titles in *Nisbett's* case within the command of the intending purchaser.

On the whole matter I am of opinion that the defender is attempting to break the contract by which he is bound, and that the pleas he has put forward are unfounded. Decree therefore should be given against him in terms of the conclusions of the summons.

Lord Rutherfurd Clark—This is a very wretched case, and I am very sorry that it should have been presented for our decision, and I regret it the more that I find myself unable to concur in the judgment.

The pursuer is proprietor of certain subjects in Edinburgh, and he entered into a certain contract with the defender, which we are called on to construe. As proprietor of the subjects the pursuer might of course have subfeued them, but the contract into which he did enter with the defender was admittedly a contract of sale—that is to say, a contract by which he undertook to sell a part of the subjects which then belonged to him—and one condition of this sale was that "the feu-duty is understood to be not more than £4;" so that he undertook to sell the subjects, that is, to give a title to the defender, the buyer, the feu-duty in which was not to exceed £4. What feu-duty? Of course it could not be a feu-duty in any sense payable to the pursuer himself, because he was not subfeuing but selling, and a feu-duty is necessarily what is paid to a superior. In short, the subjects were sold on condition that the pursuer undertook that the defender should enter with the superior on the footing of paying a feu-duty of £4 and no more. Now, it is quite clear that as the titles then stood it might be perfectly impossible for the pursuer to give such a title to the defender. The pursuer held the whole subjects at a *cumulo* feu-duty of £35, 15s. 6d., and it might be out of his power to give the defender a title to the subjects sold in which the feu-duty should be £4 and no more, for the magistrates, the superiors, were perfectly entitled to decline to agree to such a condition. But if the pursuer was not able, and is not able, to give a title of which the feu-duty is £4 and no more, then the only consequence is that he is not in a position to implement the conditions on which he agreed to sell the subjects; but the defender did not undertake to buy except on the conditions that he got an entry with the superior, and that at a *reddendo* of £4 and no more. I do not think that the new forms of conveyancing introduced by the recent Acts affect the matter. What the pursuer undertook to give was a conveyance with a double manner of holding, on the procuratory of which the defender was entitled to resign into the hands of the magistrates and get a charter from them with a feu-duty of £4 and no more. I am speaking in the language of the old forms, and the new forms do not deprive the magistrates of the right to refuse to grant such a charter. In short, once one sees that this is a contract of sale not of feu it seems to me impossible to attach any other meaning to it than this, that the feu-duty of which it speaks is a feu-duty payable to the seller's superiors.

It was said that people do not bargain about all the burdens incidental to the feudal tenure. It is quite likely that the incidents of the magistrates holding of Heriot's Hospital, who are said, I suppose accurately, to be the superiors of the magistrates, or of the Hospital's holding of the Crown, did not form part of this contract. These are burdens about which the parties could not possibly be held to deal. What they are bargaining about are the incidents of their relation to the immediate superiors. All the burdens above that remain the same.

My opinion accordingly is that the condition of this contract of sale is that the seller should give the buyer a disposition under which he may enter with the superior at a feu-duty not exceeding £4. He has not tendered such a conveyance. It is quite true that the magistrates are willing to accept a feu-duty of £4, 6s., and that the seller is willing to commute the additional 6s. by paying the buyer a sum equal to twenty-five years' purchase. I do not think that the defender is bound to accept that. I think he is entitled to implement of the contract in accordance with its terms. I do not attach any importance to the fact that he took possession of the subjects. He took possession on the faith of getting a conveyance in terms of his contract, and not getting that I think he is only bound to pay the fair and reasonable value of the subjects for the time they were in his occupation.

The Court pronounced this interlocutor:—

"Find that the defender having purchased the subjects described in the summons under the missives of sale libelled, is bound to implement the purchase by making payment of the price and accepting a conveyance from the pursuer; and that the pursuer having apportioned the *cumulo* feu-duty rateably to the several houses forming the tenement, and the deeds of allocation thereof having been placed on record, the defender is not entitled to require the pursuer to deliver to the defender a deed by the superior allocating a feu-duty of £4 to his house: Therefore recal the interlocutor reclaimed against: Repel the 1st, 2d, 3d, and 4th pleas-in-law for the defender, reserving consideration of the 5th plea: Decern against the defender in terms of the conclusions of the libel."

Counsel for Pursuer—D.-F. Mackintosh, Q.C.—Graham Murray. Agents—Duncan Smith & MacLaren, S.S.C.

Counsel for Defender—Gloag—Begg. Agents—Ronald & Ritchie, S.S.C.

Friday, July 9.

SECOND DIVISION.

[Lord Lee, Ordinary.

WOODS *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Negligence — Railway — Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 40—*Contributory Negligence.*

The Railway Clauses Act 1845 provides that at every level-crossing the railway company whose line crosses the road shall have good and sufficient gates at each side of the rail-

way across the road, which gates are always to be kept shut except when cattle or carriages require to cross the line. A railway company whose private Act of Parliament incorporated the general clause under the Act of 1845, had a line crossing a very much frequented road, and had, as required by a private Act, erected a footbridge over it, but did not in consequence of the great traffic at the place keep the gates shut at any time, but had a man stationed at the gates to warn people who attempted to cross the line if there was danger of a train passing. An accident occurred to a person who had been duly warned by the gateman but had gone upon the line. *Held* that the railway company were in fault in not having the gates shut according to the provisions of the Act of Parliament, which was the proximate cause of the accident.

Bill of Exceptions—Direction to Jury—Matter of Fact—Contributory Negligence.

In an action of damages for the death of a young woman who was killed by a passing train when she was upon the railway track, the evidence being conflicting as to whether she was on the track trying to cross the line, or in an endeavour to drag a companion out of danger from an approaching train, the presiding Judge charged the jury that if they were satisfied the young woman was upon the line attempting to save her companion, and that through her alarm and excitement she became insensible to her own danger, in point of law she was not guilty of contributory negligence. Counsel for the defender asked the presiding Judge to direct the jury that if the young woman went into a seen danger she was not entitled to recover damages even if her object was to rescue her companion. This direction the Judge refused to give, and exception was taken to the refusal. On a bill of exceptions, *held* that the question what the object of the girl was in being upon the line, and whether she was guilty of contributory negligence in being there, were not matters for direction in point of law, but were properly left for the consideration of the jury, and the bill of exceptions *refused*.

On 27th July 1885 there was a pleasure excursion from Edinburgh to Stirling known as the Catholic trip. Among the parties present were two young women Josephine Woods and Kate M'Dermaid. While at Stirling they met two others of the excursion party, brothers, John and Samuel Kerr. The party of four proposed to walk from Stirling to Cambuskenneth Abbey by the Shore road. Samuel Kerr walked first with Kate M'Dermaid, and John Kerr with Josephine Woods. In the course of the walk they came to a level-crossing where the track of the Caledonian and North British Railways crosses the Shore road. Samuel Kerr and the girl M'Dermaid crossed in safety, but while John Kerr and Josephine Woods were crossing a train passed and the end of the buffer beam struck the girl on the head and killed her. Her father raised this action of damages against the Caledonian Railway Company for the loss of his daughter.

He averred that the Shore Road was a turnpike road or highway or statute-labour road for carts or carriages within the meaning of the Act 2 and 3 Vict. cap. 45, and 5 and 6 Vict. cap. 55, and was also a turnpike road or public carriage road within the meaning of the Acts 8 and 9 Vict. cap. 33, and 26 and 27 Vict. cap. 92; that it was the duty of the railway company to have gates at each side of the level-crossing with proper persons to open and shut them, but that they failed in that duty; that the company's duty was also to keep the gates constantly closed except during the time when horses, cattle, carts, or carriages passing along that road should have to cross the railway, but that they habitually failed in that duty, and did so on the occasion in question; that the death of his daughter was caused by the culpable negligence of the railway company in not having the gates closed, although no cattle, horses, or vehicles required to cross the railway or could have done so in safety.

The defenders stated that there was a signalman posted to warn people of their danger if a train was at hand, that the signalman so warned the girl Woods and her companion, and ordered them to stand back; but that in defiance of this warning they attempted to cross the line, and the girl was so killed.

They pleaded that they were not liable, as the girl's death was caused or materially contributed to by herself.

The Special Act under which the line at this point had been made provided that there should be a footbridge over the line at the place in question. This bridge had been erected. The Special Act also incorporated section 40 of the Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) which provides —"If the railway crosses any turnpike road or public carriage road on a level the company shall erect and at all times maintain good and sufficient gates across such road on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates. And such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway."

The case was tried before Lord Craighill at the Spring sittings for jury trials on 22d and 23d March 1885, the issue being "Whether on or about 27th July 1885 the pursuer's daughter Josephine Woods was killed at a level-crossing at or near Stirling by a train belonging to the defenders, through their fault, to the pursuer's loss, injury, and damage. Damages laid at £500 sterling."

At the trial it was clearly proved that the footbridge was almost never used, and the gates were not kept shut at any time in the ordinary traffic of the railway; that the passenger traffic at Shore Road was large, and the practice was for a gateman to have charge of erecting a wooden signal and otherwise warning the public of the approach of trains. On this occasion when Kerr and Woods came up a train was slowly approaching, and this man warned them not to cross as there was danger. Kerr, however, who was slightly affected by drink, paid no attention to the warning and persisted in crossing. Woods was then holding his arm, but there was a con-

flict of evidence whether she was intending to hold him back or merely to cross with him. Kerr escaped injury, but the buffer of the engine struck Woods, who was thrown against the engine-shed and killed.

Lord Craighill in charging the jury directed that there was fault in law in regard to the gates. His Lordship further on the question of contributory negligence gave this direction—"If you are satisfied that the deceased Josephine Woods did not leave the side of the railway—did not put her foot within the lines—in order to cross from the one side to the other, but in order to rescue the man with whom she had been on the day in question, from that which she feared might be almost certain death, and that through alarm and her perturbed and excited state she became insensible to her own danger, you will take the law from me to be that that which was done by her was not contributory negligence." Whereupon the counsel for the defenders, without excepting to the said direction, requested his Lordship to direct the jury as follows, viz.—"If the jury are satisfied upon the evidence that the deceased went upon the line of railway, in the face of a seen danger, in sight and in front of an approaching train which caused her death, the pursuer is not entitled to recover damages, even though the object of the deceased was to save her companion." His Lordship declined to give such direction. Whereupon the counsel for the defenders excepted to the said declinature.

The jury found for the pursuer, and assessed the damages at £150.

The defenders obtained a rule for a new trial on the ground that the verdict was contrary to evidence. They also brought a bill of exceptions against the ruling of the presiding Judge, as explained above.

Argued for the defenders—(1) *On the rule.* It was admitted that the gates, which were on each side of the railway, were not kept shut according to the provisions of the Act of Parliament, but that was because the Act could not be literally obeyed owing to the continuous stream of traffic over the line and along the road. The only fault that could be attributed to the railway company was in not keeping the gates shut, but that was explained, and they did even more than the Act of Parliament insisted upon, as they kept a gateman always there who warned the people if there was danger. The negligence which is complained of must be reasonably connected with the accident if the defenders are to be liable. Here there was no negligence and no invitation to the public to cross the line, as the gateman warned the girl Woods that there was danger—*Stubley* v. *The London and North-Western Railway Company*, Nov. 18, 1865, L.R., 1 Ex. 13; *Stapley* v. *The London, Brighton, and South Coast Railway Company*, Nov. 25, 1865, L.R., 1 Ex. 21. (2) *On the bill of exceptions.* There was no doubt on the evidence that the girl saw the train coming and was warned not to cross, but in spite of these facts she went from the edge of the line, where she was quite safe, into the track, and so was killed. This was contributory negligence, and the company were not liable for her death—*Skelton* v. *The London and North-Western Railway Company*, June 8, 1867, L.R., 2 C.P. 631. The true test of contributory negligence was to find out who was responsible as being the proximate cause of the accident. The fact of whether there was contributory negligence or no must be left to the jury—*Dublin, Wicklow, and Wexford Railway Company* v. *Slattery*, July 31, 1878, L.R., 3 App. Cas. 1155; *Campbell* v. *Ord & Maddison*, Nov. 5, 1873, 1 R. 149; *Davey* v. *The London and South-Western Railway Company*, June 22, 1883, L.R., 11 Q.B.D. 213. The exception was taken to the Judge's direction at the proper time, viz., at the end of the charge to the jury. Lord Craighill gave what was considered a wrong direction, and the direction stated in the bill was asked and refused, whereupon exception was taken—*Baird* v. *Reilly*, March 6, 1856, 18 D. 734.

The pursuer argued—The exception here was not taken when the Judge delivered his direction to the jury, and therefore the bill of exceptions was wrong and ought not to be allowed. As no exception was taken timeously it was not competent to move for a new trial on the ground of misdirection by the presiding Judge in point of law—*M'Clelland* v. *Rodger & Company*, Feb. 9, 1842, 4 D. 646. The railway company were bound by their private Act, and by the Railway Clauses Consolidation (Scotland) Act 1845, to have gates on each side of the railway, and to keep these gates shut except when cattle or carriages desired to pass. It was admitted that these gates were practically never shut, and therefore the railway company were in fault—*Gilchrist* v. *The Ballochney Railway Company*, June 8, 1850, 12 D. 979. The young woman did not contribute by her negligence to the accident although the gateman said there was a train coming; he did not stop them as they would have been stopped by a shut gate. There was an invitation to the public to cross the line. The greater the amount of traffic, the more need there was for care in having the gates shut. Negligence implied something wrong in itself, and here there was nothing wrong in the girl endeavouring to stop her companion from crossing the line.—*Wanless* v. *The North Eastern Railway Company*, May 10, 1871, L.R., C.Q.B. 481; *Gibb* v. *Crombie*, July 6, 1875, 2 R. 886; *Eckert* v. *Long Island Railway Company*, Jan. term, 1871, 3 Amer. Rep. 721.

At advising—

Lord Young—This case comes before us upon a bill of exceptions and also upon a motion for a new trial.

The case may be stated in a very few sentences. At the place referred to, near Stirling, the Caledonian Railway is carried across the road upon the level by a level-crossing, and confessedly there applies to the place that provision of the general statute by which a gate is required to be kept upon the road—across the road—on each side of the railway—to be kept as a rule shut, and to be opened only when carriages or cattle present themselves to cross, and when they may safely be permitted to cross. There were gates there, but the provision of the statute that they should be so kept shut, and opened only when occasion required and safety permitted, was confessedly not complied with. On the occasion immediately in question the young woman who met with her death came too close upon the edge of the railway, coming along the public road, and prepared to cross with a young man with whom she

had been spending the forenoon. There was no gate to keep them from going upon the railway, but there was a gatekeeper, who told them that there was a train coming, and that it was not safe for them to cross. The young man however, having been drinking, did not pay attention to this warning, but proceeded to cross. The young woman had a hold of his arm—whether she was simply leaning upon his arm and moving rapidly across along with him, or whether she was trying to hold him back, is a matter in dispute, and in the statement of the facts which I have made is the first matter of fact in dispute between the parties. He was more vigorous or more active than she, and he got across before the approaching train—just cleared it. She was a step behind him, although near enough to have hold of his arm, and she was caught—just caught. She had crossed the line of rails on which the train was running, but she was hit by a projecting buffer or beam of a buffer of the engine on the far side, and killed. This action is brought against the railway company by her father to recover damages in respect of her death; and the ground of action is, the fault imputed to the railway company in their not having the gate closed at the time. Mr Murray in his very clear and candid statement of the case for the railway company quite conceded that, *prima facie*, this was fault and a good ground of action, although of course it was for the jury to say whether it was, I shall not say the proximate cause, but a cause so proximate of the accident as to justify subjecting the railway company in responsibility in respect of it. I think Mr Murray was disposed to concede—in fact did concede—that it was not only fault but also a sufficiently proximate cause of the accident to render the railway company responsible, but for the fact that there was a gatekeeper there who warned the young woman and her companion, and any others, that there was a train coming, and that it was dangerous to cross, and that they proceeded in the face of that warning. But it was maintained that with that warning the railway company had done what was just as good as the shut gate would have been—what in fact was equivalent to it—and that therefore they were guilty of no negligence; but if the jury should think nevertheless that there was negligence—that the gatekeeper with his warning could not be taken as a substitute for the closed gate as required by the Act of Parliament, that nevertheless the young woman proceeding in the face of the warning and of the seen danger of an approaching train, was guilty of contributory negligence which barred recovery.

Now, I think that is really the whole case, and it seemed to present two questions to the jury. The first was, whether there was negligence on the part of the railway company—a sufficiently proximate cause of the accident—that is, of which the accident was a sufficiently natural and to be looked for consequence—and that question seemed in the particular case to depend upon whether or not the jury thought that the gatekeeper with his verbal warning and holding up a signal was a sufficient substitute for the closed gate. The second and only other question was—and arising only if the jury answered the first in the affirmative—whether the pursuer was barred from recovering in respect of the contributory negligence of his daughter. Now, I have stated to your Lordships that the case is before us upon a bill of exceptions and also upon a motion for a new trial; and I will take the motion for a new trial first, dealing with the bill of exceptions afterwards. Now, I have no hesitation in saying that I think the jury were right in holding the railway company guilty of fault. I cannot doubt that they were right in that, although it is sufficient to say that the evidence is such that I should not be at all disposed to disturb their verdict. And it is plain that they must have been of opinion that the railway company was in fault, for that was the primary condition of liability. We have no concern with contributory negligence unless there is a primary negligence on the part of the defenders in respect of which liability is sought to be imposed. I therefore assume that the jury were of opinion that the railway company were in fault, and I give it as my opinion that upon the evidence I should not be in the least disposed to disturb their verdict. I think it seems a grave and a gross fault not to have that gate shut, and I must say that I have heard with some surprise the statement on the part of the railway company, first by Mr Cunningham in the witness-box, and afterwards by the counsel at the bar here—I suppose only repeating what was submitted to the jury—that the requirement of the statute was violated not only on this occasion, but was habitually violated. I think it is a most proper provision of the Act of Parliament—if I were entitled to judge of it. But it is a provision of the Act of Parliament, and therefore whether proper or not it must be enforced. The condition of the railway company being permitted to maintain their line of railway across the public road, and to carry their traffic across it, is that they shall fence the road off the railway at either side of it by a gate, to be kept as a rule shut, and to be opened only when traffic presents itself to pass, and then only when it may be permitted to pass with safety. That is the import of the statutory provision which is the condition of the railway company carrying on their traffic there. Mr Cunningham states in his evidence that their traffic and the traffic on the road are so great as to make obedience to the Act of Parliament impossible. I cannot accept that, because the railway company's traffic must be regulated so that it can be conducted conformably to the statute under which it is permitted; and I am not surprised (I should have been surprised if the verdict had been otherwise) that the jury attached fault, and grave fault, to the railway company for not having on this occasion a closed gate between this young woman and the danger through which she met her death. The very case of the railway company is that it was dangerous to cross at that time. That is their case—obviously dangerous to cross at that time; but the provision of the statute is that there shall be a gate across the road whenever it is dangerous to cross, and therefore there should not have been the gatekeeper's word, but a closed gate, between the young woman and the danger which killed her, and it was in violation of the statute, and through the violation of the statute, that there was not. I repeat, therefore, that I should have been surprised had the jury taken another view. To say that the traffic is so great that it would be hard to open and shut the gate is merely to

say that the danger is great. To have the gates open just exactly as if they were not there—that is to say, never shut—and leave the public to take care of themselves and to look after their own safety, with a stream of traffic such as Mr Cunningham describes, is entirely out of the question. It cannot be; and I desire to say—I think it my duty to say—that I think the Court would on the application of any person interested—and very little interest would suffice in such a matter—order the statute to be observed here. It might be ordered by interdict—interdict the railway company from allowing that gate to stand open, or to be opened otherwise than when traffic presented itself to cross, and when it might be permitted to cross with safety. I have no hesitation in saying that on the application of any person interested, even using the road—for very little interest would suffice in such a matter—or upon an application of the Lord Advocate, as the general guardian of the public safety both of those travelling on the line and using the road, such an order would be made, and the clause of the statute, almost boastfully stated to be habitually neglected, enforced. It was said that if the gate had been kept shut there would have been a wicket for foot-passengers which they could have opened. In the first place, there is no wicket there—none; there is no such thing as a wicket there. There is no occasion for one. It would be wrong to have one, for there is a special provision of the Act of Parliament that a footbridge shall be provided for foot-passengers, and it is provided, and no wicket is required for foot-passengers; and a wicket almost inviting them to neglect the safety of the footbridge would be a wrong thing, and there is none such there. Therefore we are presented with the simple case of the provision of the Act of Parliament being deliberately violated, so that the closed gate which ought to have been between this young woman and the danger which killed her was not there. And then, I am not surprised, I must confess, that the jury, although they might have listened to it, did not give effect to the argument that the railway company were entitled to substitute the verbal warning of the gatekeeper for the closed gate. I am not at all surprised that the jury rejected that, and held that there should have been a closed gate between her and her companion, who were together, and the danger by which she met her death. And now, with respect to contributory negligence, that is eminently a question for the jury. But if the negligence is very grave, very gross, on the part of the defender, in such a case it is not according to one's experience that juries are very strict to exact great self-possession and much precaution on the part of the sufferer as the condition of obtaining compensation for injury. What was alleged here was that the danger was obvious, and that warning was given. It was submitted I suppose to the jury that if the young woman's companion rushed into danger in a way which he should not have done, being a little excited by drink, had there been a gate between them and the railway, as there ought to have been at that time when it was dangerous, he could not have got into the position that alarmed her, and that if she in her alarm rushed after him and tried to stop him, and was caught, that was not a case in which it would be reasonable for them to impute to her culpable neglect of her own safety which would have precluded her if she lived, or those who survived her, she having died, from recovering compensation from the railway company; and I cannot doubt for a moment that if the jury took that view of the fact they would have negatived contributory negligence. I should almost have expected that even if they took the view that she had held on to her companion and tried to run across with him—even not trying to pull him back—I should not be at all surprised if they negatived contributory negligence. I do not say that I should have been greatly surprised if they had affirmed it in that view, but it is sufficient that they having negatived it, I am not of opinion upon the evidence that there is a case for disturbing their judgment or the conclusion at which they arrived.

But this brings me to the bill of exceptions, and I repeat before adverting particularly to the exceptions that I think the question of contributory negligence was a simple question for the jury—a question of fact in this sense, that it was a question for their judgment upon the facts proved before them, whether they would impute such negligence as would bar recovery or not, and that there is no law to interfere with them in the exercise of their judgment upon that question. But both parties seem at the trial to have regarded it otherwise, and to have persuaded the learned Judge to regard it otherwise; because the pursuer seems to have asked the learned Judge to direct the jury as a matter of law that if she did not go there in order to cross from the one side to the other, but in order to rescue the man from what she feared might be almost certain death, and through alarm and her perturbed and excited state she became insensible to her own danger, then there was not contributory negligence. Now, I apprehend that the pursuer desired the learned Judge so to direct the jury in point of law—that it was a question of law. The defenders upon the other hand also regarding it as a question of law, and arguing it to the Judge, desired him to direct the jury that if she went upon the line in the face of a seen danger, then in point of law the pursuer was not entitled to recover damages, even though the object of the deceased was to save her companion—that is to say, that in point of law the jury were not entitled to take into consideration the object with which she was there. Now, I must say that I cannot be surprised that the parties arguing the case so to the learned Judge—that it was a question of law—he should have treated it so and given a direction. I think the direction which he gave was most in conformity, not as a matter of law, but as a matter of good sense, with the view which the jury were most likely to take. But I think it was not a question of law. I should have been gratified if I had been relieved of this, which is the only serious difficulty which the case has presented to my mind. The view I take of it is this—if the jury thought that they could not impute culpable neglect of her own safety to her in the circumstances, rushing after her companion to try to bring him back—which is, I think, the view that they would most probably have taken—almost certainly—and the view which they would certainly take in the case of a mother pursuing her child in the face of a seen danger, and meet-

ing with her death in consequence—then it was a pity to give them any direction to that effect in point of law, and peril the case. It was superfluous. They would take that view as a matter in their own department. If, upon the other hand, they thought that she, although her object was to pull back her rather tipsy sweetheart, was acting with gross rashness and recklessness in the circumstances, and that she was guilty of contributory negligence—had acted really as I suppose a young woman in pursuit of a tipsy sweetheart may act with recklessness of her own safety—I could not assent to this, that the jury are to be told, "although that is your opinion, yet in point of law you are not entitled to form it if she wanted to rescue him, for then the law is that she was not negligent, however much you may think she was." I do not think that was right; and therefore if there had been an exception to this, upon the ground that it was a matter for the judgment of the jury, and not for the determination of the Judge as a question of law, I should have felt bound to sustain the exception. But in the first place it was not argued to the Judge that it was not a question for him, but a question to be submitted to the jury as a question for them. The argument was, "it is a question for you, but you ought to decide that question the opposite way." And then there is no exception taken to it; and there is an exception taken to the learned Judge's most proper refusal in my opinion to direct the jury that the law was the opposite of that. Now, upon the motion for a new trial I should overcome any mere formal difficulty in the way of the exception being taken in order to do justice in the case. But I feel no such obligation here; and therefore I am prepared for my own part to dispose of the bill of exceptions by holding that there was no exception taken to the direction which the learned Judge informs us he gave, and which I think erroneous, and that the direction which he refused, and his refusal to give which is excepted to, was an improper direction, and very rightly refused by him. Upon the whole matter, therefore, I should state it as my opinion that the bill of exceptions ought to be refused, and that the rule to shew cause why a new trial should not be granted ought to be discharged.

Lord Craighill—I agree in all that Lord Young has said, and in the judgment which he has proposed.

Lord Rutherfurd Clark—I am of the same opinion.

The Court discharged the rule, disallowed the bill of exceptions, and applied the verdict, with expenses.

Counsel for Pursuer—W. Campbell—W. E. Fraser. Agent—William Considine, S.S.C.

Counsel for Defenders—R. Johnstone—Graham Murray. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, July 6.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EDWARD (BAXTER'S EXECUTOR) *v.* CHEYNE AND ANOTHER (BAXTER'S TRUSTEES).

Husband and Wife—Accounting—Wife's Separate Estate—Proof—Implied Consent.

The income of a share of residue to which a wife was entitled under her brother's trust-settlement, exclusive of the *jus mariti* and right of administration of her husband, was paid by her husband, who was one of her brother's trustees, and latterly the sole trustee from the year 1866 to 1881, when both spouses died, into the separate bank account of the husband. The husband predeceased his wife, leaving a settlement disposing of his whole estate which the wife had signed as a consenter. The wife left no operative settlement. In an action at the instance of the wife's executor-dative against the trustees under the husband's settlement the pursuer called on the defenders to account for the income of the wife's separate estate during the period mentioned. This income survived as an accumulation at the death of the husband, and had not been spent during the subsistence of the marriage. *Held* that the same rules of strict accounting did not apply between husband and wife which applied between strangers; that it was a fair inference from the facts in evidence that the wife knew and assented to the manner in which her income was dealt with; and that therefore her representatives had no claim, as the accumulated income was disposed of by the husband's settlement which the wife had adopted as a settlement of their joint estate.

This was an action at the instance of Allan Edward, executor-dative *qua* one of the next-of-kin of Mrs Margaret Edward or Baxter, widow of Dr John Boyd Baxter, against John Cheyne and Thomas Watt Thoms, trustees and executors of Dr Baxter, for an accounting of their whole intromissions of Dr Baxter with the trust-estate of the late David Edward, merchant and flax-spinner in Dundee, and for payment of £20,000, or of such other sum as shall be found due.

Mrs Baxter was a sister of David Edward, who had died on 22d December 1857 leaving a trust-disposition and settlement under which Mrs Baxter had a liferent interest in a share of the residue of his estate, exclusive of the *jus mariti* and right of administration of her husband Dr Baxter. The trustees who accepted office under the settlement were the truster's brothers Alexander and Allan Edward and Dr Baxter. On 31st December 1857 Dr Baxter was appointed factor on the trust-estate, with full power to uplift all sums, grant discharges, and make payments under the supervision of the trustees. Alexander Edward died on 29th March 1863, and Allan Edward on 16th June 1874. Dr Baxter continued to act as factor or sole trustee down to the date of his death on 4th August 1882. Mrs Baxter died on 15th October 1882; from the date of her husband's death to that of her own she was unable to attend to matters of business.