and an affidavit was lodged to that effect in terms of the Act of Sederunt of 16th February. She was accordingly examined on commission, and the evidence so taken was used at the trial. The case was decided in favour of the defenders, and the pursuers were found liable to them in the expenses of process as taxed by the Auditor. The pursuers objected to the Auditor's report on the defenders' account that he had improperly allowed (1) the expense of a doctor's attendance on the defender in order that an affidavit of her inability to appear at the trial might be given; and (2) the expense of two copies of the report of the commission containing the evidence of the same defender, whereas the expense of only one copy should have been allowed.

The Court *repelled* the objections.

Counsel for Pursuers—Salvesen. Agent—Andrew Newlands, S.S.C.

Counsel for Defenders—M'Clure. Agent—R. Addison Smith, S.S.C.

Wednesday, November 7.

SECOND DIVISION.

[Sheriff of Ayr.

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

Reparation — Master and Servant — Railway — Dangerous Occupation — Reasonable Precautions for Safety of Railway Servants—Contributory Negligence.

A surfaceman was engaged in clearing away rubbish from both the lines in a railway station, when he was run over by a shunting engine which was proceeding up the down line. He sued the railway company for damages, on the ground that, looking to the dangerous nature of his employment, they ought to have taken special precautions to warn him of any approaching danger. The evidence showed that the shunting operations were of an ordinary character, and that they were being carried out in the usual way. It was not proved that special precautions were taken by other railway companies in similar circumstances. The Court *assoilzied* the defenders, *holding* (1) that the pursuer had failed to prove fault on the part of the defenders; and (2) that, assuming fault on the part of the defenders to have been proved, the pursuer had by his own negligence materially contributed to the accident by stepping on to the down line without looking to see that it was clear.

Upon 11th July 1893 George Adams, a surfaceman in the employment of the Glasgow & South-Western Railway Company, was ordered by the foreman under whom he worked to clear away rubbish from between both the up and down lines in the railway station at Ayr. While engaged in this work Adams was knocked down by an engine, which was proceeding tender first up the down line.

In November 1893 Adams raised an action of damages in the Sheriff Court at Ayr against the railway company. The action was laid both at common law and under the Employers Liability Act.

The pursuer averred that the accident had been caused by the defective system followed upon the defenders' line, which allowed the engine to proceed along the wrong line; that "it was the duty of the defenders while the pursuer was engaged in his work to have had some person watching the line so as to warn the pursuer of any approaching danger, especially from the wrong direction;" and that it was the duty of the driver in charge of the engine, or the servant under whose orders he was acting, to see that the line was clear, and to whistle or to give intimation of the approach of the engine, but that there had been negligent and culpable failure to take these precautions.

The defenders denied fault, and averred that the accident had been caused by the pursuer violating rule 347 of their rules and regulations, which was in these terms—"When a train is approaching, platelayers and other men at work on the permanent way must not remain on any running lines, nor between them if the spaces are less than 8 feet, but must at once move clear of all lines, unless they can distinctly see that they are in a position of safety and in no danger from another train approaching them unobserved. The men must stop in the position they have taken up till the train has cleared a sufficient distance to enable them to see that no train is approaching on the other lines before they re-cross the rails."

Proof was allowed. The material results of the evidence were as follows:—In accordance with the orders which he had received the pursuer was engaged in clearing away rubbish upon the up line when the 7·20 train from Glasgow came in. He was working alone. The down line was blocked at both ends of the station by signals, and it was the custom of the Glasgow & South-Western Railway and of other railways to allow engines to travel along such blocked lines in either direction as the exigencies of the traffic required. The engine which struck the pursuer went along the line in the same way every morning, after taking in water, as it did on the day of the accident, in order to pick up some carriages upon the up line. Before starting from the water column the engine-driver looked along the down line and saw that it was clear. He then went to the platform side and kept a look-out on that side of the engine. The shunting porter was standing upon the footplate on the other side of the engine, and according to his own state-

ment kept a look-out on that side. Neither of these men saw the pursuer upon the down line before he was struck. It was not the custom of either the Glasgow & South-Western Railway Company or any other railway company to send a man to watch while a surfaceman was engaged in such work as the pursuer was doing. The distance from the point from which the engine started to the place where the accident occurred was about 350 feet. The engine was going at a speed of from four to five miles an hour.

The pursuer deponed—"When the 7·20 train was coming past the signal-box I crossed from the up line on to the down line. I saw nothing on the down line when I crossed on to it. I could see as far as the water column, and looked in that direction. I did not see Scott's engine there, and saw nothing approaching there. When I got on to the down line I was gathering up waste and paper. I heard no engine approaching, nor did I get any warning nor hear any whistle. I have no recollection of the engine knocking me down. I was between two and three minutes on the down line before the engine struck me. I am sure of that. If there had been any whistle sounded I would have heard it.

On the other hand, a porter, Watson, who had witnessed the accident, deponed that he had seen the pursuer on the up line immediately before the 7·20 train came in; that, in order to get out of the way of this train, he crossed on to the down line, when the 7·20 train was almost upon him, that his head was turned up the line, and that he did not look down it before stepping on to it, and that as he was making towards the platform Scott's engine struck him on the back.

Upon 20th February 1894 the Sheriff-Substitute (PATERSON) pronounced this interlocutor—"Finds that on the 11th day of July 1893 the pursuer, who was a surfaceman in the employment of the defenders, was severely injured through being knocked down and run over by an engine and tender belonging to the defenders on the down line of rails between the platforms at Ayr station; That the pursuer has failed to prove that he was so injured through causes for which the defenders are responsible, either at common law or under the Employers Liability Act 1880: Therefore assoilzies the defenders from the conclusions of the action."

On appeal the Sheriff (BRAND) adhered.

The pursuer appealed, and argued — There was fault on the part of the company at common law, on account of the defective system they employed. In this case the pursuer was engaged upon a dangerous business which necessitated his going upon both the up and the down line. The company were aware that, in carrying on the work within a large station such as Ayr, engines would travel upon the different lines in directions opposite to that which an ordinary train running upon each line would take; it was therefore their duty to take special precautions for the safety of the pursuer, such as having a man with a flag who could warn trains or engines going the wrong way that the pursuer was there—*Sword* v. *Cameron*, February 13, 1839, 1 D. 493; *Cairns* v. *Caledonian Railway Company*, March 19, 1889, 16 R. 618; *M'Guire* v. *Cairns & Company*, February 28, 1890, 17 R. 540. Under the Employers Liability Act the gaffer was in fault in sending the pursuer, who was bound to conform to his orders, to do this dangerous work alone. Surfacemen were always employed in squads, so that one of them could keep watch for approaching danger and warn the others. At all events, the engine-driver, being in charge of the locomotive engine, was in fault in not seeing the pursuer upon the line and giving intimation to him of danger by sounding his whistle. The pursuer was not guilty of contributory negligence if it was proved that the railway company were in fault, either from defects of their system or from the negligence of their servants, for whom they were responsible under the Employers Liability Act. The pursuer was employed in a dangerous work, and if the railway company was in fault it could not escape liability on the ground that the pursuer, if he had been more vigilant, would have seen the danger and might have escaped it by his own adroitness. The primary responsibility was on the defenders. Persons in dangerous work were always specially protected—*Russell* v. *Caledonian Railway Company*, November 5, 1879, 7 R. 148; *Clark* v. *Petrie*, June 19, 1879, 6 R. 1076; *M'Dermaid* v. *Edinburgh Street Tramways Company*, October 24, 1884, 12 R. 15.

The defenders argued — There was no defect in the system. It had been the practice on the Glasgow and South-Western Railway and on all the large lines in Scotland to have this work done in the manner in which the pursuer was ordered to do it, and no accidents happened. This man had been engaged on the line for some time, and knew the practice of running shunting engines on the "down" line in an "up" direction, and he ought to have guarded against an engine coming on him. With respect to the negligence of the gaffer, he merely did what was the ordinary course of business in the station. The reason why the engine-driver did not whistle was not that he was negligent, but because the pursuer was not upon the line. He was hidden from the driver's view by the 7·20 train, and the real cause of the accident was that the pursuer jumped on to the down line without looking whether this engine, which was only 120 yards away, was in motion or not. In all the cases cited where exceptional precautions for the safety of the workmen had been taken, there were exceptional circumstances in the surroundings. Here everything was ordinary, and the pursuer had failed in ordinary carefulness—*Barnet* v. *Glasgow and South-Western Railway Company*, January 22, 1891, 28 S.L.R. 339.

At advising—

LORD JUSTICE-CLERK—The work going on at this station when the pursuer met

with his unfortunate accident, and the conditions under which the work was being carried on, were quite of an ordinary character. It seems to have been suggested in the Court below that something turned in favour of the pursuer on the fact that the engine in question, going tender first, was going upon what was called the wrong line, *i.e.*, it was proceeding in an opposite direction to that in which a train upon that line would usually go. That view, however, was not seriously pressed here, and rightly not, because in a station of this kind, between signals which protect the running on the main lines, engines must shunt, up and down, along any line that is suitable for their shunting at the particular moment, and must in doing so occasionally go in what would be the wrong direction for a train in course of ordinary running from station to station. In shunting it must of necessity go tender first in one direction. Now, the engine here was doing ordinary work of this kind—work which it did every morning. Certain carriages had to be brought to a particular spot, and the engine was going to bring them to that spot going at a slow rate of speed as it was shunting. The evidence in the case is that it was going at not more than four to five miles an hour, and that is a speed at which it does not appear that any special protection for persons engaged in working on the line is called for.

Well, the engine-driver, who looked before starting from the side of the engine next the six-foot way and saw that it was clear, went to the side of the engine next the platform so that he could keep a look-out on that side as it went along the platform. The shunting porter was keeping a look-out on the other side of the engine. Both of these men who were keeping a look-out say that if the pursuer had been on the line on which they were travelling when the engine left the water column, they would have seen him, and that is important, because however the accident happened, the Sheriffs are satisfied there was a good look-out being kept on the engine at the time it started.

If, however, either of these men failed to keep a good look-out, and did not see the man in time to warn him, it must have been the shunting porter, because he was looking out on the six-foot way side, from which the pursuer came, and if he failed to do his duty, the company would not be liable under the Employers Liability Act, because he was not the person in charge of the engine at the time.

The case of the pursuer is that he had been upon this line of rails for two or three minutes before the engine came down upon him, and that he had been engaged at his ordinary work of clearing refuse from the line. Something was urged on his behalf to the effect that a special man with a flag should have been sent by the company to give notice to the pursuer of approaching trains, and, if it had been the practice to have had a man on such occasions, the company would have been in fault if they had not sent a man for that purpose, but I do not think it has been proved that it was the practice on this railway or on any other to have a man with a flag, or other means of attracting notice, to give warning.

Then it was said—and several cases were referred to in support of the proposition—that special precautions ought to have been taken, but, as was pointed out, all these cases referred to accidents occurring where the surrounding circumstances were exceptional, and therefore where the officials were bound to take exceptional care for the safety of persons working under abnormal circumstances.

I think the true view of the case is that the pursuer came off the up line just in front of the 7·20 train, and passed on to the down line in front of the engine without looking to see that the line was clear. There is no evidence to the contrary but his own, and, while I do not impugn his good faith, or think that he is saying what he knows not to be true, it is quite possible, as was pointed out at the discussion, that after such a shock as he received he may have thought he had really done on that morning what he was in the habit of doing on other mornings at the same time. If that view is the right one, then it is impossible to hold that, even if he had proved the Railway Company to be in fault from their negligence—which I do not think he has done—he had not by his negligence contributed materially to the accident. By such contributory negligence he is barred from recovering damages.

LORD RUTHERFURD CLARK—I should not like to be taken as agreeing with all the grounds of judgment stated by your Lordship. I am, however, satisfied that there is no proof of fault on the part of the company, and I am also satisfied that the man's own negligence was the cause of the injury he suffered.

LORD TRAYNER—I agree with your Lordship in the chair.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute dated 20th February 1894: Therefore dismiss the appeal, and affirm the interlocutor appealed against: Of new assoilzie the defenders from the conclusions of the action, and decern," &c.

Counsel for the Pursuer—Salvesen—Hunter. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Respondents—D.-F. Sir Charles Pearson, Q.C.—Guthrie. Agents—John C. Brodie & Sons, W.S.