relevancy. It was also suggested that the case might come under sec. 40 of the Judicature Act, 6 Geo. IV., cap. 120.

Argued for the defender, that the Sheriff's judgment must be a final one, not one necessarily leading to a final judgment; there must be decree. In any view, sec. 40 of the Judicature Act does not apply, as that only refers to proof *prout de jure*, not to proof by writ or oath; *Hamilton* v. *Henderson*, 10th June 1837, 15 S. 1105.

At advising—

Lord President—The question which we have now to dispose of is as to the competency of this appeal, and as the question thus raised is one of importance, we consulted the Judges of the Second Division, and we have unanimously arrived at the same result. The Sheriff-Substitute, by his interlocutor of December 13, 1872, repelled the defences, but on appeal the Sheriff recalled that interlocutor, and allowed the defender a proof before answer of the first and seventh statements in his revised defences, by the writ or oath of the pursuer. The peculiarity of the case is that this appeal is by the pursuer, to whose oath reference is made by the interlocutor appealed against. The pursuer contends that the judgment of the Sheriff-Substitute is well founded, and she says that if the judgment of the Sheriff is to stand, and her oath is taken, she will lose the benefit of any objection she might have taken on relevancy. This is not quite correct, but still there is a good deal in the complaint, and we all felt considerable sympathy for the pursuer, and if we could have held the interlocutor appealable we should have done so. But unfortunately the 24th sec. of the Act 16 and 17 Vict. is conclusive, for it not only enumerates what interlocutors shall be appealable, but it further enacts that it shall not be competent to review any others; and, as regards the last class of interlocutors mentioned, namely, those disposing of the whole merits of the case, we are further enlightened as to what they are by sec. 53 of the Court of Session Act of 1868. It has been suggested as matter for consideration whether this case does not come under sec. 40 of the Judicature Act, but all the authorities are against that view, and so, on the whole matter, I am of opinion that the judgment of the Sheriff is quite right.

The Court pronounced the following interlocutor:—

"Refuse the appeal as incompetent: Find no expenses due to or by either party, and decern."

Counsel for Shirra — Brand. Agent — A. A. Hastie, S.S.C.

Counsel for Robertson—Asher. Agents—Millar Allardice, & Robson, W.S.

Saturday, June 7.

FIRST DIVISION.

POTTER *v.* NORTH BRITISH RAILWAY CO.

Rule for a New Trial—Contributory Negligence—Excessive Damages.

In a case where a party injured on a railway obtained a verdict against the company—*held* that negligence on the part of the company's servants having been proved or admitted, their plea of contributory negligence on the part of the pursuer was properly a question for the jury, whose award of damages should not be interfered with unless plainly extravagant.

The pursuer in this case was injured while travelling by the North British Railway from Dalkeith to Heriot, on the evening of Sept. 30, 1872. He raised an action against the Company, which was tried before Lord Mure and a jury on Feb. 25, 1873, and obtained a a verdict in his favour, with £600 damages. The defenders obtained a rule to show cause why a new trial should not be granted, and argued—(1) That no negligence on their part had been proved. (2) That even if there had been, the pursuer had by his own negligence contributed to the accident, as he had descended from the carriage incautiously and without looking where he was going. (3) That the damages awarded by the jury were excessive.

The Court discharged the rule.

Authorities — *Bridges* v. *North London Railway Co.*, Exch. Ch., 6 Law Rep., Q.B. 377; *Præger* v. *Bristol and Exeter Railway Co.*, Exch. Ch., 9th Feb. 1871, 24 Law Times Rep., 105; *Harrow* v. *Great Western Railway Co.*, 23d April 1866, 1 Cox 548; *Siner* v. *Great Western Railway Co.*, Feb. 1869, 4 Law Rep., Exch. 117; *Joy* v. *Brighton Railway Company*, 14th Jan. 1865, 18 Comm. Bench Rep., 225; *Cockle* v. *London and South-Eastern Railway Co.*, 21st May 1872, Exch. Ch., 7 Law Rep., C.P. 321; *Holden* v. *Cooper*, 20th Dec. 1871, 44 Jur., 144; *Stewart* v. *Caledonian Railway*, 4th Feb. 1870, 8 Macph., 486; *Miller* v. *Hunter*, 24th Nov. 1865, 4 Macph., 78; *Snare* v. *Earl of Fife's Trustees*, 18th June 1852, 14 D. 895; *Adamson* v. *Whitson*, 21st Feb. 1849, 11 D. 680.

At advising—

Lord President—In this case the defenders obtained a rule on three grounds:—(1) That there was no evidence of negligence on their part. (2) Assuming that negligence was proved against them, that there had been contributory negligence on the part of the pursuer. (3) That the damages given by the jury were excessive. We have now heard counsel for the pursuer, and have to give our judgment on the case, which is one of some nicety. As to the first point raised, the matter is clear enough. The train by which the pursuer was travelling had to stop at Heriot Station, and the cause of the accident was that the carriage in which the pursuer was travelling was drawn up short of the platform, and he had to descend from the floor of the carriage to the level of the rails, and, the place being dark, he descended further than he expected. Now the platform at Heriot Station was quite long enough to accommodate the whole train, but it is divided in the middle by a level crossing, and here there is no platform, but on one side of this crossing there are 89 and on the other 83 feet of platform, so that the accommodation is ample. It is not explained why the train was not drawn up opposite the platform; there may have been some slight miscalculation on the part of the driver, but that of itself is not negligence, and may often occur without the least fault on his part. Stopping a train is more or less easy according to circumstances—such as the state of the rails or of the atmosphere. But when such a thing as this

has happened, there arises a demand on the Company's servants to provide against its consequences. If the ground is such that it is not safe to get out except at the platform, they should bring the train up to the platform, or if they do not think it worth while to take that trouble, then they ought to see that the passengers are warned or helped in getting out. Now the place where the pursuer had to get out was undoubtedly a place of some danger, and he had no alternative but to get out. He took it for granted, and rightly, that the passengers for Heriot were meant to get out there, and so he had to do that or be carried on. As for the doctrine suggested on behalf of the defenders, that he ought to have done so, and then sought for his remedy in an action for damages, it is utterly unreasonable. I think he had no alternative. The place, as I have said, was one of some danger, for it is proved that the descent was considerable, and even if he had known where he was, it was not very safe. The porter plainly confirms this, for he says that he saw no one coming out, and that if he had he would have helped or warned them, so it is plain that he thought this necessary, and the other evidence confirms this. The place where the pursuer got out was even a longer step down than at the level crossing, and there, as is proved by the station master's evidence, it was customary to give help, so we may assume that the place was dangerous, and one where the railway company's servants ought to have given help or warning. Nothing of the kind was done, and there was no good light. There were lights in various places, but none of them were very available; the light in the shed was of no use, for it was intercepted by the end wall; and there was also a light in the carriage, but it does not seem to have done much good. It is also said that the porter's light was placed on the footboard of the van, but even if that be so, it is not at all clear that it would have helped the pursuer, and the light on the van itself was of no use, being a bull's-eye, which threw its light straight forward, and being besides too high. On the whole matter, I think that the place where the pursuer had to get out was a dangerous one, and that the railway company's servants should have provided another or warned him, and that their failure to do so was negligence.

But then comes the question, Did not the pursuer by his own negligence contribute to the accident? He certainly got out in a way that seems rather rash, for he did not look before him, and he took for granted that all was right. His own experience of the station taught him that it was not uncommon for the carriages to overshoot the platform, and he might have known that it was just as possible for them to be short of it. He did not apparently look out, and it is a question whether, if he had done so, he could have seen—but anyhow he got out and could not see what he was going to step on. I cannot say that I think he was very prudent, but the question was one very suitable for a jury, and I certainly cannot say that the evidence of his negligence was so strong as to compel a jury to find against him.

The only question remaining is as to the excess of damages. We had occasion to consider this matter recently in the case of *Cooper*, and we make it a rule never to interfere unless the excess is plainly extravagant. That the jury have given more than the Court might have given is no reason for disturbing their verdict. The injury to the pursuer was a serious one; he sustained a good deal of loss pecuniarily, and the medical evidence shews that there was concussion of the spine, an injury the ultimate consequences of which it is difficult to foresee, and all the doctors admit that in this case the consequences may be serious. The injury being of such a kind, and its effects being still uncertain, I think the jury were quite entitled to allow a margin, and on the whole matter I am for discharging the rule.

The other Judges concurred.

Counsel for Pursuers—Scott and Rhind. Agent—William Officer, S.S.C.

Counsel for Defender—Solicitor-General (Clark), Marshall, and Moncreiff. Agents—Dalmahoy & Cowan, W.S.

HOUSE OF LORDS.

Monday, May 19.

SPECIAL CASE—JAMES MACKINTOSH AND MISS EMILY MARIA MACKINTOSH, ALEXANDER HAY MILN AND OTHERS.

Ante, vol. vii. p. 340.

Heir of entail—Relief—Annuity—Real burden—Drainage.

In an entail of one of his estates a party bound himself and his heirs and executors to relieve the lands of his debts and obligations. Subsequently, in an antenuptial contract of marriage he burdened the entailed estate with an annuity to his widow. *Held* (reversing judgment of the First Division) that the heir of entail was entitled, out of the general estate, to relief of this annuity.

This was an appeal from a decision of the First Division on a special case. The question was whether the respondents, the trustees and executors nominate of the late James Mackintosh of Lamancha, in the county of Peebles, were bound to relieve the appellant, who was the eldest son and heir of entail under a deed of entail executed by his father, of two annuities of £150 and £70 respectively, which were settled by the late Mr Mackintosh upon his third wife, now his widow. These annuities had been provided by an antenuptial contract of marriage, executed after the deed of entail, and were made burthens on the estate of Lamancha. The deed of entail contained this clause:—"I oblige myself and my heirs, executors, and representatives whomsoever to free and relieve my lands of Lamancha of all my debts and obligations." The contract of marriage reserved power to the testator's heirs, executors, and representatives whomsoever to relieve the lands of Lamancha of the annuities by purchasing annuities from an Insurance Company to the satisfaction of the widow, which she was taken bound to accept as in lieu of the security over the estate. The appellant had contended that under the terms of the two deeds the executors were bound to relieve the heir of entail of these annuities, as they were debts and obligations within the meaning of the clause in the