the same to the lawful issue of his body. The only ground on which it is maintained for the first parties that they should retain the balance is that in the fifth purpose it is declared that payment is to be made in the case of sons only on their attaining majority, and in the case of daughters on their attaining majority or being married. But I am of opinion that the words "sons" and "daughters" apply only to the truster's children and not to remoter descendants.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court answered the first, second, and fourth questions in the negative, and the third question in the affirmative.

Counsel for the First Parties—Cheyne—Clyde. Agents—Henry & Scott, W.S.

Counsel for the Second Parties—Dundas—Neish. Agents—White & Nicolson, S.S.C.

Counsel for the Third Parties—Macfarlane—Dudley Stuart. Agents Henderson & Clark, W.S.

Tuesday, June 23.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

M'AULAY *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Reparation — Negligence — Railway — Getting Out of Train Not at Platform—Invitation to Alight.

In an action of damages against a railway company, the pursuer averred, that about five o'clock in the morning in January, when some yards from the station to which he was travelling, the train stopped; that he stepped out, in the belief that the train had arrived at the station. He further averred that he was justified in this belief by the fact that the railway company were in the habit of leaving the station unlit, and that at the point where the train stopped there was a parapet wall in a line with, and abutting the coping of the platform, the top of which in the darkness resembled the platform; and that on discovering his mistake he was about to re-enter the train when it started again without warning, with the result that he was precipitated over the parapet, and sustained certain injuries. *Held* that these averments were irrelevant, nothing being alleged which could be reasonably construed as an invitation to alight.

Whittaker v. *Manchester and Sheffield Railway Company*, L.R., 5 C.P. 464, note (3), *distinguished per* Lord Young.

John M'Aulay, mason, Crosslee, Johnstone, brought an action in the Sheriff Court at Glasgow, against the Glasgow and South-Western Railway Company, in which he sought damages for certain injuries sustained by him.

He averred—"(Cond. 2) On 15th January 1896 the pursuer was a passenger in a third-class carriage from Johnstone to Elderslie by the workmen's train leaving Johnstone at twenty-four minutes past five o'clock in the morning, and had duly paid his fare. (Cond. 3) The station at Elderslie is not lighted at all by the Railway Company, and when some yards from the platform of that station the train stopped, but at that time it had not reached the said platform. (Cond. 4) About 300 yards before entering the station platform, and in a line with, up to, and abutting the coping of the platform, is a parapet wall which reaches to the footboard of the carriage, and resembles the station platform, although it is narrow. (Cond. 5) On the train stopping, the pursuer in the darkness stepped out on to the parapet wall, where there is a bridge over the Glasgow, Paisley, and Johnstone Canal, thinking it to be the station platform owing to the darkness, and the fact that the defenders systematically were in the habit of leaving Elderslie Station unlit, the pursuer, along with other passengers, believed, and was justified in believing, that the train had arrived at the station platform. (Cond. 6) When he discovered where he was, he turned round to re-enter the carriage, but the train started suddenly and without any previous warning, and the pursuer was precipitated over the parapet on to the ground, a distance of 10 feet. He was rendered unconscious by the fall, and lay there for several hours, when he was taken to the Paisley Infirmary, where he remained till 19th February. In consequence of said accident defenders now light the station in the morning."

The defenders pleaded, *inter alia*—(1) The pursuer's statements are irrelevant.

On 29th May 1896 the Sheriff-Substitute (BALFOUR) allowed a proof before answer.

The pursuer appealed to the Court of Session for jury trial, and lodged an issue for the trial of the cause.

The defenders objected to the relevancy of the action, and argued—The pursuer had stated no reasonable ground for supposing that he was at the station. The fault alleged was failure to light, but if the station had been lighted on the morning in question, that would not have prevented the accident to the pursuer. There was nothing here which could be construed into an invitation to alight as there was in all the cases quoted for the pursuer. A failure to light a station properly was not an invitation to get out at any point on the line where a train might stop. Of the two things which the pursuer said induced him to get out, the failure to light had nothing to do with the accident, and the existence of the parapet wall was not a fault on the part of the company.

Argued for the pursuer—If a railway company brought a train to a standstill in such circumstances as to induce a passenger reasonably, but erroneously, to suppose that

he was at a station, then they were liable for any injury sustained by the passenger as the result of his having got out of the train—*Siner* v. *Great Western Railway Company*, February 9, 1869, L.R., 4 Ex. 117, *per* Hannen, J., at page 124; *Whittaker* v. *Manchester and Sheffield Railway Company*, L.R., 5 C.P. 464, note (3) *per* Willes, J., at page 465, note. See also *Cockle* v. *London and South-Eastern Railway Company*, May 10, 1870, L.R., 5 C.P. 457; and *Petty* v. *Great Western Railway Company*, L.R., 5 C.P. 461, note (1). *Bridges* v. *North London Railway Company*, L.R., 5 C.P. 459, note (5), referred to by Willes, J., in *Whittaker cit.*, was reversed, June 22, 1874, L.R., 7 H. of L. 213. Here it was averred that the pursuer believed and was justified in believing that he was at the station (1) because the defenders were in the habit of leaving Elderslie Station unlighted, and (2) because of the resemblance of the top of the wall to a station platform. The averment of habitual failure to light, was a relevant averment of fault against the Railway Company, because but for such habitual failure the pursuer would not have got out when he did. This case was ruled by *Whittaker cit.* The only distinction between that case and the present was that here there was no calling out of the name of the station by the porters. That element was not of vital importance. It was absent also in the cases of *Roe* v. *Glasgow and South-Western Railway Company*, November 9, 1889, 17 R. 59; and *Aitken* v. *North British Railway Company*, May 22, 1891, 18 R. 836.

LORD JUSTICE-CLERK—This is a curious case. It is not alleged that anything the Railway did or failed to do at the place where the accident took place was the cause of the accident, but the fault alleged is something done at another place. The allegation made is that when the train stopped the pursuer made the mistake of getting out, believing he was at the station, and stepped out on to the parapet of a bridge, in the belief that he was stepping on to the platform. One would have expected some other explanation, but such is the averment. I cannot conceive how he could make such a mistake. It was impossible, unless it was so dark that he could not see at all. It was a mistake for which I cannot see that the company are responsible. To say that if an accident happens because of the train stopping anywhere except at a station the railway company is responsible, is absurd. There is here no relevant case.

LORD YOUNG—The only doubt I have arises from *Whittaker's* case, but that case is distinguishable. The train there had arrived at the station, and the name of the station was called out, so that the judge and jury thought it was a reasonable invitation to a passenger to alight. The train overshot the platform, and the passenger answered the invitation by getting out. Here the train had not reached the station, and nothing took place which could be regarded as an invitation to alight—nothing to show arrival at the station. The pursuer thought he had arrived. What was the actionable fault? The pursuer says that Elderslie station, which was 300 yards off, was never lighted, and that the pursuer might reasonably think he was at the station. That is not a sufficient averment, and does not bring this case within the rule in *Whittaker*.

LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court dismissed the appeal, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer—A. J. Young—Munro. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Defenders—Balfour, Q.C.—Guthrie. Agents—J. C. Brodie & Sons, W.S.

Wednesday, June 24.

SECOND DIVISION.

[Sheriff of Fife.

ROBERTS & COMPANY *v.* YULE.

Sale—Disconformity to Description—Rejection—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *sec.* 11, *sub-sec.* 2, *and sec.* 13—"*Failure to Perform Material Part of Contract.*"

A firm of machinery merchants contracted to supply a second-hand gas-engine at the price of £47, 10s., which they described as "in excellent order," "running up to within about a week ago," and "a great bargain at this price." When the engine was delivered on 22nd October it could not be made to work by the engineer employed by the buyer, and he then intimated to the sellers that he rejected it. The rejection was not accepted, and thereafter the sellers sent an engineer to inspect the engine, but he was also unable to make it work. He reported that it would require an expenditure on repairs of £8, 10s. to put the engine right, and the defenders offered, on 16th December, to execute these repairs. This offer was refused by the buyer, who had in the meantime supplied himself with another engine.

In an action for the price, the pursuers led evidence to show that the defects in the engine were trifling, and that it could have been made to work "as a second-hand engine" at a cost of £1 or £1, 10s., their offer of 10th December including the renewal of parts that were worn so as to make it as good as new.

Held that the engine was disconform to description, and that the defender was not bound to accept the pursuers offer to repair it.

On 17th October 1895 Messrs Roberts & Company, machinery merchants, Leeds, contracted to supply Mr David Yule, spinner, Abbotshall Mills, Kirkcaldy, with a second-hand gas-engine. The contract