do transact, at that office; but, on the other hand, it seems to me that they do, in any ordinary commonplace sense of the word, transact business, and, that being so, I have come to the conclusion that the decision of the learned Sheriffs is right.

I do not hesitate to say that I am very much influenced in coming to this conclusion by finding that in another subsection of the section which I have read it is possible to make a defender not otherwise subject to the jurisdiction of the Courts of Scotland subject to the jurisdiction of the Sheriff Court by arrestments *ad fundandam jurisdictionem*. The result of that is to turn this particular plea into an absolutely technical plea. If there was nothing of that sort I think it would be very much for consideration whether it could have been the intention of the Legislature to subject foreigners—because this company is a foreigner—to the jurisdiction of the local Court unless they really had what might be called a considerable—I will not say a principal place of business, but, at any rate, a very considerable—place of business within the jurisdiction. But any such general considerations of what the Legislature must have meant seem to me put out of the question by this other section. We, of course, have nothing to do with the policy of the matter. We have only got to take it as we find it. And, accordingly, I think that, reading the words acccording to their ordinary meaning, there was here a place of business. The defenders were undoubtedly cited at that place of business and therefore there was jurisdiction.

LORD M'LAREN—I concur.

LORD PEARSON—I also concur.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"The Lords . . . of new allow the parties a proof of their averments on record as now amended, affirm the interlocutors of the Sheriff and Sheriff-Substitute, dated 12th November 1908 and 4th June 1908, and remit the cause to the Sheriff-Substitute to proceed as accords. . . ."

Counsel for Pursuers (Respondents) — Cooper, K.C. — Blackburn, K.C. — Spens. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Appellants) — Hunter, K.C. — Horne. Agents — Drummond & Reid, W.S.

Thursday March 11.

FIRST DIVISION.

[Lord Guthrie and a Jury.

MITCHELL *v.* CALEDONIAN RAILWAY COMPANY.

STRACHAN *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Negligence — Contributory Negligence—New Trial.

A, while going diagonally across a double line of rails in a dockyard, was knocked down and injured by a train approaching from behind on the first or nearer set of rails. At the time of the accident another train was passing on the further set of rails, and it was in order to avoid it that A was crossing diagonally. From the evidence it appeared that A was in such a position that had he looked he must have seen the approaching train in time to get off the line. In an action by A against the company the defenders pleaded contributory negligence. The jury found for the pursuer.

Held that the verdict must be set aside as contrary to evidence, in respect that it failed to affirm contributory negligence.

Radley v *London and North-Western Railway Company* (1876), L.R., 1 A.C. 754, *distinguished* and *commented on.*

John Mitchell, measurer, Greenfield Street, Alloa, brought an action against the Caledonian Railway Company for £1000 damages in respect of personal injury sustained through his having been knocked down and run over while crossing a line of rails in Grangemouth Docks, the property of the defenders, owing, as he alleged, to the fault of the defenders' servants. A similar action at the instance of Nathan Strachan, mill-hand, who was also run over and injured on the same occasion, was tried along with Mitchell's action, the evidence in the latter case being held as the evidence in the former.

The pursuer (Mitchell) averred—"(Cond. 2) Between five and six o'clock in the morning of Friday, 15th May 1908, the pursuer along with other workmen was proceeding to his work at the pit prop mill of his employers Messrs Gibb & Austin, which is situated at Grange Dock, Grangemouth, and within the foresaid dockyard. One of the regular and recognised means of access to the mill is by a pathway which runs alongside a double line of railway on the south side of the yard, and which pathway is in the knowledge of the defenders regularly used by the public as a passage or road, not only to Messrs Gibb & Austin's premises, but to several dwelling-houses and other places in the neighbourhood of said premises which are likewise within the dockyard. On the morning in question the pursuer entered the dockyard by the main entrance thereto from the highway, crossed an overhead bridge, and descended by a

stair into the dockyard. In order to reach the said public road or pathway he had to cross the double line of railway before referred to at a point nearly opposite the defenders' goods shed in said dockyard. The pursuer had reached the first set of rails when he observed a goods train coming along the other set of rails, and he thereupon halted to allow the train to pass before he crossed. The goods train having just passed, the pursuer proceeded to cross to the pathway, but before he could do so a composite carriage belonging to the defenders, and which was being propelled in front of an engine, also belonging to the defenders, suddenly and without any warning to him, came up behind the pursuer on the first set of rails at a high rate of speed, knocked him down and ran over him, thus causing very serious personal injuries to the pursuer. . . . (Cond. 3) The defenders were well aware that the public, including employees of Messrs Gibb & Austin, had often to cross their said double line of railway in order to reach the said pathway. It was the duty of the defenders accordingly to warn and instruct their drivers of trains to go slowly along the lines in the dockyard, and especially at the points where the public were in the habit of crossing said railway. This they failed to do, and in consequence of their failure the foresaid composite carriage was recklessly and culpably propelled along said line in front of and attached to an engine driven by the defenders' servant John Adamson at an excessive rate of speed—about fifty miles an hour—without said engine-driver having a view of the line in front of him. It was gross negligence not only on the part of Adamson to drive his train in such a manner and at such a speed at the point in question, but on the part of the defenders in failing to issue regulations for the speed of trains as they passed along the lines in said dockyard. Further, the brakesman in the said composite carriage was negligent in failing to keep a proper lookout. If he had been doing so he would have seen the pursuer, and could have signalled to the engine-driver to stop. Either he did not keep a proper look-out and did not signal, or if he did, the engine-driver failed to have his engine fully under such control that he could instantly have obeyed said signal. . . ."

Similar averments were made by Strachan.

The defenders pleaded, *inter alia*—"The said accident having been caused, or at any rate materially contributed to, by the negligence of the pursuer, the defenders are entitled to absolvitor."

Both cases were tried before Lord Guthrie and a jury on 12th, 13th, and 14th November 1908, on issues in ordinary form.

In Mitchell's case the jury found for the pursuer and assessed the damages at £400. In Strachan's case they also found for the pursuer, assessing the damages at £200.

The import of the evidence sufficiently appears from the opinion (*infra*) of the Lord President.

In both cases the defenders obtained a rule.

At the hearing on the rules the pursuers argued—The evidence showed (1) that the defenders' servants were in fault in failing to keep a proper look-out, and in going at excessive speed, and (2) that there was no contributory negligence on the part of the pursuers. The case of *Watson* v. *North British Railway Company*, December 6, 1904, 7 F. 220, 42 S.L.R. 165, was distinguishable, for that was a clear case of contributory negligence. Where, as here, the evidence was conflicting, it was not for the Court to interfere with the verdict—*Dublin, Wicklow, and Wexford Railway Company* v. *Slattery* (1878), L.R., 3 A.C. 1155. *Esto*, however, that the pursuers were negligent, their negligence was not the proximate cause of the accident, for had the defenders exercised ordinary care they might, notwithstanding the pursuers' negligence, still have avoided the accident, and therefore the plea of contributory negligence should be repelled—*Radley* v. *London and North-Western Railway Company* (1876), L.R., 1 A.C. 754.

Counsel for the defenders were not called on.

LORD PRESIDENT—I think there must be a new trial, on the ground that the verdict is contrary to the evidence, in that it does not affirm contributory negligence.

If I had to come to a conclusion as to what happened on the occasion of the accident I should have little doubt. I think that when these two men quitted the side of the line and went on to the four-foot way, the train was not in sight. They crossed diagonally instead of going straight across, and they forgot to keep a look-out behind to see what was coming. That seems to me to reconcile the whole of the evidence—that of the three railwaymen on the train and that of the pursuers themselves. But while I think that is what happened, it is a matter of opinion, and not a ground upon which we can interfere with the verdict. The circumstances under which the accident happened, and the possibility of there having been a want of proper look-out on the part of the railway servants, are matters on which the jury were entitled to take their own view.

The case, however, does not end there, for the question of contributory negligence has been acutely raised, and the pursuers are placed in a dilemma. They were in a place where they could have seen the approaching train, and either they crossed the line without looking, or else they saw the danger and nevertheless crossed. The only way in which they could escape the imputation of contributory negligence would be by proving that the pace of the train was so excessive that it caught them before they had time to get off the line. It is uncertain what the speed of the train was; on record it is stated at fifty miles an hour, but the pursuers' counsel does not put it above fifteen miles. Even if it were twenty miles the pursuers' case would be in no better position, for at that speed the time occupied by the train in travelling 70 or 80 yards would be enough for the men to get off the line.

The observations of Lord Cairns in *Slattery's* case are therefore to be distinguished. In that case there was such obstruction to the view of the line and the speed was so great that, as Lord Cairns pointed out, it was possible to take the view that there was no negligence involved in being on the line, and that the question should be left to the jury. Here there are no facts which could support the verdict without at the same time affirming contributory negligence. The men must have seen the train in time if they had been looking, and in no view can they escape the imputation of negligence.

With reference to *Radley's* case, I cannot help thinking that there is some misapprehension abroad as to the limits of the doctrine. The negligence of the defender there referred to must be a second negligence following upon the pursuer's contributory negligence; it cannot be the original act of negligence, or there would never be such a plea as contributory negligence at all. In order to bring a case under the rule in *Radley* there must be (1) negligence, (2) contributory negligence, (3) an ensuing act of negligence without which the accident would not have happened. If the whole matter were open, the doctrine might have been expressed in the question—"What is the *causa proxima* of the accident?" Here, for instance, at the eleventh hour these men were seen on the line by the witness Moir, who then and there signalled to the engine-driver to stop. If it had been proved that the engine-driver went on, and could by stopping have avoided the men, then the doctrine in *Radley's* case would have been applicable.

I think the doctrine has no application here, and I am for allowing a new trial.

LORD M'LAREN—I concur.

LORD KINNEAR—I agree with your Lordship, and especially with the last remark which your Lordship has just made. The question really is, Was the accident caused by someone else's negligence or by his own?

LORD PEARSON—I agree.

LORD GUTHRIE—I concur. It seemed to me at the time of the trial that the question of fault on the defenders' part was for the jury, but in regard to the question of contributory negligence I told the jury that it would be very difficult to avoid the conclusion that contributory negligence was present.

The Court set aside the verdicts and granted new trials.

Counsel for the Pursuers — Anderson, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders—Clyde, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, February 24.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

EARL OF LOUDOUN *v.* MORTON.

Superior and Vassal — Casualty — Proof of Superior's Title—Identity of Description—Onus of Proof.

A brought an action for payment of a casualty against B in respect of certain lands in which B was infeft in 1906. B, who was a singular successor of the last-entered vassal, had acquired the lands from her by a disposition in which they were described as part of the lands of H, sometime possessed by William M'Kay, tenant therein, and as particularly described in an instrument of sasine of date 1830. To the superiority of the lands so described A had a valid prescriptive title.

Held that as B had failed to show that the lands in question were not part of the lands of H as above described, or that they were other lands of H held by him of another superior, he was liable in payment of the casualty sued for.

Earl of Breadalbane v. *Macdougall*, November 4, 1880, 8 R. 42, 18 S.L.R. 40, *followed.*

On 6th December 1907 the Earl of Loudon brought an action against Alexander Morton, Gowanbank, Darvel, for declarator that in consequence of the death of Miss Martha Brown of Langfine and Waterhaughs, in the parish of Galston and county of Ayr, the vassal last vest and seised in the subjects therein mentioned, a casualty, being one year's rent of the said subjects, became due to him as superior thereof. A pecuniary conclusion followed.

The defender pleaded, *inter alia*,—"(4) The pursuer not being the superior of the lands described in the summons, the defender should be assoilzied.

On 7th July 1908 the Lord Ordinary (MACKENZIE) held that, on an examination of the titles, the subjects described in the summons now possessed by the defender were within the lands over which the pursuer had by prescription the right of superiority, and granted decree as craved.

The defender reclaimed, and argued that the lands in question were not part of the lands of Hillhead described in the sasine of 1830, assuming that the pursuer was superior thereof, but were other lands held of another superior.

Counsel for the respondent were not called on.

LORD PRESIDENT—This is an action of declarator and for payment of a casualty instituted at the instance of the Earl of Loudoun against Mr Morton, who is proprietor of some lands now known under the modern name of Gowanbank, which he acquired by disposition from Miss Brown, the disposition being dated 11th August