

3 App. Cases, 1155, was decided by the House of Lords. Where there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury. (It was a rule of the railway company that the express train should always sound a whistle on approaching the station, and the conflicting evidence in this case was as to the sounding of the whistle.)

Held, that this was a case which was properly left to the jury, for that where there was contradictory evidence of facts, the jurors and not the judge must decide upon them.

Dissenting, Lords Hatherly, Coleridge and Blackburn, who thought that where there was not, in the first instance uncontradicted evidence to establish the right of a plaintiff to a verdict, the judge might direct a non-suit, or a verdict for the defendant, and that there was here enough to show, even on the undisputed facts, that the mischief had been the result of S.'s own negligence, and that a non-suit or a verdict for the defendants ought to have been directed.

Per Lord Cairns, L.C.: "If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company that caused his death. This would be an example of what was spoken of in this House in the case of *Jackson v. Metropolitan Ry. Co.*, 3 App. Cases 193, an *incuria*, but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling with the accident to the man who rushed, with his eyes open, on his own destruction." (Lord Cairns goes on to speak of the facts in the present case and continues), "Now I cannot say that these considerations ought to have been withdrawn from the jury. I think they ought to have been submitted to the jury, in order that the jury might say whether the absence of whistling on the part of the deceased