would indeed be the case with a machine of any kind if a material part of the machine is put out of its place or turned the wrong way.

The Lord Ordinary has in his judgment extracted some of the more noticeable expressions of opinion by the scientific witnesses on the question of prior publication and prior use, and has pointed out the insufficiency of the reasons given for holding Varley's specification to be incorrect or incomplete. I concur in the Lord Ordinary's view as to the weight to be attached to this part of the evidence, and in his Lordship's opinion generally on the facts of the case, except in so far as he may be held to imply that the test of the sufficiency of an anticipation is the same as the test that would be applied to the construction of a specification founded on as such.

There is another objection to the defenders' patent, and it is founded on an alleged inconsistency between the provisional and complete specifications. The provisional specification announces as one of the improvements for which the patent is granted, an improved construction of the commutator. The function of the commutator is to connect the alternating currents (as they pass from the revolving axis to the external circuit) into one continuous current; this is accomplished by fitting the axis with insulated segments to which the poles of the armature are connected by insulated wires, and the segments are so arranged that at the moment when the current in the machine is reversed, the external wire becomes disconnected from the corresponding segment and is at the same time brought into connection with the segment which is attached to the opposite pole of the machine.

The improvement indicated in the provisional specification is a purely mechanical improvement for the purpose of obtaining a mechanical advantage. But in the course of perfecting his invention Mr Brush found that an electrical advantage might also be secured by means of a slight variation of the mechanical arrangement indicated in the provisional specification. The variation consists in separating the segments, so that for a small portion of each semi-revolution the current shall be interrupted; that is to say, the current is cut out during the brief interval when the armature (or the particular member of the compound armature) is in a neutral position and when the resultant of the forces acting on it is therefore very small.

In the complete specification the variation whereby this electrical advantage may be gained is claimed as one of the patented improvements, and the question arises whether this difference between the provisional and complete specifications does not exceed the latitude allowed to an inventor who is only perfecting what he has provisionally announced.

The Lord Ordinary has held that the claim referred to is not covered by the provisional specification, on the ground that although the construction of the commutator as perfected is not materially varied, yet as the variation represents a distinct principle and is directed to an object distinct from that which is indicated in the provisional specification, the two things cannot be regarded as identical inventions. There is much force in the Lord Ordinary's view on this question, but we consider it unnecessary to come to a decision upon it; because we are all of opinion that if there had been no more serious objection to the Brush Patent than this, it would be only fair to the patentee that he should be allowed an opportunity of disclaiming the variation on one of the patented improvements. But this is not the condition of the case as it arises for decision, because we are agreed that the patent is invalidated in its essential and fundamental privilege by reason of the prior publication and prior use by Varley of the invention of a compound winding for which this exclusive privilege is given.

For that reason I am of opinion that the interlocutor of the Lord Ordinary should be adhered to and decree of reduction of the patent pronounced.

The LORD PRESIDENT and LORD ADAM concurred.

LORD SHAND was absent.

The Court adhered.

Counsel for the Pursuers and Respondents — Graham Murray—C. S. Dickson—Daniell. Agents—Davidson & Syme, W.S.

Counsel for the Defenders and Reclaimers —D.-F. Balfour, Q. C.—Jameson. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, July 17.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

PIRIE *v.* THE CALEDONIAN RAILWAY COMPANY.

Process—Jury—Verdict—Mistake by Foreman of Jury in Counting Votes — Challenge of Verdict by Jurymen—Affidavit —New Trial.

In an action of damages the jury returned a verdict for the defenders by seven to five. Shortly thereafter the pursuer presented a note to the Court stating that the foreman of the jury had made a mistake in counting the votes, that in reality the jury were equally divided, and craving a new trial. Affidavits by certain of the jurymen were produced in support of these allegations. *Held* that after the verdict of a jury is returned, recorded, and published, it cannot competently be challenged even by a member of the jury.

Reparation—Damages—Railway—Passenger Killed while Leaning from Railway Carriage—Contributory Negligence.

A railway company were under statutory obligation to carry mails, and to afford all reasonable facilities for the receipt and delivery of mails at any place on their railway which Her Majesty's Postmaster-General might require, and to obey such reasonable regulations as he might make. About the year 1867 the Postmaster-General demanded that the railway company should allow at two of their stations the erection of a revolving iron standard from which the mails might be transferred to the receiving apparatus of the postal van as the train passed at speed. When the pouch containing the mails is suspended on the standard and turned towards the approaching train, the clearance between the sides of the carriages and the pouch is from 8 to 10 inches, and the pouch is on a level with the windows of the carriages. This method contributes largely to public convenience, and no objection had been made to it, and it has been pursued in the country for about thirty-five years without previous accidents.

A passenger in a train belonging to the railway company became unwell during the night, and put her head out of the window of the compartment. Shortly after this she was struck on the head by the pouch hanging from the standard at the first of the above-named stations, and was rendered insensible. She remained with her head out of the window, and was again struck by the pouch hanging from the standard at the second station, and she died in consequence of the injuries received.

In an action of damages by her representative against the railway company the Judge directed that the question was whether the railway company in allowing the erection of the apparatus were giving a reasonable facility to the Postmaster-General which they were bound to give, and whether they should have foreseen that it was a source of danger, and that it was a question for the jury whether when a traveller chooses to put his head 8 or 10 inches out from the window of a railway carriage so that he is injured by such an apparatus, he is guilty of contributory negligence? The jury returned a verdict for the defenders, and on a rule for a new trial the Court *refused* to disturb the verdict.

This was an action of damages by Mrs Mary Lyon or Pirie, widow of James Pirie, Aberdeen, against the Caledonian Railway Company, for the death of her daughter Miss Elsie Pirie, which occurred while she was travelling in one of the defenders' trains between Aberdeen and Carlisle.

The pursuer averred that her daughter (who was thirty-two years of age and her principal support) on the 19th of February 1889 took a ticket from Aberdeen to London, and that while the train was nearing Beattock station Miss Pirie, feeling sick, put her head out of the window of the compartment in which she was travelling; and that she was struck on the head by a mail bag which was suspended on the standard of the apparatus erected at the side of the railway for transferring the mail bags to the receiving net of the postal van. The pursuer further averred that Miss Pirie was rendered insensible by the blow, that she remained with her head out of the window, and that at Ecclefechan she was again struck by the mail bag suspended at that station, and that she died on the following morning of the injuries she had received.

"The receiving apparatus of the railway carriage conveying the letters consists of a strong iron frame fastened to the side of the van, to which is attached a net. This frame is kept close to the side of the van, except when lowered from the inside when a receiving station is being approached. The pouch containing the letter bags to be received is a strong leathern bag, measuring when full 22 inches long, 22 inches deep, and 18 inches thick, the weight when full being about 55 lbs. It is suspended by a leather strap 13 inches long from the arm of a revolving iron standard fixed on the side of the line, 4 feet 8 inches to 5 feet from the outside rail, the arm being 10 feet above the rail level. A raised platform enables the post-office official to suspend the pouch from the arm of the standard, which he then turns round from its normal position with the arm parallel to the rails to the position at right angles to the rails in which the pouch is to be caught by the net projecting from the side of the mail van. When the pouch is thus hanging in order to be caught, the clearance between the sides of the carriages and the pouch hanging from the standard is from 8 to 10 inches, and the pouch is on a level with the windows of the carriages. The apparatuses on which the mail bags were suspended at Beattock and Ecclefechan were erected as described in the preceding article, and were thus exceedingly dangerous to passengers. The apparatuses were so erected by the defenders, or by others for whom they are responsible, and at any rate they were erected upon the railway belonging to them, and by their authority and with their consent. The railway company have a contract with the Post-Office for the carriage of the mails."

The defenders in answer "admitted that they have a contract with Her Majesty's Postmaster-General for the carriage of mails, dated in 1873. *Quoad ultra* denied, and explained that by the Act 1 and 2 Victoria, c. 98, and 36 and 37 Victoria, c. 48, the defenders are under statutory obligation to carry the mails, and to afford all reasonable facilities for the receipt and delivery of mails at any place on their railway which the Postmaster-General may require, and to obey all reasonable regulations which the Postmaster-General shall, in his discretion, from time to time give or make. The apparatus referred to is supplied and erected by the Postmaster-General at his sole cost and expense, and it neither belongs to nor is it under the charge of the defenders. It was erected at Beattock, Lockerbie, and Ecclefechan about twenty

years ago, the then existing contracts between the Postmaster-General and the defenders being dated respectively in May and December 1867. Copies of these are produced and referred to. There is no difference, so far as the defenders are aware, between the apparatus at present in use at Beattock and Ecclefechan and the apparatus at Lockerbie, or at any other station on the defenders' system. The Postmaster-General has in use a similar apparatus on all the principal railways in the kingdom, and has used the same (with improvements in construction made from time to time) for upwards of twenty years, and this is the first time that an accident to a passenger was ever ascribed to the use of such apparatus.

The defenders pleaded—(2) No fault. (3) Contributory negligence on the part of the deceased.

The case was tried on the 21st and 22nd March 1890 before Lord Adam and a jury, the facts stated in the above narrative were proved, and the jury after an absence of three hours returned a verdict by a majority for the defenders.

On 16th May a note was presented to the Lord President by the pursuer, stating that since the trial she had "discovered that the foreman of the jury, in announcing that they found for the defenders by a majority, made a mistake, the real state of matters being that the jury were equally divided."

The pursuer prayed his Lordship "to move the Court to grant a rule to show cause why the verdict in this case should not be set aside and a new trial granted; and in the meantime to order all further proceedings to be stayed."

Affidavits were produced by the foreman of the jury, by the juryman whose vote was wrongly counted, and by another of the jury who sat next the latter.

In his affidavit William Sinclair, the foreman of the jury, deponed as follows—"I was foreman of the jury in the action at the instance of Mrs Pirie against the Caledonian Railway Company. At the end of nearly two hours the jury were six to six. One member of the jury said he was of opinion that the Caledonian Railway Company did not foresee any danger, or something to that effect. He was told by some that in that case he ought to give his vote in favour of the company, whereas he had been voting for the pursuer. The opinion of the Judge was taken. I put the question, which had been committed to writing, to the Judge, as follows—'A gentleman of the jury is of opinion that the railway company did not see the danger. Is he bound to vote one way or the other.' The Judge said that if that was his opinion on the facts he was bound to vote for the railway company. The jury then retired, and the vote was taken again, and this juryman still voted for the pursuer, and we were still six to six. The jury were then recalled into Court, and the Judge explained that his answer had reference to the previous charge, and I then informed him that it was so understood, and that the gentleman in question still declined to vote for the railway company. The Judge said he must be a very stubborn juryman, but he could not compel a juryman to record his vote one way or the other. It wanted just five minutes from the expiry of three hours, and we continued in the jury-box. During that time some one whispered to me from behind that the gentleman in question had given in. I do not remember the words in which the information was conveyed, or who informed me, but I was led to understand he had given in, and at the end of the three hours I stated that the jury returned a verdict for the defenders by a majority. I was sitting on the extreme right, looking from the jury-box, of the seat next to the back seat, and the juryman in question who had the difficulty was sitting on the extreme left of the back seat, and I had no communication with him while in the box during the last five minutes, except that while the information was being whispered to me he seemed to nod, by which I understood that he signified his approval of what was being told me. The vote, counting the vote of the said gentleman for the defenders, was seven to five."

Mr James Duncan, the juryman whose vote was alleged to have been wrongly counted, deponed—"After the jury had retired, the vote was taken several times, and we found we were six to six. While we were discussing the matter, one of the jurymen said that, as I was of opinion that the railway company did not see this danger, I ought to vote for them instead of voting for the pursuer, as I had been doing. It was then resolved by some of the jurymen that the question should be put to the Judge, whether my opinion being as above, I was bound to vote one way or the other. The Judge said that if my opinion was that the railway company did not see or foresee the danger, then I ought to vote for them. The jury again retired, but my opinion still was that the railway company was liable, and on taking the vote, I again recorded my vote for the pursuer. We were recalled into the Court in a few minutes, and the Judge explained that his answer to the question put by the foreman had reference to his previous charge, and that the word 'see' meant 'foresee.' The foreman said it was so understood, and that I still declined to record my vote for the defenders. The Judge said he could not compel a juryman to vote one way or the other, but that I must be an extraordinary juryman. We sat about five minutes in the jury-box, at the end of which time the three hours were up, and the foreman then stood up and said that the jury had found for the defenders by a majority. During the time we were in the box I did not speak to anyone, except that I remarked to Mr M'Laren that they should go on and get the matter finished in some way, or something to that effect; and I certainly never consented to give my vote for the railway company, either by word or sign, and would not have consented, in any event, as it was against my idea of justice. When the Judge said he could not compel a juryman to vote one

way or the other, I understood that a juryman could not be compelled to vote, and that therefore my vote was discounted, and the verdict arrived at by the votes being six to five. After the Judge's ruling, and what he said when we came back to the box, I felt myself in an awkward position, because, according to my views of justice, I held the railway company liable, as I considered the apparatus was dangerous, and I could not have satisfied my conscience if I had voted in their favour. During the time the jury were in the box I sat at the left-hand end of the back seat. Mr M'Laren sat next me, on my right hand looking from the jury-box, and the foreman sat at the right-hand end of the seat in front of me."

Mr Duncan M'Laren, a juryman who sat next to Duncan, deponed, *inter alia*—"During that five minutes the juryman in question next me on my left did not tell any one, so far as I heard, that he had given in, and he could not have told anyone without my seeing and hearing him. He did not signify either by word or sign, so far as I saw, that he had changed his mind. He made some remark to me, but I do not recollect what it was, only I am certain that it had nothing to do with his having changed his mind. I did not hear it whispered amongst the jury that he had given in. I had no communication with the foreman at all during that five minutes. At the end of the five minutes, the foreman stood up and returned a verdict for the defenders by a majority. The reason why I did not call the verdict in question was that I thought the vote of the man next me on the left had been passed over on account of the Judge's ruling, and that the verdict was arrived at by a vote of six to five. When I found out that a verdict could not be arrived at by a vote of six to five, I called upon the pursuer's agent and asked what the vote was, and he said it was seven to five. I told him it was not, and explained what took place as above. While in the jury room, Mr Duncan informed me that although he thought the company may not have foreseen the danger, that still the apparatus was dangerous, and he led me to understand that he thought they ought to have seen it."

The pursuer moved for a new trial (1) under Statute 55 Geo. III., c. 42, sec. 6, "as essential to the justice of the case;" (2) because the verdict was contrary to evidence.

After hearing counsel the Court granted the rule.

The argument at the discussion was confined to the first of the two grounds above stated, viz., that it was "essential to the justice of the case."

Argued for the defenders—The question was, whether it was competent *ex post facto* to receive evidence at the hands of the jury of anything which they might have done to enable them to arrive at their verdict. Upon this matter the authorities both in this country and in England were at one, that it would open the door to fraud if such a course were followed. Juries might be amenable to bribes or to outside influence, and verdicts might be thus changed, and injustice might follow. In England since 1805 it had been held as a settled rule that no new trial would be granted on amendments like those here and supported by affidavits —*Davies* v. *Taylor*, 2 Chitty, 268; *Rex* v. *Mosler*, 6 Maule & Selwyn, 366; *Jackson* v. *Williamson*, 2 Durnford & East's Term Reports, 281; *Owen* v. *Warburton*, 1 Bosanquet & Puller, 326; *Straker* v. *Graham*, 4 Meeson & Welsby. These cases showed that the point which the pursuers sought to raise was quite settled against them in England. But the grounds upon which these decisions rested were equally applicable to Scotland as the decisions did not rest upon any technicalities of English law. In this country the point was authoritatively settled by *Stewart* v. *Fraser*, 5 Murray (Jury Court Cases) 166; *Fullarton* v. *Caledonian Railway Company*, November 2, 1882, 10 R. 70. In the present case, even if the matters alleged in the affidavits were proved *habili modo*, they were not relevant because they did not involve that the juror whose note was in dispute did not at the last give in, and assent to the opinion of the majority, as announced by the foreman of the jury.

Argued for the pursuer—The circumstances in the present case were so very special, that the rules applicable to jury trials could not be appealed to. Thus when the jury after retiring returned to Court with a prepared verdict, then of course it would be impossible to get behind that by any such procedure as was being adopted here. But in the present case the verdict was arrived at in the jury-box, and under circumstances which contributed to the mistake which had occurred. If a new trial was refused the greatest injustice would result to the pursuer. The Court had the power in a case like the present to order a new trial under the provisions of the Act of 1815, 55 Geo. III., c. 42, sec. 6 (which instituted Jury Trial in Scotland) for any "cause essential to the justice of the case." This was "a cause essential to the justice of the case." Authorities cited by defenders *supra*.

At advising—

LORD PRESIDENT—This is a very important question, and it is satisfactory that it has been so fully discussed, but to my mind it is one which is not attended with any difficulty. When the presiding judge has completed his charge to the jury they then proceed to consider their verdict. Their deliberations are generally confined to the box in which they have sat during the trial, and by exchanging a few words among themselves they are in many cases able at once to return a verdict. But in a case of difficulty they retire to their own room. They are segregated from the whole world while they conduct their deliberations upon the important question that they have to determine, and more especially where they differ in opinion and are only in a condition to return a verdict by a majority they are

kept in deliberation for three hours, at the end of which time the verdict may be returned by a majority. Now, while they are in deliberation in their own room, and in the case where they are kept in deliberation, because they cannot return a unanimous verdict, for three hours together, all that is in my opinion a period of deliberation with which nobody has any concern but the jury themselves, and upon which nobody else is entitled to intrude in any way. The jury are left entirely to themselves during that period unless in the case where they return into court for the purpose of consulting the judge upon some matter of law or practice and taking his opinion for their guidance. Then if they are unanimous in their verdict they return into court as soon as the unanimity has been ascertained, and if they are not unanimous they return at the expiry of three hours, and they are then asked by the clerk of court what their verdict is. The foreman of the jury announces verbally what the verdict is. The clerk takes it down in writing, and then the clerk reads to the jury what he has taken down and asks them if that is their verdict. Such is the universal and everyday practice in jury trials.

Now, I apprehend it to be settled that after that form has been gone through, and the verdict has in the manner that I have explained been recorded and published, it is out of the question to entertain any challenge of that verdict by the jurors themselves who have returned the verdict, or by any others. That, I apprehend, was settled in Scotland so long ago as 1830 in the case of *Stuart* v. *Fraser*, and the reason of it is, I think, abundantly clear; but it is explained by the Lord Chief Commissioner, Adam, when he refers not to any English authorities, but to an institutional writer in our own law, Baron Hume, and uses these words—"Baron Hume speaks sound sense when he says in the passage referred to at the bar that the utmost danger and uncertainty would be the consequence if questions were to be raised against the verdicts of juries by examining the jurors themselves after their verdict was delivered and the jury discharged and separated and liable to be influenced elsewhere." The passage in Baron Hume which is thus summarised by the Chief Commissioner is a very important one, and occurs in the 2nd volume of his great work on crime. After mentioning the sort of plea that is sometimes attempted to be raised in impeachment of the verdict, he goes on to express himself thus—"If a plea of this sort in impeachment of the substance of a verdict can at all be listened to, one thing at least seems to be clear, that it can only be in those cases, comparatively few in number, where the jury re-enter the court and straightway on breaking up their private sittings, for if they disperse and disclose their verdict (as sometimes happens) then are they exposed to all those temptations from the opinions and commentaries of the world, against which it is the very object of our law to guard when it orders them to be enclosed, and they may thus be prevailed with to disavow their genuine verdict on false and defective grounds, nay, though they conceal even, as they ought to do, the result of their deliberations, yet still they learn the sentiments of others concerning the case and the evidence, and are liable to be influenced less or more by what they thus hear passing in the world."

Now, I am anxious to put the decision of this case upon the broad general principle which I find thus clearly expressed both by Baron Hume and by the Lord Chief Commissioner, because it is most desirable that the rule which we are now laying down as to an application of this kind should be based upon some general intelligible ground of public policy, and I think it cannot be better expressed than in the words which I have just read. I think it would introduce the greatest peril into the proceedings of this Court in the conduct of jury trials if any application of this kind were listened to.

LORD SHAND—I am clearly of opinion with your Lordship that this application cannot be listened to, and that these affidavits cannot be received in evidence in support of the proposal which the pursuer makes. It is admitted—indeed, it is stated in the note for the pursuer—that the verdict recorded was the verdict given by the jury. The proposal is practically one to prove that a mistake was made in counting votes, so as to reach the majority by which the verdict was given. One of the jurymen declares that he did not vote, and yet his vote was counted as in the majority. That is plainly going into the matter of the deliberations of the jury. Now, I am clearly of opinion that a verdict having been once returned and recorded, it is not permissible to have any inquiry by the evidence of the jurymen as to what were the terms of the deliberations of the jury in the jury-room, or as to the effect of these deliberations, because that has been recorded in the verdict. And when I use the expression jury-room I include the jury-box.

It appears here that after the jury had gone a certain length in their deliberations, they came into Court and made inquiry of the learned Judge as to the law, and they received from him a direction which was obviously sound. They then resumed their deliberations, and before leaving the jury-box they delivered their verdict. The proposal here, therefore, is practically to adduce evidence by the jurymen as to what was the character and result of their deliberations. Now, I think with your Lordship that that must be excluded upon grounds of public policy. If such an application as this were to be entertained, it is quite evident that it would open a door in countless cases to inquiries after the verdict of the jury had been given, in which it would be extremely difficult to find the truth of what was alleged, and in which as your Lordship has observed it would be almost impossible to reach a true result, because the jurymen having separated are liable to such influences as have been mentioned. I think it clear that it is very much better that injustice should happen,

it may be in one or two isolated cases where a mistake may have been made, if such a thing were to occur in the counting of the jurymen's votes, than that every verdict should be open to be challenged upon grounds such as we have here, involving inquiries as to what occurred during the deliberations of the jury.

I am therefore of opinion with your Lordship that the evidence here tendered is quite incompetent.

It is said that in England an exception is allowed in cases where a party is able to prove by extrinsic evidence, by third parties altogether—not the jurymen themselves—that the jurymen reached their result in an improper way, as for example by casting lots instead of deliberating. Probably that distinction may be sound, and might receive effect if a question of that kind occurred in this Court, but in the meantime what we have to deal with is a proposal to lead evidence by jurymen themselves as to the effect of their deliberations, and I am clearly of opinion with your Lordship, and in accordance with the authorities, that that is inadmissible.

I have only to add that the counsel for the pursuer have been unable to cite any authority which in the least supports his proposal, so that it would be an entire novelty if we were to give effect to it. The only case to which Mr Johnston could refer in support of his argument as at all analogous was not a case in which it was proposed to go into the deliberations of the jury; it was a case in which the jury had given a certain verdict, but the clerk had recorded it the wrong way. The Court there were of course bound to see that the correct verdict of the jury was recorded, and not a verdict to an opposite effect. But such a case as that with reference to a mistake made by the clerk can have no possible bearing on a question such as we have had discussed before us.

LORD ADAM—I quite concur, and have nothing to add to what your Lordships have said. I only wish to say with regard to this particular case, that it is perhaps some satisfaction to know that assuming all the statements of the juryman to be absolutely correct, yet no real injustice will be done, for this reason, that entertaining the opinion on the facts of the case which this juryman did, it was his bounden duty according to his oath well and truly to try the case, to have voted for the defenders in this case; and if he had done that, the result would just have been what it is.

LORD M'LAREN—It results from the doctrine delivered in Baron Hume's Commentaries, and from the inveterate practice of the Court of Justiciary, that a verdict announced by the chancellor of the jury, and recorded, cannot afterwards be corrected by statements made by the jury that the verdict as delivered was not their true verdict. It appears also from the elaborate examination which has been made by counsel of the English authorities, that this is also the long settled and established law of the Civil and Criminal Courts of England. And we have the opinion clearly and powerfully expressed by Lord Commissioner Adam to the effect that similar principles ought to guide the action of the Civil Court in Scotland. It would be strange indeed if in a matter so essentially one of principle, there could be a difference of practice between the different branches of the supreme jurisdiction of the United Kingdom.

I will only add that it appears to me that for a complete exposition of the reasons of this rule of the law we ought to take into account not only the reasons given by Baron Hume and Commissioner Adam, but also the views so forcibly put by Lord Ellenborough in the cases in the English Civil Courts cited to us. Lord Ellenborough explained that when a verdict is propounded by the foreman of the jury in presence of the others, an opportunity is given to any juryman who thinks a mistake has been made, to correct that mistake, or to state his impression as to the result of their deliberations, and if he does not avail himself of the opportunity which he has of correcting the foreman either as to the general question, or as to the sum of damages, it might be, which they were agreed upon, he is held to have acquiesced in the verdict as delivered. This seems to me to be a perfectly sound and unimpeachable principle, and I see no reason why it should not govern the decision of the present case, because what does the statement of the objecting juryman amount to? The jury were divided 7 to 5; that is, of those who knew their own minds there were 7 for the defenders, and 5 for the pursuer. One of the jury who did not quite know his own mind invited an expression of opinion by the Judge as to what ought to be the result of the opinion that he had formed on the special facts of the case. Now there can be no doubt that a juryman who has invited such an expression of opinion by the Judge ought to follow his direction. He was told that upon his view of the facts his verdict ought to be for the defenders. I have, morally speaking, no doubt from his own statement of what passed in the box, that when the foreman rose and announced the verdict by a majority, this gentleman acquiesced in that verdict. Subsequently, from what influence we do not know, he chose to come forward and say that he was misapprehended, but I am of opinion that we cannot listen to such statements, and that the record of the verdict being in accordance with the oral verdict as delivered by the foreman, is final and conclusive so far as regards the action of the jury themselves. Of course it is open to review by the Court upon well-known grounds.

This interlocutor was pronounced:—

"The Lords, including Lord Adam, who presided at the trial, having heard counsel for the parties on the rule formerly granted, Discharge the said rule and refuse to grant a new trial:

Find the defenders entitled to the expenses connected with the rule."

Upon the following day the Court heard counsel for the pursuer on the second ground of her application for a new trial, viz., that the verdict was contrary to evidence.

At advising—

LORD PRESIDENT—Before giving judgment we should hear the opinion of the Judge who tried the case.

LORD ADAM—My view of the case is that the verdict was right. I think the real question was this—This was an apparatus the property of Her Majesty's Postmaster-General. It was manipulated and worked solely and entirely by Her Majesty's servants, and the reason why it came to be erected where it was, was that by Act of Parliament the railway company were bound to give all reasonable facilities at their stations to Her Majesty's officers with reference to these matters, and the question came to be whether, when Her Majesty's Postmaster-General demanded that the railway company should allow the erection of this machine, it was a reasonable facility that they were bound to give; that was the question I think for the jury. Now, I told the jury that it was not a reasonable facility if it was a source of danger to the public, and nobody objected to that ruling, and I told the jury that if they thought it was a source of danger to the public the railway company had no right to allow it to continue where it was, and I told them further that the question was whether the railway company, in giving permission to Her Majesty's Postmaster-General to erect this apparatus, were or were not giving a reasonable facility which they were bound to give, or, in other words, whether the railway company ought to have refused to allow the erection of this apparatus when it was erected some thirty years ago, and nobody objected to that ruling. So the real question was whether or not the railway company were in fault, not because it was a dangerous thing or might be, but whether they ought to have foreseen that it was a dangerous thing when it was proposed to erect it. That was the way I put the case to the jury, and without objection on either side.

That being so, it appeared to me at the time, and it appears to me still, that if the railway company could not reasonably have foreseen the danger, they could not reasonably have refused to give this as a reasonable facility; that the question therefore is, whether it could have been reasonably foreseen by the company that the apparatus was a source of danger, and therefore whether they ought to have refused to allow its erection. That was the question I put to the jury. It was pointed out to the jury that nobody had apparently ever thought that this was an element of danger, because Her Majesty's Postmaster-General had erected it without objection, and apparently without anybody in the kingdom thinking it was a matter of danger at all. It had been allowed to be so erected, and no doubt the jury thought that if Her Majesty's Government had thought it was a source of danger they would not have erected things that were to endanger the lives of the subjects, and the fact which was undisputed is, that since the erection of those things thirty or forty years ago in such numbers on all the principal lines in the kingdom, between two and three millions of deliveries have been made with them and no accident has ever resulted. The case was so put to the jury, and the jury came to the conclusion, taking all these things into consideration, that though it may be dangerous, as the result shows, the railway company were not in fault, because they could not reasonably foresee that there was danger, and therefore they could not have refused this as a reasonable facility to Her Majesty's Postmaster-General. That was the way that part of the case was put to the jury.

It was also put as a question of contributory negligence. Upon that matter I told the jury I was not going to tell them that under no circumstances was a railway traveller entitled to put his head out at the window, and that if he met with an injury the railway company would not be liable. I refused to put any such obligation upon a railway passenger as that he was under no circumstances to put his head out of the window. I think Mr Johnstone asked a direction to that effect, and I refused to give it, but I told the jury it was for them to consider whether when a traveller chooses to put his head 8 or 10 inches out from a window that was not contributory negligence. I left it as a jury question for them to say whether this lady had been guilty of contributory negligence in respect that she exposed herself by putting her head so far out of the window as it is proved she did on that occasion. That was the way I left the case to the jury, and my own opinion is that the verdict was right.

LORD SHAND—I think that Mr Wallace has not succeeded in showing that there was not evidence before the jury to warrant this verdict, and I feel very much strengthened in making that observation by the fact that the learned Judge who tried the case, if he had been one of the jury, would have decided in the same way, and that the verdict was one entirely in accordance with his views. The evidence that seemed to justify the verdict may have been upon either of two points—First, the danger of this receiving apparatus, and secondly, the question whether this unfortunate lady was entitled to put her head out of the carriage window to the distance she did except at her own risk. In regard to the danger, we find that the occurrence took place, but upon the other hand it is a very material circumstance—a circumstance of overwhelming weight—that we find that for very many years this apparatus has been in use over all the kingdom; I suppose we could not very well tell the number of deliveries in that way of letter-bags into

trains and out of trains, and no accident of any kind has ever before occurred. That fact speaks volumes as to the question whether this was a danger of itself or was a danger that could have been anticipated, and I think the jury were quite entitled to take that into view. One knows that in cases of this kind juries are much more ready to find railway companies responsible than to find them free from liability so far as the travelling public are concerned, and I think the jury must have been thoroughly satisfied upon this point before they gave their verdict.

For my own part, I add this, that in considering even a danger which may have happened once in the thirty or forty years, as is the case here, you are not to set out of view a great public convenience, a convenience the public insist upon having, in the delivery of letters. I think the jury were quite entitled to weigh that as a circumstance even in a question of danger; and so I think that there is a failure to show that this verdict is contrary to the evidence, and I agree in saying that my verdict would have been the same way. Then again, as to the circumstance that this unfortunate lady, having been unwell, had put her head a good way out of the window, I should say again that if the verdict had stood upon that it could not be set aside. The windows of the carriage are there of course for light and air. It is not intended because a window is there that people are to put their heads out of the window a considerable distance. There are a number of risks that may occur—bridges and other obstacles that may come there quite unexpectedly—and if a person, even under such circumstances as this lady was in, put her head 8 or 10 inches out of the window, and an accident occurred thereby, I do not think the results of that can be thrown upon the railway company. And so upon either of those grounds, and certainly upon both, I think the verdict must be allowed to stand.

LORD M'LAREN—Assuming that the Lord Ordinary's direction to the jury was right in law, it seems to me that the jury could return no other verdict than that which they returned by a majority. As no exception was taken to his Lordship's ruling, we must for the purposes of this case assume that the direction was right, and so far as my opinion is concerned, I have no doubt it was a right direction in the circumstances. His Lordship put it to the jury that as the apparatus for receiving and delivering the Post Office bags was entirely under the control of the officers of the Post Office, there could be no negligence, and the circumstances did not admit of negligence on the part of the company as regards the use of that apparatus, and if there was any negligence it must have been in their consenting to the original construction of the apparatus. A duty was no doubt cast upon the company when the Post Office applied to them to consider whether, consistently with their duty to the travelling public, they could give the facilities demanded. Now, on that point I have no more doubt than the presiding Judge appears to have had. I think that if the company had taken up the position that this was a dangerous apparatus, and had refused to give the facilities, and if an action had been brought by the Post Office to compel the Caledonian Railway Company to allow the erection of these posts, they would have had no good defence, because it would have been maintained by the Post Office in the first place that experience proved that this apparatus was reasonably safe. I think an arrangement may be reasonably safe although one or two accidents have occurred through the use of it in forty years. In fact a mere infinitesmal risk to the public does not deprive the apparatus of the character of a reasonable facility. It must be a substantial danger, and one that people cannot very well avoid by the exercise of ordinary care and discretion in travelling. But then I think the Post Office would have had another answer, that it was always possible for the company, if there was a danger, to avoid that danger by so altering the construction of their carriages as to make it impossible for passengers to put their heads out of the window when the train was in motion. I do not suggest it is necessary that they should do so. Apparently it is not, but I mean that failing other answers that is one which obviously occurs as a possible case. On these considerations I am of opinion that the rule should be discharged.

LORD PRESIDENT—I am entirely of the same opinion.

The Court pronounced the following interlocutors:—

"Having heard counsel for the pursuer on her motion for a rule, Refuse the rule."

"The Lords, on the motion of the defenders, and of consent of the pursuer, apply the verdict of the jury, and in respect thereof assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses," &c.

Counsel for Pursuer—H. Johnston—Wallace. Agent—A. Morison, S.S.C.

Counsel for Defenders—D.-F. Balfour, Q.C.—R. Johnstone.—F. T. Cooper. Agents—Hope, Mann, & Kirk, W.S.