LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.

The Court admitted the applicant.

Counsel for the Applicant—James Clark. Agent— David Dougal, W.S.

Counsel for the Defenders—Gunn. Agent —Robert Stewart, S.S.C.

Saturday, November 9.

SECOND DIVISION.

[Sheriff of Lanark.

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

Reparation—Damages—Relevancy.

A passenger sustained injuries by leaving a railway carriage while the train was in motion and approaching a station. In an action of damages against the railway company he averred that he had acted with due care, but was misled to the conclusion that the train had stopped through the fault of the defenders in not providing a sufficient number of lamps upon the platform, and in not having the existing lamps properly lighted. *Held* (*diss.* Lord Young) that the action was relevant.

Alexander Robertson Roe, hairdresser, 60 Buccleuch Street, Glasgow, travelled to Largs on the evening of Saturday 3rd August 1889 by the Glasgow and South-Western Railway Company's train, which was timed to leave St Enoch's Station, Glasgow, at 11·5 p.m., and to reach Largs at 12·40a.m. Upon approaching Largs station he looked out, and thinking that the train had stopped he stepped out of the compartment. He was knocked down by the door of the compartment, the train being still in motion, and severely injured. He brought an action of damages in the Sheriff Court at Glasgow against the railway company, in which he averred—"The injuries which pursuer sustained were due to the fault and negligence of the defenders, or of those for whom they are responsible. The station at Largs at the place where the pursuer was injured is unsafe and dangerous, and badly constructed. There was not a sufficient number of lamps on the arrival platform to light it sufficiently for safety to the travelling public, and, except quite close to the roofed-in portion, it was in total darkness. The arrival platform is about 260 yards long; of this about 60 yards are roofed in, and the remainder is uncovered. In the covered portion there are eight gas lights, which are believed to be lighted at night, but on the uncovered portion there are only five lamps for the whole distance of 200 yards, and of these only two (the two nearest the covered portion) were lit on the night in question, and for some reason they were not burning brightly, and were yielding little light. . . . It was the duty of the defenders to have had the station properly and sufficiently lighted for this as for other trains. The night in question was very dark, and several of the carriages, and amongst them the pursuer's, were brought to a stand at a portion of the platform which was in total darkness. Before the pursuer could be rescued after the accident matches had to be lighted and lamps sent for. . . . The approach of a train to Largs station is not only gradual and prolonged, but unusually smooth. Its motion is quite imperceptible to passengers within the train, and they can only tell that it is in motion by observing objects outside. The pursuer on the night in question thought, and had good reason for thinking, before he attempted to alight, that the train had stopped. The motion had become imperceptible to him and to the other passengers in the compartment. He opened the window and looked out twice to make sure that all was right. Had the platform been lighted, as it ought to have been, he could have seen that the train was in motion, and the accident would not have happened. . . . The pursuer waited a reasonable time before attempting to alight, and it was the duty of the defenders, or those for whom they are responsible, to assist the passengers in alighting at said dark part, or to warn them that the train had not stopped. This duty they did not perform."

The pursuer pleaded—"The pursuer having been injured by the fault of the defenders, or of those for whom they are responsible, is entitled to decree against them as craved."

The defenders pleaded—"(1) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the action. (3) *Separatim*—The accident having been caused by or materially contributed to through the fault of the pursuer, the defenders should be assoilzied, with expenses."

The Sheriff-Substitute (SPENS) on 24th October 1889 pronounced the following interlocutor:—"For the reasons in note assigned, Sustains the first and third pleas-in-law stated for defenders, and assoilzies them from the conclusions of the action.

"*Note.*—The pursuer left St Enoch Station on the 3rd August by the 11·5 p.m. train timed to arrive at Largs at 12·40 a.m. on the 4th August. It is not disputed that he left the train when it was in motion, and has been very seriously injured, but he says the train was going so slow, and the platform was so insufficiently lighted, that he had reasonable grounds for believing that the train stopped, and he alleges *culpa* on the part of the railway company in respect of the insufficiency of light. No case was quoted to me where a passenger was successful in claiming damages for injuries received by him in consequence of attempting to leave a train when still in motion. It is narrated by pursuer in his condescendence that he took certain ineffectual precautions for the purpose of ascertaining whether the train had stopped. I am of opinion that a duty was incumbent on him of ascertaining the fact with absolute certainty. He could assuredly have done this

by fixing his eyes on one of the station lights; and further, I cannot myself understand how it was possible for a man to be on the footboard of the carriage without being conscious whether the train was or was not in motion. A proof therefore seems to me unnecessary, as in my view of the facts disclosed on record there was such contributory carelessness on the part of pursuer as to bar the claim."

The pursuer appealed to the Second Division of the Court of Session, and argued—That he had relevantly averred fault on the part of the railway company (1) for not supplying a sufficient number of lamps, and secondly, for not lighting those that were there. That was enough to entitle him to a trial—*Bridges* v. *Directors, &c., of North London Railway Company*, June 22, 1874, L.R., 7 H. of L. 213. It lay with the jury to say whether or not there had been contributory negligence.

The respondents argued—That the interlocutor of the Sheriff-Substitute was right, and upon the grounds stated in his note. There was no averment that the company by their servants invited or encouraged the pursuer to get out. Contrast the case of *Hellawell* v. *London and North-Western Railway Company*, May 8, 1872, 26 L.T. 557. There was no reason for haste, especially as the station was the terminus of the line.

At advising—

LORD RUTHERFURD CLARK — In my opinion this case should be sent to a jury. The questions to be laid before them will be, first, whether the pursuer honestly believed that the train had stopped, and secondly, whether that belief was induced by the failure of the defenders to provide lamps. If the jury hold affirmatively on both these questions they will find for the pursuer.

LORD LEE—The question in this case is, whether there is or is not a relevant allegation made by the pursuer that he thought the train had stopped owing to the fault of the defenders? My opinion is that there is a relevant allegation of that. A train may be moving so smoothly that a passenger may think it is at rest, and I am not for throwing out this action upon relevancy where there is a statement that the pursuer believed the train had stopped owing to the fault of the defenders. I do not agree with the Sheriff-Substitute that "a duty was incumbent on him of ascertaining the fact with absolute certainty."

LORD YOUNG—My opinion is in accordance with that of the Sheriff-Substitute, except so far as he affirms that there was contributory carelessness on the part of the pursuer. That was only an error in language, for contributory negligence implies that there was negligence on both sides, and I am not prepared to affirm, and neither was the Sheriff-Substitute, that there was negligence on the part of the railway company, that is, that on this record negligence was relevantly averred by the pursuer. Avowedly, the pursuer got out of the moving train—in fact, that he did so is the immediate ground for this action, His case is that it was through the fault of the defenders that he was led to believe that the train had stopped.

It is a very curious case, and such a case may be conceivable, although I have not yet conceived it. The cause of an action is a man getting out of a train in motion. *Prima facie* a man takes the risk upon himself in doing so. Now, what is the particular allegation that the railway company is to blame for his doing so without taking the risk? Want of lighting. Well I am not prepared to accept that statement. If there was great darkness, that demanded all the more care. If this case is sent to a jury, it must be sent on grounds which would apply in the case of the Waverley Station or any other large station. Is a person to be allowed to say, "The train was moving so smoothly I thought the train had stopped, but I was wrong. I shall, however, allege that the station was insufficiently lighted, and take my chance of getting a verdict from a jury's sympathy with suffering humanity?" I am not prepared to make a ground of action in the case of a man who without invitation gets out of a moving train merely upon the allegation that the station was not sufficiently lighted.

The LORD JUSTICE-CLERK was absent in the Justiciary Court.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor of the Sheriff-Substitute of 24th October 1889; allow the pursuer within eight days to lodge issues for the trial of the cause: Find him entitled to the expenses of his appearance to-day; modify the same to £9, 9s. stg.; ordain the defenders to make payment of that sum to the pursuer, and decern."

The following issue was afterwards approved of for the trial of the cause:—

> "Whether on or about the 4th day of August 1889, and at or near Largs Station on the defenders' line of railway, the pursuer, while travelling as a passenger by a train on defenders' line of railway, was injured in his person through the fault of the defenders, to his loss, injury, and damage.—Damages laid at £3000."

Counsel for the Pursuer—Comrie Thomson—A. S. D. Thomson. Agents—Miller & Murray, S.S.C.

Counsel for the Defenders—Sir Charles Pearson—Guthrie. Agents—John C. Brodie & Sons, W.S.