suffered nothing from being so ejected, and therefore I think the damages should be nominal. There seems to me to be no ground whatever for the allegation of personal violence.

LORD DEAS—With the exception of his finding as to the reduction of this warrant, I think the Lord Ordinary is right, and on that point I think we have no alternative but to reduce the proceeding.

But the facts being as they are, it does not follow that there should be any substantial damages. On the contrary, I think the nominal damages proposed by your Lordship are quite sufficient to satisfy all parties, and no further damages ought, in my opinion, to be awarded in the case.

LORDS MURE and SHAND concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuer Thomas Fairbairn against Lord Craighill's interlocutor dated 15th March 1878, Adhere to the said interlocutor in so far as regards the findings in fact: *Quoad ultra* recal the said interlocutor; Sustain the reasons of reduction; Reduce, decern, and declare in terms of the reductive conclusion of the summons: Find the defender liable in damages for the use of the illegal warrant now reduced; assess the same at one shilling sterling, and for which sum decern against the defender for payment to the pursuer: *Quoad ultra* sustain the defences, assoilzie the defender, and decern: Find no expenses due to or by either party."

Counsel for Pursuer (Reclaimer)—Smith—Lang. Agent—Daniel Turner, S.L.

Counsel for Defenders (Respondent)—Trayner—M'Kechnie. Agent—William Lowson, S.L.

Saturday, July 13.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HORN *v.* NORTH BRITISH RAILWAY CO.

Railway—Action of Reparation by Father for Damages in respect of Son's Death by Accident—Liability of Company issuing Through Ticket where Accident happened on Line of another Company.

A passenger travelling with a through ticket from Kirkcaldy to London, issued by and in the name of the North British Railway, was killed by an accident at Morpeth, in Northumberland, on the North-Eastern Railway portion of the line. His father brought an action for reparation in the Court of Session against the North British Railway Company, and the following was the issue sent to the jury:—"Whether . . . . the pursuer's son, while travelling as a passenger from Kirkcaldy towards London, in virtue of a ticket issued by the defenders, suffered injuries in his person, whereby he died, through the fault of the defenders," &c. The jury found that the death was caused "through the fault of the defenders," owing to certain defects upon the North-Eastern Railway. Upon a bill of exceptions to the charge of the Judge (Lord Gifford)—*held* (*diss.* Lord Ormidale) that upon the action as laid the fault of the North-Eastern Company's servants was the fault of the defenders, and that the pursuer was entitled to have compensation afforded him according to the law of Scotland, *i.e.*, the law of the place where the contract was made.

Observed—per the Lord Justice-Clerk (Moncreiff)—that such actions at the instance of a father where his son has met his death, or of a son where a father has, are not ordinary suits for patrimonial loss, and (approving the remarks of the Lord President (Inglis) in *Eisten* v. *The North British Railway Company,* July 13, 1870, 8 Macph. 980) that the liability arises out of contract, the true foundation of the right to sue being partly the nearness of relationship and partly the existence during life of a mutual obligation of support.

Opinion—per the Lord Justice-Clerk (Moncreiff)—that the law of the place of performance will regulate the incidents of a contract only (1) where it may be reasonably inferred that it was so agreed originally between the parties thereto, and (2) where there is what can be properly called a place of performance, which there cannot be in the case of a railway journey.

Reparation—Amount of Damages for Pecuniary Loss and Solatium in a Case of Death by Railway Accident.

A youth of twenty-four, who had had the active management of an extensive drapery business under his father, an old man and in frail health, and was paid £150 a-year therefor, was about to be made a partner under a deed of copartnery for ten years with his father, by which he was to get, in addition to the £150, the half of the profits of the business, which were estimated at £700 a-year, when he met his death by railway accident. In an action for reparation at his father's instance the jury awarded £550 as pecuniary loss, and £150 as solatium. In an objection taken to the first as excessive the Court *held* that it was not so unreasonably large as to call for their interference.

On 24th March 1877 Henry Horn junior was a passenger from Kirkcaldy to London, and purchased a through return ticket between those stations from the North British Railway Company. The ticket was issued in their name only. The train by which he travelled was timed to leave Edinburgh at 10.30 P.M. On the night in question it was rather late, but proceeded safely till it was passing a curve to the south of Morpeth station, in Northumberland, when it suddenly ran off the line. The result was that Henry Horn junior, among others of the passengers, was killed.

Henry Horn senior, the father of the deceased, then raised this action against the North British Railway Company concluding for £2000 as reparation for the injury he had sustained through the death of his son. He averred (Cond. 2) "On or about the 24th March 1877 Henry Horn junior was a passenger from Kirkcaldy to London under a contract with the defenders to convey him to London. The defenders accordingly gave to him a ticket issued at Kirkcaldy on said date by or on behalf of the defenders on payment of the legal fare, by virtue of which the pursuer's son was entitled to

travel, and the defenders undertook to convey him with due expedition and safety, from Kirkcaldy to London." After narrating the nature of the accident it was stated (Cond. 4)—"The deceased was a young man of twenty-six or twenty-seven years of age, active and industrious, and with a thorough knowledge of business. He had the sole conduct of the Kirkcaldy establishment" (the pursuer carried on business as a draper in Kirkcaldy and Dunfermline), "and acted as buyer for both businesses. The pursuer enjoyed the benefit of his said son's services, and had the prospect of continuing to enjoy the same mainly in respect of the relationship existing between them, and the said relationship materially affected the terms on which the pursuer enjoyed, and had the prospect of enjoying, the said services. The pursuer received a severe shock by the intelligence of his son's death, and he has suffered in his feelings, and has sustained, and will yet sustain, serious pecuniary loss and damage through the death of his said son, in respect of which he is entitled to compensation from the defenders to the extent of at least the sum sued for."

The journey from Kirkcaldy to London was performed on the lines of three different companies—(First) the North British as far as Berwick-on-Tweed, (second) the North-Eastern to York, and (third) the Great Northern. The accident took place on the part of the line owned by the North-Eastern Company, and the defence was that if it was due to fault the fault was on the part of that company, and that any claim which could arise to the pursuer must arise *ratione delicti.* The defenders, *inter alia,* stated —"(2) For the convenience of persons making the through journey to London from Kirkcaldy or other places on the defenders' system in Scotland the defenders arrange with the other railway companies over which the said journey extends for the sale of through tickets to London, and the defenders believe that the deceased Henry Horn purchased such a through ticket. The contract constituted by the sale of the said ticket was, as the said Henry Horn well knew, to be executed as regards the whole of the journey south of Berwick in England by the North-Eastern Railway Company and other companies subject to the law of England. The defenders did not, and do not, as the said Henry Horn well knew, own or take charge of the line to the south of Berwick; and he was well aware when he bought the said ticket that in so far as it entitled him to travel to the south of Berwick it was sold by the defenders merely as the agents for the North-Eastern Railway Company and other companies to the south. (3) According to the law of England no claim of solatium arises, or can arise, to the father or other relatives of a person killed as the said Henry Horn was killed upon a railway in England through the fault of a railway company or their servants. According to the law of England the pursuer can have no claim for damages against the defenders in respect of the death of his son unless by virtue of the provision of the Act 9th and 10th Victoria cap. 93, and under said provision it is necessary for the father or other relative of a person so killed to allege and prove that he during the lifetime of the person killed derived, and would if that person had remained alive have continued to derive, a pecuniary advantage from that person in consequence of his relationship, and not in respect of any contract between them."

The train to which the accident happened was a joint-stock train—that is, it was run by mutual arrangements between the three companies, and the carriages or some of them were joint-property. The engine at the time of the accident was a North-Eastern engine, and the engine-driver, stoker, and guard were North-Eastern Railway Company servants. The conductor of the train was a joint-servant of the three companies. By the North-Eastern Company's regulations each train was under the control of the head-guard, who instructed the engine-driver as to stopping, &c., the engine-driver regulating the running of the engine.

The pursuer's pleas-in-law were as follows:—"(1) The pursuer's said son having, while being conveyed as a passenger by the defenders as aforesaid, been killed through the fault of the defenders or those for whom they are responsible, and the pursuer having thereby suffered loss, injury, and damage, he is entitled to reparation as concluded for. (2) The contract of carriage being one entered into between the pursuer's son and the defenders they were bound to fulfil the same, and for any failure in doing so they are responsible, and are not entitled to throw their responsibility on other parties between whom and the deceased there was no contract."

The defenders pleaded, *inter alia*—"(2) The validity of the pursuer's claim falls to be determined according to the law of England, in respect that that claim could only arise *ratione delicti,* and that the accident occurred, and the fault from which it resulted was committed, in England. (3) *Separatim,* the validity of the claim falls to be determined according to the law of England, in respect that the contract under which the deceased was being carried was entered into for the purpose of being executed in England in so far as the carriage along the line of the North-Eastern Railway Company was concerned, and subject to the law of that country. (7) The action cannot be maintained, in respect that no grounds exist for rendering the defenders liable in damages according to the law of England."

The ticket had been issued by the defenders in terms of their obligations under two Acts of Parliament—the North British and Edinburgh and Glasgow Railway Companies Amalgamation Act of 1865 and the Caledonian and Scottish Central Railways Amalgamation Act, also of 1865—under which they were bound to give the East Coast Companies all facilities for the convenient working or development of the "East Coast traffic," including through booking, through tickets, and through carriages and waggons, &c.

The following issue was adjusted by the Court (adhering to that settled by the Lord Ordinary, Rutherfurd Clark) for the trial of the cause—"Whether at or near Morpeth station, on or about the 25th day of March 1877, the pursuer's son Henry Horn junior, while travelling as a passenger from Kirkcaldy towards London, in virtue of a ticket issued by the defenders, suffered injuries in his person whereby he died, through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages laid at £2000."

The trial took place on the 25th and 26th of March 1878 before Lord Gifford, who in the course of his charge directed the jury in point of law as follows:—"1. That fault of the servants or employees of the North-Eastern Railway Company,

which the jury must think caused the death of Henry Horn, was in the sense of the issue the fault of the defenders. 2. That if the death of Henry Horn junior was caused by the fault of the defenders, the jury in assessing the amount of damages were entitled to award to the pursuer not only compensation for any pecuniary loss he has suffered through the death of his son, but also solatium for wounded feelings." Counsel for the defenders excepted to both these directions.

The defenders' counsel then asked Lord Gifford to give the following directions to the jury:—"1. That fault of the North-Eastern Railway Company or their servants, which the jury may think caused the death of Henry Horn junior, was not in the sense of the issue the fault of the defenders. 2. That if the jury are satisfied upon the evidence that the ticket in respect of which Henry Horn junior was travelling was issued to him under the obligations imposed upon the defenders by the North British and Edinburgh and Glasgow Railway Companies Amalgamation Act 1865, and that the death of Henry Horn junior was not caused by fault on the part of the defenders or their servants, the defenders are entitled to a verdict even if the jury should be satisfied upon the evidence that the said death was caused by fault on the part of the North-Eastern Railway Company and their servants. 3. That the pursuer's right to reparation must be determined according to the law of England, not according to the law of Scotland. 4. That if the jury are satisfied upon the evidence that the death of Henry Horn junior was not caused by fault on the part of the defenders or their servants, but by fault on the part of the North-Eastern Railway Company or their servants, the question of the pursuer's right to reparation must be determined according to the law of England, not according to the law of Scotland. 5. That assuming the pursuer to be entitled to reparation, the damages must be measured according to the law of England, not according to the law of Scotland. 6. That if the jury are satisfied upon the evidence that the death of Henry Horn junior was not caused by fault on the part of the defenders or their servants, but by fault on the part of the North-Eastern Railway Company or their servants, the damages, assuming the pursuer to be entitled to reparation, must be measured according to the law of England, not according to the law of Scotland"—All of which directions his Lordship refused to give to the jury, to which ruling counsel for the defenders excepted.

The jury found—"That the death of Henry Horn junior was caused through the fault of the defenders owing to the defective state of the North-Eastern Railway at or near Morpeth station, and the deficient cant on the curve of the line there, together with the train going at too great a speed for the cant; therefore find for the pursuer, and assess the damages at £700, of which sum they assess £550 as compensation for pecuniary loss occasioned by the death of the pursuer's son, and £150 as solatium for wounded feelings, and with liberty to the defenders to move the Court to reduce the damages to £550 in case the Court are of opinion that in point of law the pursuer is not entitled to solatium, but only to compensation for pecuniary loss occasioned by the death of his son."

The defenders then proposed the above exceptions, the bill was signed by Lord Gifford, and was argued before their Lordships of the Second Division. The defenders also asked for a new trial on the ground of excessive damages.

Argued for defenders (in support of bill)—This was not an action founded on contract, but purely *ex delicto*, and therefore must be directed against the persons that did the harm, and be tried by the law of England. If tried by English law, the action could only be founded on Lord Campbell's Act, and must under it be directed against the persons who committed the delict, and further, in England there was no claim for solatium. Even admitting that there was here a contract, the law of the place of performance must govern it, and besides, if there was a contract, how was the pursuer in right of it; he had no interest in suing for the specific performance of it—how could he claim damages for the breach of it? The result of the cases was (*Eisten* and *Neilson's* cases, &c., quoted *infra*) that a father could not sue for damages on account of the death of his son, and on that ground the action ought to be dismissed. The defenders were here compelled by statute to give through tickets, and therefore they could not be held to be liable except for the portion of the journey performed upon their own line. The statute could not compel liability. This was a different case from the carriage of goods. It had been suggested that although this was not a claim founded on a contract, it was one founded on delict following on a contract; but in this case was the contract such a one as to make the defenders liable? The North-Eastern Railway who committed the delict were in no sense the agents of the defenders; on the contrary, the defenders were the compulsory agents of the North-Eastern for the sale of tickets, and the action here was brought against the agents when the principal was in the fault.

Authorities—*Eisten* v. *North British Railway Coy.*, July 13, 1870, 8 Macph. 980; *Mytton* v. *Midland Railway Company*, 4 H. and N. 621, and 28 L.J., Exch. 385; *Greenhorn* v. *Addie and Miller*, June 13, 1855, 17 D. 860; *Goodman* v. *London and North-Western Railway Coy.*, March 6, 1877, 14 S.L.R. 449; *Ferus* v. *North British Railway Company*, July 24 and 25, 1872, 9 Scot. Law Rep. 652; *Marshall* v. *York, &c., Railway Company*, 11 C.B. 655, 21 L.J., C.P. 24; *Tattan* v. *Great Western Railway Company*, 29 L.J., Q.B. 184; *Austin* v. *Great Western Railway Company*, L.R. 2 Q.B. 442; *Blake* v. *Great Western Railway Company*, 7 H. and N. 987, 31 L.J., Exch. 346; *Buxton* v. *North-Eastern Railway Company*, L.R. 3 Q.B. 549; *Thomas* v. *Rhymney Railway Company*, L.R. 5 Q.B. 226, 6 Q.B. 266; *Phillips* v. *Eyre*, L.R. 4 Q.B. 225, 6 Q.B. 1, 38 L.J., Q.B. 113; *Scott* v. *Lord Seymour*, 1 H. and C. 219, 31 L.J., Exch. 457; *Mostyn* v. *Fabrigas*, 1 Smith's Leading Cases, 658, Coup. 161; *Robertson* v. *Burdekin*, November 14, 1843, 6 D. 17; *The Peninsular and Oriental Steam Navigation Company* v. *Shand*, June 22 and 23, 1865, 3 Moore's P.C. Reps. (N.S.) 272; *Lloyd* v. *Guibert and Others*, November 27, 1865, 35 L.J., Q.B. 74; *Young* v. *Barclay*, May 27, 1846, 8 D. 774; *Neilson* v. *Rodger*, December 24, 1853, 16 D. 325; *Alton and Another* v. *Midland Railway Company*, June 1, 1865, 34 L.J., C.P. 292; Addison on Torts, 505; Hodges on Railways, 633; Story's International Law, 280-305; Westlake's International Law, 215.

Argued for pursuer—The word delict was here

totally inapplicable. There was a duty to perform arising out of a contract, and the defenders had failed to perform it, and were therefore liable. It was a preposterous contention to say that the law of a contract of carriage was to change with the countries that might be passed through. Although the defenders were compelled by Act of Parliament to give through tickets, that did not remove their responsibility for safe carriage. The pursuer had suffered pecuniary loss by the death of his son, and he had also suffered in his feelings, and the common law of Scotland entitled him to reparation.

Authorities—*Collins* v. *Bristol and Exeter Railway Company*, February 20, 1856, 25 L.J., Exch. 185, and 11 Exch. 790; *Muschamp* v. *Lancashire and Preston Railway Company*, 8 M. and W. 421; *Metzenburg* v. *Highland Railway Company*, June 25, 1869, 7 Macph. 919; *Collett* v. *London and North-Western Railway Company*, May 6, 1851, 20 L.J., Q.B. 411; *The "Halley,"* June 17, 1868, 2 L.R., P.C. App. 193; *Callendar* v. *Milligan*, June 20, 1849, 11 D. 1174; Guthrie's Savigni, 205.

At advising—

Lord Justice-Clerk—In this case we propose to deal to-day only with the bill of exceptions. The motion for a new trial will come to be afterwards considered.

The son of the pursuer was killed in the course of a journey from Kirkcaldy to London by the North British, North-Eastern, and Great Northern lines of railway. The accident which caused his death took place at Morpeth, on the North-Eastern line. He was travelling with a ticket issued by the North British stationmaster at Kirkcaldy in the name of that company only, and which bore to be a voucher for conveyance from Kirkcaldy to London. The jury found that the death of Henry Horn junior, the pursuer's son, was caused by the fault of the defenders, and they mention two specific causes which led to the accident. They accordingly found for the pursuer, and assessed the damages at £700; and they divided that sum into £550 as compensation for pecuniary loss, and £150 as solatium for wounded feelings.

In the course of the trial the presiding Judge—Lord Gifford—had occasion to lay down two propositions in point of law, which are the subject of the present bill of exceptions. These two propositions were—First, That fault of the servants or employees of the North-Eastern Railway Company, which the jury may think caused the death of Henry Horn, was in the sense of the issue the fault of the defenders;" and the second was—"That if the death of Henry Horn junior was caused by the fault of the defenders, the jury in assessing the amount of damages are entitled to award to the pursuer, not only compensation for any pecuniary loss he has suffered through the death of his son, but also solatium for wounded feelings." The defenders excepted to these two rulings, and they asked the Judge to lay down six other propositions. I need not go over these in detail, because in truth the whole subject-matter of these propositions is raised by the two rulings in point of law to which exception was taken. The Judge refused to give the directions that were required of him, and exception has also been taken upon that.

Now, these exceptions undoubtedly raise some questions of very considerable general importance. In regard to the first of them, viz., that the servants of the North-Eastern Company in regard to this matter must be held as in a question with the pursuer to have been the servants of the North British Company, I am of opinion that the law laid down by Lord Gifford is right. If an action had been brought by Henry Horn junior himself—if he had survived and had brought an action for injuries received on this occasion—I have no doubt that in a question with him the servants of the North-Eastern Company must have been considered as the servants of the North British Company with whom his contract was made. The latter company had contracted to convey him from Edinburgh to London, and the officials of the North-Eastern Company were, as far as he was concerned, merely the agents by whom the contract was in course of being fulfilled. Indeed, but for the pleas founded upon the Railway Companies' Amalgamation Act, which I shall afterwards consider, this was not disputed. It seems to follow from this that when the same fault in regard to the same contract, followed by the same result, is made the subject of an action at the instance of the father of the deceased, the legal relations of those whose fault caused the death of the deceased must be identical. It is said, however, that the father was not a party to the contract, and could not sue either for implement or for injury, and that is quite true; but this is not an action of that nature. It is an action for a wrong done to the father by reason of a fault committed by the defenders in the course of the execution of a contract with the son. If that fault and its consequences give rise to an action by the father, it must needs be the fault of the defenders, and they are responsible for it.

It is true that the father sues here in his own right and for his own loss, but the action is not an ordinary suit for patrimonial injury. The same loss which is libelled here, or part of it, might have been sustained by a collateral relation or by a stranger, but it would have conferred no right of action. Moreover, it is only because the son, if he had survived, would have had a right of action against the company that the father was entitled to sue the same persons in respect of the same act. So much is this the nature of the claim by a parent for the loss of his child, or a child for the loss of a parent, that when this principle of liability was introduced into the law of England by Lord Campbell's Act it was expressly enacted that an action by the father or the wife or child of the deceased should be brought against the same parties who would have been liable to the deceased had he survived. In our law, in which the principle has been long recognised, although not strictly a derivative or representative right, the title of the father is a corollary or adjunct to the primary right of the deceased, and although differing in its incidents has and must have the same foundation.

Now, I do not think it is necessary to go through the authorities in detail that were quoted to us in the very elaborate argument from the bar. The cases that were referred to in the English Courts indicate that the principle that I have now mentioned, viz., that there may be a claim depending on contract, and yet not depending on the contract itself, has been recognised in more

than one case; and the passage which was referred to in Addison on Torts shows that it is at all events not unknown to the English practice. But I very much concur in the views that were laid down in the recent case of *Eisten* v. *The North British Railway Company*, 8 Macph. 980, and especially by the Lord President in that case. He seems to me to point at very much the same view as I have now shortly indicated, and as the case was so entirely similar in its facts, with one exception, I shall conclude what I have to say on that matter by simply reading a passage or two from his opinion.

That was an action at the instance of the sisters of a person who, having taken a ticket from Glasgow to London, was killed at Thirsk, near York, on the North-Eastern line. There was no objection taken to the competency of the action, but the objection was taken to the title of the pursuers, and the Lord President says (p. 989)—"The fault on which the action is laid was committed by a servant of the North-Eastern Railway Company, for whom the defenders are answerable; and the defenders are answerable for the North-Eastern Railway Company, not because of being answerable for the delict of that company, but because the contract of carriage between Mr Eisten and the North British Railway Company implied that the North British Railway Company was to carry him safely to the end of his journey, which involved travelling over part of the line of the North-Eastern Railway Company. The liability of the defenders rests on contract more properly than on delict." And then, after some further observations to show that the law of assythment is not truly, now at all events, involved in questions of this kind, he goes on to say this—"It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination our law has held that a person standing in one of these relations to the deceased may sue an action like this for solatium where he can qualify no real damage, and for a pecuniary loss in addition where such loss can be proved." Now, that being the nature of the claim, and it being one truly depending on the primary obligation to the son, I am of opinion that the ruling is right, that this claim cannot be dissociated from the original and primary wrong, and that if the servants of the defenders caused the death of the deceased they also caused the injury to the father.

Before going to the second exception, in regard to the right to claim solatium, I must deal with the question that has been raised on the Amalgamation Act between the North British and Edinburgh and Glasgow Railway Companies of 1865. The objection, as I understand it, is this—It is admitted that if this had been a voluntary contract on the part of the North British Company, and the ticket had been given by them without any statutory obligation, that would have formed a Scotch contract prestable by the North British Company alone in a question with the customer, and would therefore have rendered the North British Company liable to the party to whom their failure took place. But it is said that this is otherwise when they were by the terms of the Amalgamation Act compelled to grant this through ticket although they were not the proper debtors in that obligation, and that the effect of the provisions in the Act of Parliament is that the North-Eastern Company became the true debtors in the obligation, and that at all events the North British Company can be liable no further than their line goes. I am utterly at a loss even to appreciate the way in which this result is arrived at, for if the Act of Parliament compelled the North British Company to enter into this contract, I cannot see that it can in the slightest degree modify the contract itself with the third party with whom they made it. It no doubt imposes an obligation and burden on the North British Company in a question with the North-Eastern and the Great Northern Companies, but how that can affect the incident or nature or essence of the contract itself, or the obligation expressed in it, I have been entirely unable to understand. But it is not easy to put the thing so strongly as that, because this Act of Parliament is a local and personal Act, passed on an application to Parliament with reference to agreements made between these companies themselves. These agreements were entirely voluntary. They need not have been entered into unless the company had been prepared to enter into them, and therefore I can look upon this Act of Parliament as nothing but a statutory contract between these railway companies, with which the public have nothing whatever to do. This contract created by the ticket granted by the authority of the North British Company at Kirkcaldy bound them just as effectually as if there had never been an Amalgamation Act, and therefore my opinion on the first of these exceptions is in no way affected by that Act.

The second exception raises a question of very considerable general interest, or which might be so if the circumstances under which it arose were such as to give it weight, and that is substantially this—That because Henry Horn was killed in England on the North-Eastern line the right of the father to recover here must be measured by his right to recover in England—that is to say, must be measured by Lord Campbell's Act, and that he is not entitled therefore to payment in name of solatium, because under Lord Campbell's Act no such payment would be allowed. I think that the whole argument on this matter proceeds upon a fallacy. The ground on which it is stated has not been very clearly distinguished. Whether it is the place of performance that is founded on, or the *locus delicti* that is founded on, was not made very clear, but, however, the argument is substantially maintained on this ground, that damages must be regulated by the place of performance, and that as the place of performance was London, as I understand, or at all events in England, and as the *locus delicti* was in England, the measure of damage must be regulated by that. I think that this proposition embraces a great number of fallacies.

In the first place, the rule by which the law of the place of performance is applied to the incidents of a contract is an exception from the general rule—that is, that the place of the contract is the place where it is made; and it is not an exception which by any means is universally applicable; it is only applicable where it may

reasonably be inferred that the parties in contracting have in view the law of the place of fulfilment of the contract. And in addition to that there are many differences between the laws of reparation in different countries, which makes it impossible to apply this proposition in regard to the law of the place where a contract is to be performed. In Guthrie's Savigni there are many illustrations of that doctrine.

But, in the second place, there is no place of performance in a contract of this kind by which any such matter can be regulated. Is the place of performance London? Clearly not. The execution of the contract was to be completed there, but the contract was to be executed during the whole course of the journey over the line. The law of one place was not considered more than another. According to the view that is suggested, the law of England would have ruled if the accident had taken place at Dunbar, and that was scarcely maintained. This is not a case where there is any ground for thinking that it had been designated by the parties that the law of the place of performance is to rule, and there is also this further objection, that the places of performance vary.

On the other hand, the *locus delicti* clearly is not the law that is to regulate—that is to say, the place where the contract was broken is not to regulate the law which is applicable to it. If you had a contract from Southampton to Bombay, it might chance that the ship was wrecked in the Red Sea, but I do not see how the proposed doctrine of law could readily apply in such a case.

And therefore I am of opinion, in the second place, that this is not a case where the law of the place of performance can possibly rule; and indeed the case of *Shand* v. *The Peninsular and Oriental Company* in the Privy Council proceeded precisely on the ground that if the law of the place of the contract was intended to regulate, as the performance was to be throughout various countries and places, it was impossible to say that the law of one of these was contemplated by the parties as regulating the incidents of the contract.

Such is my opinion on the general question, but here I am quite satisfied that the law of the place of remedy is the true principle applicable to this particular case. The question is, Whether solatium is to be added to or made part of the damages to be awarded by the jury in an undoubtedly well-laid and competent action of damages. I think that is entirely for the Courts of the country in which the action is brought, and it is plain enough that otherwise these cases could not be worked out satisfactorily. If an action had been brought in England for an accident taking place in Scotland under a North-Eastern contract, according to the view that was argued to us, the solatium should be awarded by the English Courts under Lord Campbell's Act; but we know that under Lord Campbell's Act solatium cannot be awarded. Therefore the law which is contended for could not possibly be applied. In the same way, in the case quoted to us from the English books, where an assault having taken place in Naples the parties made a claim in the English Courts, Mr Justice Wightman held that the law of England must regulate, for this reason that the remedy granted by the law of Naples was entirely different. If two Neapolitans in London had brought their suit in the Courts of Naples, the Courts of Naples would not have entertained an action of damages, for that is against the principle of their law. They would have said, We have no jurisdiction, but we will give you your criminal remedy which the law of Naples would have given if the cause of action had arisen there. Therefore, on the whole matter, I think this is simply a question of what elements are to go to the damages to be recovered by the father. I think that is a question for the Courts of this country, and I think the verdict on this subject also was right.

I do not think there is anything else embraced in these exceptions upon which it is necessary that I should make any observations. The ground is varied in expression in each of them, but I think substantially I have gone over the whole of it.

On the whole matter, I am of opinion that the law laid down was correct, and that the bill of exceptions must be refused.

Lord Ormidale—The verdict in this case has been challenged by the pursuer, and its validity depends upon whether the rulings of the learned judge who presided at the trial are or are not sound in point of law. This question has been raised for the determination of the Court under two exceptions which were taken by the pursuer to the directions in point of law given by the learned judge to the jury, and six exceptions to his refusal to give certain other directions which the pursuer asked him to give.

As all of these exceptions depend very much, if not entirely, upon whether the defenders, the North British Railway Co., are liable to the pursuer for the consequences of an accident which did not occur on their line, but on the North-Eastern Railway, I think it will simplify matters if I address myself at once to this question.

The pursuer maintains that the defenders are liable to him, because they, by issuing to his son at Kirkcaldy a ticket from that town to London, *via* the North-Eastern Railway among others, contracted to convey him in safety throughout the whole journey. That the defenders would be under that liability *ex contractu* in any question with the pursuer's son had he, in place of being killed, been merely injured, is I think free from doubt, and indeed was not disputed. It has been frequently so determined in reference to the loss of goods, and on this point reference may in particular be made to the case of *The Peninsular and Oriental Steam Navigation Company* v. *Shand*, 3 Moore's Privy Council Reports (N.S.) 272; and the same principle has also been given effect to in several cases relating to injuries to passengers, as, for example, in the cases of *Blake* v. *The Great Western Railway Company*, February 10, 1862, 31 L.J., Exch. 346; *Buxton* v. *The North-Eastern Railway Company*, June 16, 1868, L.R. 3 Q.B. 549; and *Thomas* v. *The Rhymney Railway Company* in 1871, L.R. 6 Q.B. 266. The decision in the last of these cases is all the more important as it was that of the Exchequer Chamber affirming a previous judgment of the Queen's Bench. In delivering the judgment of the Court, Kelly, C.B., said—"In this case the defendants issued a ticket to the plaintiff from Caerphilly to Cardiff, and received the amount of the fare as a consideration for the contract into which they entered to

carry the plaintiff from Caerphilly to Cardiff; and we are of opinion, both upon principle and authority, that the Company by the granting of that ticket entered into a contract that due and reasonable care should be taken that the plaintiff should be conveyed in safety upon the entire journey."

Now, it will be observed that the issue in the present case is based upon the fact that the pursuer's son sustained the injuries of which he died "while travelling as a passenger from Kirkcaldy towards London in virtue of a ticket issued by the defenders," and this is expressly founded on by the pursuer in the record as constituting a contract between the deceased and the defenders.

But do the decisions referred to, or the principle given effect to by them, apply to the present case, keeping in view that the pursuer, who has obtained a verdict for damages, was not a party or privy to the contract between his son and the defenders? The defenders contracted with the pursuer's son to carry him safely from Kirkcaldy to London, but the pursuer was not in any way a party to that contract. It does not appear that the defenders, or the person who acted for them, in issuing the ticket to the deceased at Kirkcaldy, even knew of the existence of the pursuer, and neither does it appear that the pursuer was aware at the time that his son had obtained a through ticket from Kirkcaldy to London. Nor does the pursuer sue as the executor, or in any other way as representing his son. He sues exclusively in his own right; and if so, it is difficult to see how his action can lie on the basis of contract. He had certainly no contract himself with the defenders, and if his claim is not, and could not, have been made as the executor, or otherwise as representing his son, I must own my inability to understand how the present defenders can be sued by him on the ground of contract.

But although the pursuer was not a party or privy to the contract between his son and the defender, it was suggested that from that contract an obligation arose or grew out of it whereby the defenders are bound to satisfy the pursuer's claim. No authority, however, was cited in support of this doctrine. In the case of *Eisten* the present question was not raised, and of course could not have been decided. Nor have I been able to see that the contention of the pursuer can be reconciled with legal principle. The defenders undertook no responsibility except to the pursuer's son. The contrary is not indeed anywhere said. The pursuer's claim, if it be maintainable at all against the present defenders, is certainly not dependent in any way upon the contract which they made with his son. So certain is this, that it is a decided point that the son, if he had lived for some days or weeks, that is to say, long enough to make a claim for himself against the defenders for the injuries he had sustained, and settled that claim with the defenders, and granted them a discharge in full, that would not sopite or affect the pursuer's claim supposing he had one. It was so decided by this Court in the old case of *Drew* v. *Horne*, January 25, 1611 (Mor. 13,904), where "A man being hurt and wounded, taking satisfaction from them that hurt him, and granting that it proceeded of his own default, and therefore granting him fully assythed and satisfied by them; if thereafter he die of these wounds, and his slayers take remission, and being called to underly the law, take him to his remission, and find caution to assyth the party as accords of the law; the confession of the defunct will not assoilzie him; and his assythment will not relieve him at the hands of the defunct's nearest friend, *quia hoc ipso*, that he has taken and used the remission, he acknowledges his 'guiltiness, and therefore must assyth the defunct's nearest kinsmen.'" This case, although old in date, is noticed by Lord Stair in his Institutions (b. 8, t. 9, s. 7), as a decision of authority. It is true that it related to the remedy, little in observance now, of assythment, but it illustrates, I think, the view I take of the present action, that it is founded entirely upon the pursuer's own right, apart from anything coming to him from the deceased.

It will be afterwards considered whether the pursuer's right, seeing that it does not flow from the deceased, or any contract he had made with the defenders, must not be held to arise solely *ex delicto*, and consequently that his action must be directed against the parties, not the defenders, who committed the delict. Nor, in this view, will it avail the pursuer to say that although his action arises *ex delicto*, or in other words is founded on tort, the delict or tort had for its basis the contract between his son and the defenders, for it was decided by the House of Lords, reversing a judgment of this Court in the case of *Robertson* v. *Fleming*, 4 Macqueen's Appeal Reports, 167, that one cannot sue in respect of a tort founded upon or arising out of a contract, who was not a party or privy to the contract. This was a case where an agent or attorney was sued for damages in respect of his negligence in the execution of a deed, in consequence of which the pursuer, for whose behoof the deed was intended to be executed, was a loser, but as he had neither employed nor authorised the agent or attorney in the transaction—the employment having come from another—it was held that he could not sue the action. All the noble and learned Lords, although differing in some minor points, concurred in holding that there must be privity of contract between the parties. And I may observe that in reference to this case of *Robertson* v. *Fleming* it is stated in the last (the fourth) edition of Addison on Torts, 14, that "no person can in general sue in respect of a tort founded on contract who was not party or privy to, and could not have been sued upon, the contract;" and it is added, on the authority of an English case which is cited, that "the cause of action cannot be transferred to one to whom the contract itself is not transferable."

Supposing, then, that the contract which was entered into between the deceased and the defenders cannot avail the present pursuer, the question remains whether his action is maintainable *ratione delicti.* I am not to dispute that it might if the defenders had been the parties who had committed the delict, for the principle *culpa tenet suos auctores* would on that assumption have applied. But according to any view I can take of the case as it is presented to the Court I do not see how the delict can be said to have been committed by the North British Railway Company. That might be so in respect of the contract, but the pursuer not being a party or privy

to the contract, it cannot avail him. He must show that *de facto* the defenders committed the *culpa* or tort in respect of which he sues for damages. But the jury by their verdict have found that the death of the pursuer's son was "owing to the defective state of the North-Eastern Railway at or near Morpeth station, and the deficient cant on the curve of the line there, together with the train going at too great a speed for the cant." Now, it was not, and could not be, disputed that the defenders, the North British Railway Company, had nothing to do with the state of the North-Eastern Railway or the speed of the train at or near the station at Morpeth. It was only in respect of the first direction of Lord Gifford at the trial—"That fault of the servants or employees of the North-Eastern Railway Company, which the jury may think caused the death of Henry Horn, was in the sense of the issue the fault of the defenders"—that the jury were enabled to find against the defenders. And the direction of the Judge which led to this result must, I suppose, have proceeded on the assumption that the contract between the defenders and the deceased was, in some way or other, available to the pursuer.

But as I am unable to adopt this view, or to find any other ground sufficient for holding that the fault of the servants or employees of the North-Eastern Railway Company was in any correct sense, in the present question with the pursuer, the fault of the defenders, I am for allowing the first and third exceptions of the defenders, and that renders it unnecessary for me to enter into a consideration of the other exceptions.

Lord Gifford—I happened to be the Judge who tried the issue in this case, and at the trial, according to the best judgment which I could then form on the very short argument which I then heard, I was of opinion that in a question between the pursuer and the North British Railway Company any fault leading or contributing to the accident on the part of the servants of the North Eastern Railway on which line the accident occurred was in law and in the sense of the issue the fault of the defenders—that is, the fault of the North British Company—and that whether the fault related to the state of the North-Eastern line or whether it related to the conduct of the train itself. I accordingly so directed the jury, and it was this direction which gave rise to the first exception and to several of the subsequent ones, which all raise under varied forms of expression what is substantially the same question. That question is, Whether the North British Company are liable to the present pursuer for the fault occurring on the North-Eastern Railway in the course of a journey to London, which fault occurring at Morpeth, and on the North-Eastern line, caused the death of the pursuer's son.

After the very full argument which we have heard upon the bill of exceptions, I still remain of the opinion which I expressed at the trial, although looking to the difference of opinion which has occurred on the bench I must feel that the case is a difficult one. I think that, assuming the fault to have occurred wholly in England and on the line of the North-Eastern Company by the fault either in the North-Eastern line itself or in the conduct of the train passing over it, still for that fault the North British Company are liable to the pursuer.

The facts of the case are simple. The pursuer's son, the late Henry Horn junior, purchased from the North British Railway Company a through ticket from Kirkcaldy to London and back. The North British Railway Company sold him the ticket, and it was not disputed—I think it could not be disputed—that the North British Company thereby undertook in a contract of carriage to convey the late Mr Horn from Kirkcaldy to London and back. The North British Railway Company undertook the through journey both ways, although necessarily a large portion of the journey was to be performed upon other lines, namely, on the North-Eastern line from Berwick to York and on the Great Northern line from York to London. An accident occurred on the up journey at Morpeth, on the North-Eastern line in England, whereby the passenger Henry Horn junior was killed. He was a young man of twenty-four years of age and unmarried, and the present action is brought by his father, the pursuer, claiming damages from the North British Railway Company on account of the death of his son.

It appears that the train to which the accident happened was what is called a joint-stock train, that is, a train run by mutual arrangements between the North British, the North-Eastern, and the Great Northern Railway Companies, the lines of these three Companies being used in the through journeys. The carriages or some of them were joint-stock carriages, the joint-property of the three Companies. The engine at the time of the accident was a North-Eastern engine, in charge of a North-Eastern engine-driver and stoker, but this was a mere detail of arrangement, for it might have been a Great Northern engine and driver, and the whole expense of the train was divided rateably according to mileage. The conductor of the train was a joint-servant of the three Companies, but I think I may say, whatever the details were, that the through service was jointly performed by the three Companies interested, and although the ticket was issued and the price thereof received by the North British Company alone, that price was divisible among the three Companies rateably according to their mileage.

The cause of the accident was specially found by the jury, and the substantial accuracy of their finding has not been challenged. They find that the death of Henry Horn junior was caused through the fault of the defenders. Of course this raises the question of law whether the North British Company are liable or not, but the finding proceeds—and as to it there is no dispute—that it was owing to the defective state of "the North-Eastern Railway at or near Morpeth station, and the deficient cant on the curve of the line there, together with the train going at too great a speed for the cant." The fault therefore was twofold—first, it lay in the defective state of the North-Eastern line and in the deficient cant of the North-Eastern rails, and second, in the train going at too great speed having in view the curve and the deficient cant. The fault was, first, the state of the permanent line at Morpeth curve, and second, excessive speed over that curve; and the legal question is, Are the North British Railway Company liable to the present pursuer for both or for either of these faults? I need hardly say that the two faults must have combined to cause the accident. The

defective state of the curve and the deficient cant thereon would not have caused the train to leave the rails if it had been going slow enough. It was quite possible to travel so slowly as to pass the dangerous curve in safety. The defects of the line and the speed together occasioned the catastrophe. Now, I am of opinion in the circumstances that the North British Railway Company are answerable to the pursuer for the death of his son, caused by their proved faults, and that it is of no consequence that the accident did not happen on the line of the North British Railway itself, and that it is immaterial that the engine was a North-Eastern engine in charge of a North-Eastern driver, or that the carriage in which the deceased was travelling was a joint-stock carriage. I think the North British Company would be liable directly to the pursuer although the accident was wholly attributable to the North-Eastern Company or their servants, and that it would have been the same though the accident had occurred on the Great Northern Railway and by the fault of the Great Northern Company alone. I think the railway company that issues the through ticket is liable for the consequences of a preventable accident—that is, an accident arising from fault—at whatever part of the through journey such accident occurs.

I think it proper to remark, however, that it can scarcely be said in the present case that the fault was the fault of the North-Eastern Company and their servants alone. Excessive speed contributed to the accident—that is, speed excessive for the particular cant at that curve—and if the train was a joint-train, conducted jointly and at joint-expense by the three companies, then the excessive speed was a joint-fault for which the joint-companies must be answerable, no matter to whom the particular engine happened to belong, or who happened to engage the particular engine-driver who caused the undue speed. In a joint-stock trade all the servants conducting the trade are joint-servants, and the engine and carriages are under joint-control, whosesoever be the hand which actually conducts them.

Apart from this specialty, however, the general question is raised, Are the North British Company liable to the pursuer for the defective state of the North-Eastern line? I think they are, but it would probably be enough to hold that at all events they are jointly liable for the excessive speed.

In the first place, I think it is quite fixed that a railway company who issues a through ticket undertakes the whole contract of carriage, although the journey involves passing over lines or even journeying in steam-ships which do not belong to the company issuing the ticket. This is quite fixed, and is a matter of everyday practice in regard to goods accepted for through traffic. If they are lost or injured, the loss or damage must be made good by the company who undertook the through transit, wherever the actual loss or injury may have happened to take place. The cases to this effect will be found noted in Sir William Hodge's work. There seems to be no dispute as to this rule in the case of goods.

But the rule is the same in reference to the through carriage of passengers. The Company which issues a through ticket incurs the same liability to the through passenger whether the journey be wholly over their own line or partly over the lines of other companies, and it makes no difference whether the through journey is made under agreements to share profits or under running powers. See *Great-Western Railway* v. *Blake* (1862), 31 L.J. Exch. 346; *Buckstone* v. *North-Eastern Railway*, L.R. 3 Q.B. 549; *Thomas* v. *Rhymney Railway*, L.R 5 Q.B. 226, 6 Q.B. 266, and other cases.

Hence it follows—and indeed this was not seriously disputed—that if the late Henry Horn junior, instead of being killed at Morpeth, had only received personal injuries, all the other circumstances being the same, then his action for these personal injuries would have been properly directed against the North British Company, and the North British Company would have been answerable in damages, with relief against the North-Eastern Company if they were able to show that the fault was solely attributable to that company or its servants.

But the defenders, the North British Railway, plead that though they would have been liable in an action of damages at the instance of the late Henry Horn junior himself had he survived, yet seeing that he was killed they are no way answerable to his father suing for damages for the son's death—in short, they maintain that though they would be answerable to the son himself for the accident in question, no matter by whose fault it occurred, yet the son having been killed they are not answerable to the father for the very same accident. Their argument comes to this, that although they must answer to all the through passengers travelling on their through tickets who survived the accident and were injured thereby, they are not answerable at all—not to the extent of a single farthing—to the relatives of the passengers who were killed.

The ground of this argument and distinction, which at first sight certainly looks strange, is the following, and it was certainly argued with great ingenuity and force:—The action at the instance of an injured through passenger, the defenders, the North British Company say, is an action upon the contract for through carriage. They admit that they would be answerable to the passenger himself; but they urge that the case is quite different when the through passenger is killed. In that case his relatives, whether they be his children, his wife, or his parents, do not sue upon the contract at all. They sue, it is said, as parties to whom the law itself gives a right to claim reparation by the common law in Scotland and by Lord Campbell's Act in England. They are not parties to the contract of carriage at all. They never were parties thereto, and they do not sue in right of the deceased at all, but in their own right as parties injured by the passenger's death. Such pursuers, the defenders urge, must bring their action not against the company that issued the through ticket, for they are not in right of that contract, but against the company who actually did the wrong and committed the fault by themselves or their servants. Hence in the present case the defenders plead the pursuer ought to have brought this action, not in Scotland against the North British Railway Company, who they say had nothing to do with the accident, but against the North-Eastern Railway Company in England, on whose line the accident occurred. In like manner, it is said that if the accident had occurred south of York the only

defender and the only party liable would have been the Great-Northern Railway Company, no matter who issued the through ticket.

I am of opinion that this argument, although very ingenious and very plausible, is fallacious, and that there is no sound or real distinction in a question of primary liability between the case of an action of damages brought by a person merely injured in a preventable accident and an action of damages by the relatives of a person killed in the same accident. I think the ground of liability is the same, although of course if the person survives the damages must be paid to himself, while if he is killed the damages can only be paid to his relatives according to law.

In the first place, if I am right in the view that the train to which the accident happened was a joint-train—that all the servants who were in charge of and conducted it were joint-servants of the undertakers or joint-carriers—then the fault of any servant was the joint-fault of the present defenders, and the action is brought against the defenders not merely as the issuers of a through ticket, but as parties who are directly though only jointly in fault. The excessive speed was quite as much the fault of the North British as of the North-Eastern Company. It was caused by the rashness of their joint-servants. It might perhaps be otherwise in reference to the state of the North-Eastern rails, but as excessive speed was a necessary factor in the fault, it would be quite enough to sustain this action if the North British Company even jointly were answerable for that excessive speed. Thus, viewing the action simply as against a wrongdoer, and apart from contract, it would be enough that the North British Company were answerable for a joint-fault.

In the second place, however, it is not true that an action at the instance of an injured party—say of the late Henry Horn had he survived—is an action solely on contract, and therefore brought against the North British Railway Company solely as the contracting party. An action by a passenger for injuries sustained in a railway accident is not an action solely on contract, although it arises out of a contract. It is an action essentially on fault or neglect, although on fault or neglect arising out of a contract. Accordingly, the issue in such an action is not whether the railway company in breach of contract failed to carry safely, but whether the pursuer while a passenger was injured by the fault of the defenders, and so it has been repeatedly held in England that such actions are actions not on contract but on fault or on tort, and none the less so that there is a contract with the company to carry the passenger. Various cases to this effect were cited at the bar, and I need not examine them in detail.

Now, if an action laid upon fault or on tort lies at the instance of an injured passenger against the company who issued the ticket, though the servants of another company were solely to blame, it is difficult to see how the same kind of action should not lie against the same defenders at the instance of the relatives of a passenger who was killed.

In Lord Campbell's Act (9 and 10 Vict. 93), which introduced into England the same action at the instance of the relatives of a party killed which was always competent by the common law of Scotland, it is enacted that the action is to be directed against the party who would have been answerable to the deceased himself had he survived. Of course this Act is not binding in Scotland, but it seems in accordance with the common sense of the case, and it would be very anomalous if the statutory action in England should lie against one party, and the common law action in Scotland of the very same nature should lie against a different party altogether, and on totally different grounds. Suppose that in the present case the late Mr Horn, instead of taking his ticket from Kirkcaldy to London, had taken his ticket in London from London to Kirkcaldy, such ticket being issued of course by the Great Northern Company, and suppose that he had been killed at Morpeth in the same circumstances as he actually was, then under Lord Campbell's Act, as amended by 27 and 28 Vict. c. 95, his father would have an action for reparation which must have been directed, not against the North-Eastern Railway, but against the Great Northern. Why should the rule be different in Scotland? I do not think any good reason can be given. I think in both countries the rule is the same—the issuer of the through ticket is liable to the father just in the same way as he would have been to the deceased himself. I am therefore of opinion that the exceptions founded on the view that the North British Company are not liable at all ought to be disallowed. If the action had been at the instance of the late Henry Horn himself, suing the North British Company for the loss of a limb, the action would have lain, and the fault of the North-Eastern would have been in law the fault of the North British. I think the rule is the same in an action at the instance of the father.

The other exceptions are founded upon the plea that the present case must be decided according to the law of England, and not according to the law of Scotland, because the accident occurred in Northumberland. This view would necessarily lead to the result that the action should have been laid upon Lord Campbell's Act alone, because that is the only statute which gives such an action in England, and the same view leads to this result, that as Lord Campbell's Act confines the reparation to pecuniary loss directly sustained, and excludes all solatium for wounded feelings, so the verdict of the jury must be reduced by £150, being the amount of solatium which the jury have awarded.

I am of opinion that the present action must be governed by the law of Scotland, and not by the law of England. The present action is not laid upon Lord Campbell's Act, but upon common law. Lord Campbell's Act is not applicable to Scotland, which is expressly excluded from its operation, and if I am right in holding that the North British Railway Company is the proper defender in this action, I think it follows that the action could not properly be laid on Lord Campbell's Act. I think the action would have been competently laid supposing the accident to have happened (in exactly the same circumstances as those in which it actually took place) before Lord Campbell's Act had been passed, or as if Lord Campbell's Act and the amending Act had never been passed at all. An action like the present, not laid upon contract directly, but upon negligence arising in the course of the execution of a contract, is a common law action brought in the Common Law Courts of Scot-

land, and founded upon Scotch law. I think that action is competent, and that leads to the result which your Lordship in the chair has stated, that in awarding damages, if the action is competent and the defender is the proper defender, the jury must necessarily go by the law of Scotland. I concur in that result. In like manner, if the through ticket had been issued in London, and the late Henry Horn had been killed in Scotland, then in any action in London against the Great Northern Company, laid on Lord Campbell's Act, the present pursuer could not have recovered solatium in the English Courts although the accident in the case supposed had occurred in Scotland.

The only other question which arises upon the exceptions is the question depending upon the Amalgamation Acts between the North British, the Caledonian, and the North-Eastern Companies, and the argument upon these Acts is this, that although if a through ticket had been issued by voluntary agreement between the different railway companies, then the North British must have been liable, because they voluntarily undertook a through contract,—still, it was very ingeniously argued, if for purposes of convenience, and to allow traffic of all kinds to be equally distributed along the rival lines in England, the Legislature have enacted that the North British Company on the one hand, and I suppose the North-Eastern Company upon the other, are bound to issue through tickets, this being a through ticket issued by force or compulsion of statute cannot be held to imply what it would have implied if it had been voluntarily issued. On that point also I concur with your Lordship. I think that compulsion to issue a through ticket is a reasonable compulsion, and that the companies, if they had acted perfectly fairly, would do so by voluntary arrangement. The liability, therefore, cannot be different for doing an act in obedience to a statutory enactment which the Legislature intended for public convenience, and for the benefit of the railway companies themselves, from what it would have been under a voluntary agreement. But I am by no means sure that the provisions founded upon force or compel the company to issue what is called a through ticket in the sense in which we have been using the word—I mean a ticket in the terms of the ticket actually issued in this case. I think it is possible that they might have issued a composite ticket mentioning the three companies on whose lines the journey was to be made. That would still be a through ticket. All the statute says is that they shall give convenience by through booking. What through booking may mean we have not had any direct authority upon. I think it means booking a passenger through, but it does not necessarily mean booking him so that the party who issues the ticket shall be solely liable. It may be so, but I am not satisfied on that point, and I do not want to foreclose any question which may arise as to the effect of these Amalgamation Acts. As the matter stands, the through ticket actually issued was a through contract, apparently binding the North British Company alone. In one of the statutes it is expressly recognised that a railway company which issues a through ticket undertakes the through journey, and I think in this case the North British Company, notwithstanding the provision of the Amalgamation Act, undertook the through journey when they issued to Henry Horn junior the ticket from Kirkcaldy to London. While therefore keeping in view Lord Ormidale's opinion, I cannot say the case is free from doubt, I agree with your Lordship in the chair that the whole exceptions should be disallowed.

The Court therefore disallowed the bill of exceptions.

The defenders then moved for a rule to show cause why the verdict should not be set aside on the ground of excessive damages.

Argued for them—The pursuer had suffered no pecuniary loss, for he paid his son a salary to conduct his business, and he could have got anyone else to conduct it as well on the same terms.

At advising—

Lord Gifford—The main question raised before the jury at the trial was—Whether the accident was attributable to the fault of the railway company, or whether it was purely fortuitous and could not have been guarded against? That was the principal question in the case as presented to the jury, and I did not feel surprised that, when subsequently the question of the amount of damages came to be dealt with, the evidence on that point was very slight.

We have now disposed of the question of fault, and fixed in law under the verdict that the defenders are liable to the pursuer in damages, and the motion which is now made is for a rule to show cause why the verdict should not be set aside on the ground of its being contrary to the evidence in so far as relates to the amount of the damages assessed by the jury. The damages awarded are said to be excessive, or rather, as the defenders stated the case in argument, it is maintained that there is no evidence of the damages awarded. I confess I should have liked more evidence upon this question of damage, but it should be borne in mind that where a jury has not heard much evidence on such a point they may not unfairly venture to a certain extent to make a guess at what has been left open by both sides at the trial. When a question of solatium or recompense arises for physical pain or for wounded feelings great latitude is always allowed to juries, and but for the circumstance that in order to raise a pure question of law the jury required to separate the damages awarded into two parts, and to distinguish between pecuniary loss sustained by the pursuer and solutium due to him for wounded feelings, there would hardly have been any ground for challenging the amount awarded. The challenge is confined to the sum assessed as pecuniary damage, and certainly the evidence adduced affords very slender materials for fixing this.

But I think the jury had some materials, and there were in the present case circumstances which may fairly be held to have been guides upon this question of damages. Mr Horn senior was a draper with an extensive business, conducted both in Kirkcaldy and in Dunfermline. He was becoming old—perhaps he felt somewhat frail—and accordingly he relied very much upon his son for the proper conduct of his business. The son made the purchases and selected the goods, and took, it appears, the active and leading management. The father had for some years

allowed the son £150 a-year, and at the time of his death was just about to make him a partner, and it appears that he estimated that the double business would afford the son, who was to have half the profits, an additional sum of £200, or £350 in all, so that the business as a whole was expected to yield £700 a-year. Indeed, the contract of copartnery had actually been drafted, although not signed.

Taking these facts, the jury may have said—This is the case of an old man, who, thinking he can fairly trust to the attention and skill of his son, resolves to give him a half of the profits of the business, and relying on him to relieve him of all trouble, and allow him to become a sort of sleeping partner.

In this view of the case the jury may have asked themselves what might be estimated as the advantage to the father to be got from this arrangement, and as the statements made by Mr Horn senior are not denied, and were not called in question at the trial, effect has been given to them. Practically these statements amount to this, that the father and son were each to get £350 for the ten years during which the copartnery was to subsist, and that during that time, if the son and father were both spared, the father would not be called on to do more work for the business than his failing strength would permit.

It is said, however, that there are two sons left to the pursuer who can take their brother's place. But these sons may not enjoy their father's confidence to the same extent as their deceased brother did, and he may not succeed in working so well with them, and even if he did it must be remembered that these two sons had to be summoned from other places where they might have been left doing well in other walks of life if their brother had lived.

If this son's services as a partner were worth even a very small sum to the father per annum more than a stranger partner would have been, the jury were fairly entitled to estimate what the father has lost by his death. Suppose they held that he was worth only £100 a-year to his father, then the father would lose what is equivalent to £1000 for the ten years of the copartnery, if it should last so long. Mr Horn senior was really retiring from business, and trusting to his son to carry it on, the relationship between them making him a more valuable and desirable partner than anyone else.

I do not think that in the whole circumstances £550 is too large a sum to give as damages—at least it is not so large as to be unreasonable and out of the question, and not such as to call for the interference of the Court. At least I am not disposed to interfere with the sum assessed by the jury.

The LORD JUSTICE-CLERK and LORD ORMIDALE concurred,

The Court therefore refused the motion.

Counsel for Pursuer—Dean of Faculty (Fraser)—Mackintosh. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Defenders—Balfour—Jameson. Agents—Cowan & Dalmahoy, W.S.

Tuesday, July 16.

FIRST DIVISION.

[Lord Young, Ordinary.

BROWNLIE *v.* MILLER AND OTHERS (MACALISTER AND WALLNUTT'S TRUSTEES).

Property—Warrandice—Sale—Whether a Disposition Conveying dominium utile *warranted the Conveyance of* dominium directum—*Concealment and Misrepresentation by Sellers' Agents as to Superiority Title of Lands Sold.*

Certain lands were sold with an *a me vel de me* holding, the disposition, by which they were conveyed containing a clause of warrandice in the usual terms. The sellers' agents had previously stated to the purchaser in writing that the lands were held blench of the Crown, and that the sellers were not entered. They further said—"You are aware that the Crown never asks for an entry." A claim to a mid-superiority of the subjects, which had been made by letter to the sellers' agents immediately before the sale, but which on its being disputed had not been at the time further pressed, was not intimated to the purchaser. Two years later this claim was made known to the latter, and on an action being raised it was held good and the purchaser found liable in the amount of a casualty of non-entry.

The purchaser then raised an action against the sellers for repetition of the sum in which he had been found liable, and the expenses of the former suit, founding (1) upon the warrandice clause, and (2) upon the alleged misrepresentation by the agents that the lands were held of the Crown.

Held (1) that as there had been no eviction of the subjects conveyed, *i.e.*, of the *dominium utile* of certain specified lands, there had been no breach of warrandice; and (2) that upon a consideration of the documents and the facts bearing upon them, as elicited on proof, there was no such duty of disclosure as made it incumbent upon the sellers to intimate the adverse claim.

Sale—Clause of Warrandice in Disposition of Heritage.

Observed (*per* Lord Deas) that in a disposition of heritable estate a clause of warrandice is to be read in connection with the dispositive clause, and that in a case where the feudal title of the purchaser remained unchallenged and no part of what had been sold had been evicted, and where there were no incumbrances affecting the subjects which required to be cleared off, no objection could be taken which was based upon that clause.

Fraud.

Opinion (by Lord Shand) that "to found a claim on fraudulent misrepresentation it is necessary not only that the representation be false in fact, but that the person making the representation should know it to be false, or at least should not believe it to be true."

This case arose out of that of *Rossmore's Trustees* v. *Brownlie*, *ante*, p. 129, 5 R. 201, reported of date November 23, 1877. The circumstances out of which the latter sprung, and which led to this, will