress admits the pursuers' averment of what her duty was. I quote from her evidence—"I consider it is my duty to be on the rear platform when we come to one of these stations (*i.e.*, cars stop-if-required stations), so as to stop the car." The defence is not that she was guilty of no negligence in not being on the rear platform when required. The defence is that in point of fact she was on the platform at the time the pursuers' witnesses swear she was not. Upon this point counsel for the defenders did not attempt to argue that the account given by the conductress was to be accepted. He admitted that the weight of the evidence was to the contrary effect. This is the view of the Lord Ordinary.

That there was negligence on the part of the driver is also, in my opinion, made out. It is necessary at this stage to repeat that the fault alleged is not that the speed of the car was accelerated, but that there was a failure to lessen speed, with the result that there was a violent jolt as the curve was taken. The evidence of the driver, explains what her duty was—"I was travelling on half-power, at a pretty slow rate of speed. . . . You generally go round slowly—you have got to go round slowly coming to the half-penny station. My car was following its usual practice of going round slowly on that occasion. I drove my car at half-power coming from the stop-if-required station, opposite the entrance gate to the Infirmary, to the next stopping-place at Lawrence Street. It was always my practice to do that. (Q) Were you driving on half-power on that occasion?—(A) I had just switched off power altogether at the the curve when it had happened." The conductress says her recollection is that the car was going round the curve at 4 miles an hour. It is obvious the Lord Ordinary did not believe this evidence, because he holds that the speed was excessive. There is an averment that the speed round this curve ought not to exceed 4 miles an hour, but the evidence is not conclusive as to whether this was a binding instruction. I therefore prefer to take the evidence of the driver as supplying the standard when she says "you have got to go round slowly." The question is, did she go round slowly?

The evidence of Mrs Cullen is that there was no slackening of speed on the part of the driver. This witness first saw the car when it emerged from behind the school buildings, before the stop-if-required station, 77 yards from the *locus* of the accident. She depones—"The speed of the car was the same when the children were thrown off as when I first saw the car." This is just the pursuers' point as averred on record. She is asked—"How fast was the car going?—(A) I cannot judge speed, but it was going very fast." She depones that the conductress said it was the swiftness of the car going round the curve that caused the accident. Mrs M'Shane corroborates Mrs Cullen and says the car was going very fast. There is also this passage in Mrs M'Shane's evidence.—"Do you remember whether she (the conductress) said anything to account for the accident?—(A) I think she said like as if the car was going too quick—something to that effect." Miss Mohan, who was in a very good position to see, gives this evidence—"I had a complete view of the accident on the day in question. I saw the electric car coming along, and I saw it going round the curve. It was going fast. . . . *Cross*—When I said that the car was going fast I meant that it was going too fast for the curve. It was not going faster than the cars sometimes go on the streets in Glasgow." This contradicts the account given by the driver that she slowed down. It was said there is real evidence that the car was going slow if the distance walked by Mrs Cullen and Mrs M'Shane is compared with the distance run by the car in the same time. This point, however, in the course of the Lord Advocate's argument, turned out to be based on a misapprehension, viz., that Ralston's grocery shop, at which Mrs Cullen says she was standing, is on the south side of Wood Street. In point of fact it is on the north, which makes the distance walked by Mrs Cullen and Mrs M'Shane

comparatively short while the car was travelling the 77 yards. It was said there is an insulator a few yards before coming to the stop-if-required station, and that power requires to be put off going through an insulator. This is so, but the driver was asked in cross—"I suppose after passing the insulator you again put on power to your car, resulting in speed?—(A) Yes." The defenders founded on the driver's statement that she pulled up the car after the accident in 5 yards. The conductress says the car went a car length after the accident before it was drawn up. This would be 10 yards—twice the distance the driver puts it at. Miss Mohan says the car went forward to the car-stop before it drew up, which on the figures given us would be 18 yards. Mrs Cullen says the car went flying right on when the girl fell. Mrs M'Shane's evidence is unfortunately of little help, for she says "the car travelled about the breadth of the Court-room (No. 6) after the accident happened." I do not know what distance that represents. I do not think the defenders have displaced the direct evidence, which shows a failure to slacken speed, by their evidence of the distance within which the car was drawn up. Nor is the fact that the car was on an uphill gradient sufficient to do so. The gradient is 1 in 93 opposite the Infirmary, and is that until the corner of the angle of the curve, immediately before the *locus* of the accident. At the corner going northwards the gradient changes to 1 in 44.

This testimony of the three independent witnessess coroborates that given by the female pursuer as to the pace of the car, and justifies the conclusion reached by the Lord Ordinary that the car at the time of the accident was going at a speed which was in the circumstances excessive.

The account given by the female pursuer of the way the accident happened is simple and I accept it. The Lord Ordinary expresses an opinion favourable to her credibility, as also to that of the three independent witnessess, Miss Mohan, Mrs Cullen, and Mrs M'Shane. The female pursuer, who is sixteen years of age, was in the habit of taking her little brother, aged two, to the Western Infirmary. Opposite the Church Street entrance is the car stop-if-required station in question. On the day of the accident she had her brother with her in the car, and intended to take him out at the Infirmary; she was watching for the car to come to the station. At Thomson Street, which is 100 yards from the station, they got "up." The car was not "just at" the station when they came "out." The conductress was upstairs when they got "out" on to the rear platform, the little boy walking by his sister's side. The car did not stop, and the female pursuer made no endeavour to make it stop. She just stood with her brother. She was holding on to the brass rod round the ticket box, and was holding her brother by the hand. Her account of what happened is as follows:—"(Q) What did you do when you saw the car going past your stopping-place?—(A) The car started to go awful quick, and my wee brother was rocking back and forward, and I lifted him in my arms and just then the car gave a jerk. I was taking him in my arms just to try and keep him safe on the platform. Just then the car gave a jerk, and my brother and I were thrown off on to the street. I do not remember anything after that until I was in the Infirmary. The car was going at an awful speed." Then in cross-examination—"I say that on this occasion the car was going faster than I had ever felt a car going before, and rocking more—something quite unusual."

In my opinion this evidence establishes the case made by the pursuer on record that the proximate cause of the accident was the failure to lessen speed going round the curve. The pursuers' averment is that the driver "recklessly and negligently did not lessen the speed at which he had driven his car along the straight, with the result that the speed at which he drove his car round said curve was excessive, caused his car to jolt unduly and suddenly, and was dangerous to anyone standing on the rear platform of said car. On the occasion in question the female pursuer and her brother were properly and justifiably on the rear platform of said car, and the sudden and violent jolting of said car due to such excessive speed caused them to fall off and sustain the injuries already condescended on."

The question of difficulty in the case is raised by the words "properly and justifiably." I hold that in the circumstances the pursuer was entitled to come out of the interior of the car at the time she did in order to find the conductress and request her to stop opposite the Infirmary gate. No evidence was led to prove this was an improper thing to do in the circumstances. No evidence was led to show there was any other way available by which the pursuer could make known her desire to be let out there. The female pursuer and her little brother came out on to the rear platform for a legitimate purpose and at a reasonable time. It is admitted it was the duty of the conductress to be there, and it is proved she was not.

The position therefore is this, when the car ran past the stop-if-required station the female pursuer and her brother were left in a position of risk owing to the fault of the conductress. This did not free the female pursuer from taking the ordinary precautions for her own and her brother's safety, and if she had done what the pursuer did in *M'Sherry's* case, and had jumped from the step, she would, in my opinion, not have been entitled to recover. It is also my opinion that if it had been proved that the car had thereafter been driven with proper care and the pursuer and her brother had fallen off from a neglect to take ordinary precautions, equally she would not have succeeded in her action. It is because I think the pursuer and her brother were jolted off by the car going round the curve at an excessive speed that I think the pursuers have made out their case. It is no doubt true that the *locus* of the accident was some 77 yards beyond the stop-if-required station, but the girl may have

thought she and her brother would be better to hold on where they were, rather than let go and try to make their way back into the interior of the car. It was only when the car started to "go awful quick" and rock that she lifted her young brother in her arms. The case of *Hall* v. *London Tramways Company, Limited*, 1896, 12 T.L.R. 611, is like the present. The jury in that case found for the plaintiff on the following facts —A female passenger had asked the conductor to stop; he rang the bell and then went on to the top of the car to collect the fares; the tramcar did not stop, and the passenger accordingly pulled the bell cord inside the car, then while the car was still in motion she went out on to the footboard and stood close to the step; the car slowed down and came almost to a standstill, but did not stop, and then suddenly went on, and the plaintiff was jerked off. The Court of Appeal (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.) dismissed an application for judgment or a new trial. Lord Esher held that there was evidence of negligence both on the part of the conductor and the driver. As regards the question of contributory negligence, this was dealt with as a question of fact depending on the particular circumstances. As Lord Esher puts it—"How could it be said that as a matter of law the Court must hold that the plaintiff must sit still until the car stopped?" It appears to me that contributory negligence can only be judged of with reference to the particular facts of each case, and that it cannot *ab ante* be laid down as a proposition of the common law of Scotland that a passenger who is upon the platform of a tramcar in motion is there at his or her peril.

I now refer to the Irish cases to see whether they contain anything contrary to the views I have endeavoured to express.

Martin v. *The Dublin United Tramways Co.* (November 1909, 2 I.R. 13). The rubric is to the effect that a passenger on a tramcar who, while the car is in motion, leaves his seat and in the absence of the conductor goes upon the platform for the purpose of stopping the car by ringing the bell, does so at his own risk, in regard to an accident caused by the ordinary motion of the car. I do not gather from the report of this case that the tramway company would have been absolved if the proximate cause of the accident had been negligence in driving the car. The accident there was caused by the ordinary motion of the car.

In *Roscoe* v. *The Dublin United Tramways Co.* (10th November 1905), reported in a footnote to *Martin's* case, Fitzgibbon, L.J., is reported as saying that, dealing with the tramway service as it exists, he could not hold that there was *prima facie* negligence in the mere fact that the conductor is not on the back platform at the moment a passenger wants to alight; but this is explained in this passage in his Lordship's judgment—"We cannot . . . . reform the system of the tramway traffic and say that every white post marks a place where preparation should be made by the conductor for every potential passenger getting in or out." The evidence as to the Glasgow system shows that it is the duty of the conductor to be on the rear platform immediately before a stop-if-required-station.

In *Murphy* v. *The Dublin United Tramways Co.* (15th December 1908, 43 I.L.T 11) the plaintiff, a lady clerk, came on to the platform before a stop-if-required place when the conductor was not there and was jerked off. There was no evidence of any change of speed at the time of the jerk. It was held that the plaintiff was guilty of negligence in going on to the platform, and that her negligence was the sole and effective cause of the accident. The point of the case is contained in the judgment of Fitzgibbon, L.J., who said that the burden lay on the plaintiff to show that something unusual or unexpected occurred on the part of the company. In the present case the pursuers, in my opinion, have discharged this burden. In *Breslin* v. *The Dublin United Tramways Co.* (14th June 1911, 45 I.L.T. 220) the accident happened to a passenger who had swung himself on to the step and was thrown off by a sudden jerk backwards of the car. The case was withdrawn from the jury apparently because there was no evidence to connect the backward jerk with negligence on the part of the company.

I therefore think these cases are distinguishable from the present. I am for adhering to the Lord Ordinary's interlocutor.

LORD SKERRINGTON—The first question which we have to consider is whether the Lord Ordinary was right in holding that the defenders, by their servant the conductress of the tramway car in which the pursuers (a girl aged fifteen and a boy aged two) were travelling, violated a duty which they owed to the pursuers by negligently failing to stop the car at the stopping-place opposite to the entrance to the Glasgow Royal Infirmary, where the female pursuer desired to alight. She had been in the habit of taking her little brother to be treated at the Infirmary, and had always descended at this stopping-place. The defenders, as carriers of passengers by tramway car, profess that they will "if required" stop their cars in order to pick up or to set down passengers at certain places which are marked by a post and are known as "stop-if-required stations" in contrast to the "all-stop" stations where all cars stop without any request to that effect. The stopping-place at the Infirmary fell within the former category. In respect of this profession I am of opinion that the law imposes upon the defenders a duty to take reasonable care in order to secure that passengers who wish to descend at such stations may have an opportunity to do so in safety. Accordingly the defenders are under a duty to establish some workable system by which a passenger may be able to communicate to the defenders' servants in charge of the car his request that it should stop at a particular station, and their servants are further bound to use due care in order to carry such system into effect. Article 2 of the condescendence is open to criticism in respect

that the pursuers do not allege in so many words that when shortly before the car reached the Infirmary station they left their seats and in the absence of the conductress went on to the rear platform, they so acted because that was the recognised method by which a passenger signifies his request that the car should be stopped at such a station. In condescendence 5, however, the pursuers aver that it was the duty of the conductress as the car approached the Infirmary station either to be upon the rear platform or at least to be in such a position as to see whether any passenger wished to alight at that station, and if so to stop the car. They further aver that if the conductress had been in either of these positions and had brought the car to a stop the accident would not have happened, but that in breach of her duty she failed to observe that the pursuers wished to alight at the Infirmary stopping-place and to stop the car there. It is, I think, implied that the pursuers' presence on the platform was a signal which the conductress was under a duty to observe and to obey. The direct result of this breach of duty was (if the pursuers prove their averments) that instead of being enabled to alight from the car at the Infirmary station they were left standing upon the platform, and were owing to a sudden jolt of the car as it went round a curve thrown from the platform on to the street and injured. The defenders allege (answer 2) that "there is always a certain amount of swaying movement on a car when going round a curve." This curve, however, was not traversed until after the car had passed the Infirmary station, whereas the track is quite straight before the car reaches that station. Obviously the sway of the car as it went round the curve was a danger to a person standing upon the rear platform. Did the defenders' servant negligently expose the pursuers to that danger? The pursuers' case as presented upon record was a very simple and plain-sailing one and did not raise any general question in regard to the duties and responsibilities of tramway companies towards their passengers. The defence was equally simple and plain-sailing. The conductress had told her employers that she was not on the top of the car but was standing on the rear platform at the time wher the children came on to it; that this happened after and not before the car came to the Infirmary station, and that the car was then approaching the curve between that station and an all-stop station near Lawrence Street. If this story was true the pursuers were in the wrong in not keeping their seats until the car had passed round the curve and had stopped or was on the point of stopping near Lawrence Street. It also followed that the defenders were right when they alleged (answer 2) that the pursuers "had no occasion to come on to the platform whilst the car was in motion or until it was brought to a stop at the next station" (*i.e.* near Lawrence Street). The defenders further averred that the female pursuer was negligent and reckless of her and her brother's safety "in going on to the platform at the part of the route in question" (*i.e.* between the Infirmary station and Lawrence Street). The defences were framed in conformity with the story told by the conductress. It is not suggested in the defences that if the pursuers really went on to the platform at the time and place and for the purpose which they described, they acted in an unusual manner, which the defenders' servants could not have anticipated, or in a negligent and reckless manner. The parties joined issue and went to proof upon the sole question of fact on which they disagreed (apart from the speed of the car and the extent of the injuries), viz., "Did the accident happen as described by the pursuers' witnesses or as described by the conductress?" The Lord Ordinary believed the female pursuer and her three independent witnesses and he disbelieved the conductress. The defenders' senior counsel admitted that the weight of the evidence was with the pursuers on this matter and he did not challenge the Lord Ordinary's findings with respect to it.

At the proof the pursuers' case was completely established—partly no doubt by the witnesses adduced for the defence. Thus the conductress deponed—"When anyone wants to get out at a stop-if-required place they come out on to the platform to notify me that they do want to get off there; otherwise I would not know that they wanted to get off." She further deponed in answer to the judge that even when she had duties to perform on the top of the car she could arrange when the car approached a stop-if-required station to get down to the rear platform in order "to see if anybody is coming off," and that she considered it to be her duty to do this. If she had not so deponed she would have condemned her employers' system. She adhered, however, to what she had told her employers, viz. that she was not on the top of the car, but was standing on the platform when the pursuers came out, and that this happened after the car had passed the Infirmary station. She further stated that there was "nobody on the top of the car." As it was proved that she was on the top of the car at the time when it was approaching the Infirmary station and when the pursuers were waiting on the platform in order to alight, it followed that she neither had nor alleged any excuse for not doing what she admitted to be her duty.

For some reason which I do not appreciate, counsel attributed to the Lord Ordinary the erroneous idea that the duty which the conductress failed to perform was an absolute duty, whereas it was, of course, only a qualified duty to take due care. There was no warrant for this suggestion.

At this point it is necessary to notice two arguments by the defenders' counsel which might have put a different complexion upon the case if they had been justified by the evidence, which they plainly were not. The Lord Ordinary does not refer to them. They are I think after-thoughts based on a forced interpretation of certain expressions discovered in the evidence of the female pursuer as printed. It was suggested that she had deponed that she and her brother went

on to the rear platform at Thomson Street, which is 100 yards from the Infirmary station. The defenders' system being what it is, I do not think that they are entitled to fix by very nice scale or measure the time and place at which a passenger ought or ought not to show himself on the platform in order to signify his wish that the car should stop at a particular station. It may, however, be granted that a passenger might come on to the platform so unnecessarily early as to suggest that his object was not merely to leave the car at a stop-if-required station, but also to enjoy a ride in the open air before doing so. No such question arises in the present case. Though the pursuer deponed that she and her brother "got up at Thomson Street" (that is, left their seats), it does not follow that they went on to the platform without some interval of time. If the car was travelling at 12 miles an hour (a rate suggested by counsel in argument), it would travel 88 yards in a quarter of a minute, and even if the actual rate was considerably less, the time allowed for making the move and getting on to the platform was not more than was reasonably necessary. All that the female pursuer said which is really relevant to the point was, that the car "was not just at the [Infirmary] station when we came out." Another equally gratuitous suggestion was founded upon a statement by the same witness which was construed as an admission that she voluntarily remained on the platform after she had been carried past the Infirmary station, notwithstanding that she had it in her power to return to her seat if she had chosen to do so. The context shows that the answer upon which this argument was founded refers to what took place when she picked up her brother. As she had already explained, this was not "until the car started to rock," by which time the pursuers were in a position of danger.

Apart from these two special arguments, based upon a hypercritical construction of the evidence of the female pursuer, the defence was rested upon two propositions which the defenders' counsel asked us to accept upon the authority of certain decisions which in my judgment do not support his contention. These were really propositions of fact which might or might not constitute a good defence in any particular case, but we were seriously and earnestly called upon to accept and lay them down as principles of general law. In the summary already given of what I regard as the true import of the evidence, these arguments have been already anticipated. It was argued, in the first place, that there is no causal connection between the negligent failure to stop a tramway car at the request of a passenger and an accident to that passenger by falling off the rear platform. That is true in the abstract, but is not true in a concrete case where a passenger, being lawfully upon the platform for the purpose of leaving the car, is compelled through the fault of the conductor to remain there while the car passes round a curve at a speed which (whether proper or improper in itself) is dangerous to a passenger standing on the platform. Another way in which the defenders' counsel formulated what was really the same proposition was the following:— Anyone, he said, who "rides on the platform" of a tramway car while it is in motion does so "at his own risk," and the pursuers so acted. Both the minor and the major premises of this syllogism are open to criticism. It is not accurate or in conformity with the ordinary use of language to say that a person who goes on to the platform of a moving tramway car for no other purpose except to expedite his exit from the car, "rides," or, in other words, travels, upon the platform. He may or may not have a good claim of damages if he is hurt while so preparing to leave the car, but if his claim fails, it must be for some better reason than that suggested. The facts of the present case and of those cited at the debate raise no question as to the legal position of a person who rides or travels in a tramway car in what, for shortness, may be described as an unusual manner—in other words, a person who does not use the seats which tramway companies provide for the safety as well as for the comfort of their passengers, but who travels standing upon the step or upon the platform, or on the outside or in the interior of the car. In all these cases the risk may be reduced to a minimum by holding on to a rail or other fixture, but there always remains a residuum of risk which would not have been incurred if the person had travelled in the normal manner. When a proper case arises the Court will have to decide as to the legal position of such a traveller, and as to the duties and responsibilities of the tramway company towards him, having regard to the manner in which they conduct their traffic. Unless he is a trespasser and not a passenger, he certainly does not "ride at his own risk." But it may be that the tramway company is not under a legal duty to indemnify him against injury arising from a peril naturally attendant upon the method of travelling which he has selected, and not due to any fault on the part of the company or its servants. In a case like the present, however, where the injured person left his seat for the sole purpose of descending from the car, the primary question is whether, according to the system and practice of the particular tramway company, the passenger acted in a manner which was either unlawful or such that the company was not bound to anticipate it. For example, if the company's rule and practice were to permit no passenger to leave his seat under any circumstances until the car had come to a stop, it would not be reasonable for the law to impose upon the company a special duty and responsibility towards a passenger who contravened this rule and practice. Moreover, if a passenger in a standing position had been knocked down in or thrown out of a moving car in consequence of a jerk due to careless driving, it might be argued that the company, having made and enforced a rule for the protection of passengers against such casual acts of negligence, the accident must be attributed to the voluntary act of the passenger as its sole efficient

cause. Assume, however, a different rule and practice, viz., that the passengers help the company to expedite the traffic by leaving their seats before the car comes to a stop, and by going on to the platform, either at a stop-if-required or at an all-stop station. Where a practice of this kind prevails, an accident such as I have figured might well be a natural consequence of the driver's negligence, for which the tramway company should be responsible in the absence of contributory negligence. If, however, the jerk was not due to careless driving, but was an ordinary incident of a journey in a tramway car, the passenger might be held to have accepted the special risk due to his attitude and position in the car, just as a passenger travelling in the ordinary way takes upon himself all the perils of the journey not due to the negligence of the tramway company or its servants.

The second proposition which we were asked to lay down as if it were a general principle of law was that a person who leaves his seat while a tramway car is in motion negligently and recklessly imperils his own safety. Undoubtedly a passenger who stands even momentarily in any part of a moving tramway car is exposed to risks which are not incurred by one who is seated, and his risks are greater at the extremity than in the middle of the car. So, too, a person whose seat is on the top runs risks which he could avoid if he sat inside. So, too, "the foolhardy folks who live on shore" and use tramways are exposed to dangers which they could avoid if they spent their lives in comparative safety on the high seas. It is a common and perennial fallacy to suppose that a person who voluntarily takes a risk is necessarily guilty of contributory negligence, or that an act which contributes to the production of an accident is necessarily negligent. In particular circumstances it may be negligent to stand either on the step or on the platform or in the interior or on the top of a moving tramway car, or in one or other of these positions. On the other hand, it seems to me to be extravagant to say that an act which many persons do habitually with perfect safety, not as a frolic but to facilitate the traffic in the joint interest of the travelling public and of the tramway company, is necessarily and always indicative of a reckless disregard of personal safety.

Among the various decisions relied on by the defenders' counsel, the authority which naturally carries most weight in a Scottish Court is the case of *M'Sherry* v. *Glasgow Corporation* (1917 S.C. 156, 54 S.L.R. 178), where the Second Division dismissed as irrelevant an action of damages at the instance of a lady who, when the car in which she was travelling approached a stopping-place at which she wished to alight, went out on to the rear platform, whereupon the conductress rang the bell as a signal for the driver to draw up. I may remark in passing that the defenders were the same as in the present action, and that the course which the pursuer followed was identical up to this point with that taken by the present pursuers. Mrs M'Sherry, however, did not remain on the platform, but as the car slowed down she went on to the step in order "to be ready to get off the moment the car stopped." She was pregnant at the time and was carrying a heavy child on her left arm, while she held on to an upright with her right hand. Knowing how little time is often allowed for the ascent or descent of a passenger by a tramway car, I cannot help sympathising with this poor woman, a victim to overcarefulness. The car slowed down almost but not quite to a stop at the stopping-place and then went on more quickly. Mrs M'Sherry being unable to retain her position on the step or to mount back on to the platform stepped on to the road and was hurt. The three judges who heard the case concurred in holding that the pursuer had acted negligently, having regard to her condition, as she herself described it. While I respectfully think that this question might properly have been remitted to a jury, who would have decided it on a view of the whole circumstances as disclosed at the trial, the judgment of the Court, so far as based upon contributory negligence, did not determine any question of general importance. The two judges, however, who gave opinions indicated what in the case of one may have been, and in the case of the other certainly was, intended as a separate and alternative ground of judgment. The Lord Justice-Clerk said—"I do not think that any passenger on a car is entitled to ride on the step of a car or to get over [off?] it while the car is in motion. If a passenger so acts, it appears to me that his own conduct is the primary cause, or at any rate a contributing cause, of any accident which may befall him." If the conduct of the passenger is assumed to have been negligent, no objection can be taken to this statement. On the other hand, if it was intended to express an alternative ground for holding the pursuer's averments to be irrelevant, it is not explained why it is necessarily either unlawful or unusual for a passenger, I do not say to ride, but to go upon the step of a car which has been signalled to stop and is slowing down apparently for that purpose. Again, I demur to the suggestion that an injured person cannot recover damages if his own conduct is the primary cause, or at any rate a contributing cause, of the accident unless his conduct is assumed to have been negligent, or, if not, to have been the sole cause of the accident. If we assume no negligence on the part of Mrs M'Sherry and also no rule which required her to keep her seat until the car came to a stop, the carelessness of the driver might, I think, have been one of the causes which contributed to bring about the accident, and the accident might, I think, have been a natural result of the driver's negligence. Similar difficulties are suggested by the opinion of Lord Salvesen, which seems to me to assume that the Glasgow tramways are managed according to a system whereby no passenger is allowed to board a car unless there is a seat available for him, and none may leave his seat until the car comes to a stop. If the case had been allowed to go to trial in the

ordinary way it might have appeared that in leaving her seat and going on to the step after the signal had been given to stop the car Mrs M'Sherry did nothing either unusual or unlawful as between herself and the defenders, and that it followed as a natural result of the driver's disobedience to the signal that she was left in a situation which might become dangerous if prolonged.

I now turn to the Irish decisions relied on by the defenders' counsel. The facts in *Roscoe* v. *The Dublin United Tramways Company, Limited*, 10th November 1905, reported in note to *Martin* v. *The Dublin United Tramways Company*, ([1909] 2 I.R. 13 and 15), differ essentially from those in the present case. FitzGibbon, L.J., in stating the judgment of the Court of Appeal to the effect that there was no *prima facie* evidence of actionable negligence against the defendant company, said—"We cannot, to meet the suggestions of the plaintiff's counsel, reform the system of the tramway traffic, and say that every white post marks a place where preparation should be made by the conductor for every potential passenger's getting in or out." According to the testimony of the conductress in the present case, on approaching a "stop-if-required" station in Glasgow, preparation ought to be made by the conductor for passengers who may wish to leave the car. The case of *Martin* (already cited) was very similar to that of *Roscoe* in this respect, that the Court negatived fault on the part of the conductor upon the ground that he had not received reasonable notice of the plaintiff's wish to alight. If (as I assume) this finding was correct, the plaintiff's case necessarily failed. In the case now before us it was proved that notice of the passenger's wish to alight was given to the conductress in the usual and recognised manner, but that she negligently failed to observe and act upon it. The opinions expressed by the judges in *Martin's* case to the effect that if there had been negligence on the part of the conductor such negligence would not have been the proximate cause of the accident, were unnecessary for the judgment, but when properly understood have no bearing one way or the other upon the circumstances of the present case. The notice upon which the plaintiff relied as imposing upon the conductor a duty to stop the car at a particular station was a verbal notice given when he entered the car at a distance of 2 miles from his intended destination. The Court held that this notice was unreasonably early and that the conductor was not to blame for forgetting to act upon it. Even, however, if the conductor had been in fault, the judges considered that there would have been no causal connection between that fault and the act of the passenger in going on to the platform and ringing the bell, whereby he was injured. I should respectfully agree with this opinion if there was evidence (as I assume there was) which justified Boyd, J., in stating that "the plaintiff chose to run the risk of an accident by doing what he had no right to do, namely, leaving the interior of the car and going on to the platform for the purpose of ringing the bell." The defendants were, of course, not bound to anticipate that the plaintiff would do what he had no right to do. There is no evidence in the present case that the pursuers were not entitled to leave the interior of the car and go upon the platform. The defenders were at pains to prove the contrary. In the next case, *Murphy* v. *The Dublin United Tramways Company* (15th December, [1908] 43 I.L.T. 11), the plaintiff was held to have been guilty of negligence for a very satisfactory reason, as explained by Holmes, L.J.—"It was an entirely negligent thing on the part of the plaintiff to go out on the platform when she saw the conductor was not there, and that the tram was going at a furious rate." Even if the accident had happened in Glasgow, where a passenger has a right to go upon the platform in order to show that he wishes to alight at the next stopping-place, I should have thought that it was reckless and improper to do so if the car was travelling at a furious pace. In the case before us the pursuers' position did not become dangerous until the car had passed the stopping-place. The fourth and last of the Irish cases cited—*Breslin* v. *The Dublin United Tramways Company* (14th June 1911, 45 I.L.T. 220)—contains a decision by Madden, J., affirmed on appeal, with which I confess that I do not agree, but this difference of opinion is irrelevant to the present action. The plaintiff having gone out upon the step of a tramway car as it neared a stopping-place was held upon the authority of the cases of *Martin* and *Roscoe* to have taken upon himself "the risks incident to the ordinary motion of the car." So far I have no difficulty. The plaintiff went on, however, to charge the defendants with negligence in respect that after he had got upon the step the car gave a sudden and violent jerk backwards "like a shot out of a gun." Personally I should have thought that the plaintiff had established a *prima facie* case of fault on the part of the defendants or their driver, and that it lay upon them to explain and justify the eccentric behaviour of their car. The learned judges of the Court of Appeal, however, agreed with Madden, J., that the case was not one to which the principle *res ipsa loquitur* applied, and that the plaintiff ought to have led evidence to show that "owing to mechanical principles a car when it stops may not jerk backwards in circumstances such as are met with in this case."

A careful study of the five decisions so earnestly appealed to by defenders' counsel as laying down certain general principles in favour of his clients satisfies me that, rightly understood, they do nothing of the kind, and that it is not merely a waste of time but also positively misleading to attempt to decide one case of alleged negligence on the part of a defender and of alleged contributory negligence on the part of a pursuer by the light of what other judges have said with reference to different though in some respects similar actions. For this reason I refrain from doing more than referring to an English case which was cited as favourable to the pursuers—*Hall* v. *London*

Tramways Company, Limited (1896, 12 T.L.R. 611).

It certainly lends no support to defenders' theory that the Court ought to lay down as matter of law that a passenger by tramway must sit still until the car stops, or to their notion that actions arising out of tramway accidents should be decided by the application of a few popular and inaccurate formulæ.

In the view which I have taken of the facts the defenders' liability to the pursuers does not depend upon the latter proving that the speed of the car was excessive and dangerous. If, however, that were necessary for the judgment, I should hold that no good reason had been shown for disturbing the finding of the Lord Ordinary on this point, which was in favour of the pursuers.

As this action was tried by a judge acting in place of a jury his decision has not the same sanctity as the verdict of a jury, but it was in my opinion a sound judgment upon a question of pure fact.

LORD CULLEN was sitting in the Valuation Appeal Court.

The Court adhered.

Counsel for the Pursuers (Respondents)—Morton, K.C.—J. A. Christie. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Defenders (Reclaimers)—The Lord Advocate (Clyde, K.C.)—M. P. Fraser. Agents—Simpson & Marwick, W.S.

Thursday, January 16.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* JOHN G. STEIN & COMPANY, LIMITED.

Railway — Jurisdiction — Traffic and Carriage — Increase of Rates for Services at Private Sidings — Railway Rates and Charges, No. 19 (*Caledonian Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lvii*), *Schedule, sec.* 4, *and Schedule of Maximum Rates and Charges, Tit. I, sec.* 5 (1) — *Railway and Canal Traffic Act* 1894 (57 *and* 58 *Vict. cap.* 54), *sec.* 1 (1) *and* (3) — *Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. cap.* 25), *secs.* 31 (1) *and* 55.

A manufacturer was in the habit of getting a railway company to move merchandise within his works upon his lines of rails from place to place for the purposes of manufacture, but not incidental to transit of the goods upon the lines of the railway company. The locomotives, servants, and waggons of the company were used. The manufacturer sent and received goods by the railway company, but the goods with reference to which the foregoing services were performed were not handled as an immediate preliminary to or consequent on transit on the railway line, and when the services were performed there was no current contract for the conveyance of the goods in question. The railway company intimated an increase in the charges for those services, which the manufacturer refused to pay, and the railway company thereupon brought an action for the amount due. The defender pleaded that the jurisdiction of the Court was excluded by I, section 5, of the Schedule of Maximum Rates and Charges appended to the Railway Rates and Charges, No. 19 (Caledonian Railway, &c.) Order Confirmation Act 1892, or by section 1 (1) of the Railway and Canal Traffic Act 1894. *Held* (*rev.* judgment of Lord Blackburn, Ordinary) (1) that section 1 (1) of the Act of 1894, referring any complaint as to the reasonableness of an increase in any rate or charge to the Railway and Canal Commissioners, did not apply, as it was a condition-precedent to the application of that section that a complaint should have been made to the Board of Trade under section 31 (1) of the Railway and Canal Traffic Act 1888, which section was only available to traders in the sense of that section and section 55 of that Act, and that the defenders were not with reference to the services in question traders in the sense of the Act of 1888; (2), *per* Lord Mackenzie (concurred in by Lord Skerrington and Lord Cullen) that section 5 (1) of the Schedule of Maximum Rates and Charges had no application, as the services in question were not incidental or ancillary to conveyance.

Railway — Ultra vires — Services Rendered by Railway Company at Private Sidings.

A railway company by means of its locomotives, waggons, and servants rendered certain services to a manufacturer on his private sidings by moving merchandise from place to place within his works for the purposes of manufacture. These services were not ancillary or incidental to the conveyance of the merchandise over the company's lines. *Held* that the services in question were not *ultra vires* of the railway company.

Contract—Personal Bar—Contract for Services—Increase of Charge—Acceptance of Services after Increase.

A railway company which rendered certain services to a manufacturer on private sidings within his works intimated to him an increase in their charges for those services. The manufacturer while continuing to accept the services tendered payment at the old rate and refused to pay the increase. The railway company accepted the old rate as a payment to account and brought an action for the balance. *Held* that the defenders having continued to accept the services after intimation of the increase in the charge were liable for the sum sued for.

The Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25) enacts—Section 31—"(1) Whenever any person receiving or sending or desiring to send goods by any railway is of opinion that the railway company is charging him an unfair or unreasonable rate