dismissing this action. The jury have been rather friendly to the railway company. I cannot help it.

"Mr. MacGregor (counsel for the plaintiff) asks for a stay.

"His Lordship: I had not observed that the jury had struck out the 'No' in answer to the 6th question. But I have asked them if their idea was that the motorman after he saw the position in which the plaintiff was could not, by the exercise of reasonable care, have prevented the accident. They said that was their view. I will give you a stay."

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.

Alexander MacGregor, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

CLUTE, J.:— . . . It will be seen that the jury found that the motorman was guilty of negligence in not applying the brakes when he first noticed the plaintiff heading across the tracks; that the plaintiff, by the exercise of reasonable care, could have avoided the accident; and that he was negligent in not seeing that he had sufficient time to cross to the north side of the track in safety, meaning, as I take it, that he should have seen that he had not sufficient time to cross to the north in safety, and should not, therefore, have attempted it. They further say that the accident was caused by the negligence of both. . . .

The question of ultimate negligence was clearly submitted to the jury; but, as the answers now stand, the jury have not dealt with that question, unless it be that their answer to the second question was intended to deal with . . . ultimate negligence. . . .

By the answer to question 5 . . . both plaintiff and defendants were guilty of negligence. If the answer to question 2 was not intended by the jury to refer to ultimate negligence, then the jury have not dealt with that question, the answers to 6 and 7 having both been struck out on the second occasion when they retired, unless they sufficiently answered that questions on their return.

The jury, during the course of conversation, said clearly enough that the motorman could not have avoided the accident when he noticed it; that is, I take it, when he saw the plaintiff. But, on their second return, when the answers to questions 6 and 7 had been struck out, only this was said: "The only change