Thursday, June 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GEMMELL OR ANDERSON *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Reparation—Railway Travelling—Culpable Negligence—Damages.

A lady having raised an action of damages against a railway company for personal injuries sustained in getting out of a carriage on their line, owing to the fault and culpable negligence of the railway officials, the Court (*diss.* Lord Young) being satisfied on the evidence that (1) sufficient time was not allowed for passengers to leave the train, and (2) that the guard in charge of the train was in fault in not at once countermanding the signal to start when he saw the door of the pursuer's carriage open, *awarded damages.*

This was an action raised by Mrs Elizabeth Gemmell or Anderson, Main Street, Barrhead, against the Glasgow and South-Western Railway Company. It concluded for the sum of £250 as damages for personal injuries which the pursuer averred she had sustained while travelling on the defenders' line, through the gross fault and negligence of the officials employed by them. The circumstances which gave rise to the action were the following:—

On the 26th of January 1880, the pursuer, who is fifty-two years of age, was returning home from Greenock to Barrhead, accompanied by her little girl, in a third class compartment on the defenders' line. The said compartment was near the front part of the train, and was occupied by two other passengers, Charlotte and Jeanie Smith. At Shields Road Station a third passenger, Thomas Conchar, entered the compartment. In her condescendence the pursuer stated that on arrival at Main Street Station, Glasgow, where she and her daughter had to change carriages for Barrhead, Conchar opened the door to allow the other passengers in the compartment to get out. The two Smiths alighted, but as the pursuer was in the act of doing so the train started off suddenly without any warning being given, and before due and reasonable time had been given for the passengers to alight. Glendinning, the guard of the train, approached her, and catching hold of her helped her to alight, but in the attempt they both fell, the guard on the platform, and she between the platform and the train, the result being that she received the injuries which gave rise to this action. She averred that the accident occurred through the gross and culpable negligence of the railway officials. The train, which was advertised to reach Main Street Station at 8·10 and depart at 8·11, was behind its time, and insufficient time was given to allow the passengers to alight. The door of the compartment in which she was was not closed when the train started. She pleaded that "The defenders having contracted to carry the female pursuer from Greenock to Glasgow, and she having received the injuries condescended on through the fault and negligence of the defenders, or of those acting under them, or for whom they are responsible, decree should pass as concluded for in name of damages and *solatium.*"

The defenders, on the other hand, averred that a reasonable time had, as was customary, been given for passengers to alight. The train had not started suddenly. The pursuer had endangered herself by attempting to alight after that period had elapsed and after the train had resumed its onward journey and before it could be again brought to a standstill to enable her to alight. The guard had approached her when she was making the attempt and warned her of her danger, and it was only because she disregarded his warning that the accident had occurred. They pleaded that "(1) The female pursuer not having received the alleged injuries through the fault of the defenders, or of those acting under them, or for whom they are responsible, they were entitled to decree of absolvitor, with expenses. (2) The injuries alleged to have been sustained by the female pursuer having been caused by her own fault, the defenders are entitled to decree of absolvitor, with expenses. (3) Even assuming the defenders were guilty of fault in the circumstances, yet the female pursuer having by her own fault materially contributed to cause said injuries, the defenders are entitled to decree of absolvitor, with expenses."

The Sheriff-Substitute (LEES) held a proof, the import of which appears in his interlocutor and note, as well as in the Sheriff-Principal's interlocutor and note and the opinions of the Judges. He found "(1) That on the evening of 26th January last the female pursuer was a passenger on the defender's line by the train leaving Greenock at ten minutes past seven in the evening, and arriving in Glasgow about an hour afterwards; (2) that on the arrival of the train at Main Street Station, Glasgow, the said pursuer and the other passengers in the compartment with her who were about to alight at that station, proceeded to leave the train; and (3) that she was by the mismanagement of the defenders' servants thrown on the platform, and thence fell between two of the carriages on to the ballast between the line and the platform, and was thereby much injured;" he therefore found the defenders liable in damages, which he assessed at the sum of £50.

"*Note.*— . . . The train seems to have been punctual in its arrival, and the solitary porter who represented the defenders at the station says that he called the name of the station as the train passed him. The passengers who were with the pursuer say they did not hear the name of the station called, and as the train was probably coming in pretty rapidly I am not surprised that they failed to catch the name mentioned by him. The fact of whether they were made cognisant of their arrival at Main Street Station is only of importance as having a bearing on the delay which it is said took place on their part in alighting. The pursuer and the Smiths say they got out at once, and as the Smiths had some knowledge of Main Street Station, and as none of them had any luggage or even an umbrella to pick up, there is a good deal to be said in favour of the view that they proceeded to get out at once. On the other hand, Conchar contradicts these witnesses, and says they did not attempt to get out at once. The railway

servants say the same; and the fact that the train had begun to move before the last of the passengers had left the compartment in which the pursuer was, and that they on alighting did not see any of the other passengers who are said to have left the train, is, on the whole, perhaps better evidence to show that there had been some delay on the part of the pursuer and the Smiths in alighting.

"I do not think it necessary, however, expressly to decide the point, because there are, as it appears to me, other materials adequate for the decision of the cause. What took place as matter of fact was, that Conchar, finding the pursuer and the Smiths desired to alight, opened the door of the carriage, and that they then proceeded to leave the train as quickly as possible. They say they got no warning the train was about to start; but I think in this they must be wrong, and that there are sufficient materials for believing that the usual signals were given that the train was about to start, although perhaps in the hurry of the moment the women did not observe them. . . . The pursuer had to make two steps of 15 inches each in perpendicular height in order to alight on the platform. Charlotte Smith got out of the train safely. Jeanie Smith also got out, and the guard came up just in time to aid her in making the last step. The pursuer's child came next, and was lifted by the guard from the carriage to the platform. There is some contradiction—and I am not surprised at it—as to when the train started. In my opinion, the bulk of the evidence points distinctly to the view that the train had begun to move before the little girl was put on the platform, and I think a strong corroboration of this view is to be found in the undisputed fact that by the time the pursuer, who came immediately after her child, got out of the carriage it had got some way from the place where the little girl had been taken out. It is shown that the guard beckoned the pursuer to stay in, and apparently called to her also, which would not have been necessary if the train had not been in motion. He says he had signalled for the train to stop, and looking to the fact that the signal consisted in moving the glasses of his lantern, this would readily account for the train having got some way on at the time when the pursuer was trying to leave the carriage. Glendinning, fearing the pursuer might receive injury, or perhaps thinking that she was not going to remain on the step of the carriage, grasped her, somewhat awkwardly I fear, but at anyrate with the result that, tripping on her dress as he says, they both fell on the platform, and she rolled in between two of the carriages and fell on the ballast, which most fortunately here extends some way under the lip of the platform. Now, as the pursuer was travelling in the middle compartment of the carriage, and fell between the carriages, this also shows that the train must have had some way on by this time, and also in my opinion supports the view that the train was in motion before the guard proceeded to lift the pursuer's child out of the carriage.

"The guard seemed an active and intelligent young man, and I entertain no doubt whatever that what he did up to this period was intended for the best. But I think it was wrong, and that his error lay in not forbidding passengers to get out when he found them trying to leave a train which had begun to move. Indeed, it may be questioned whether his best course would not have been by grasping the railing outside the doorway of the compartment to have kept them in. Instead of that he lifted the child out, and thus by his actings invited the passengers to continue to alight."

On appeal the Sheriff-Principal (CLARK) found "that on 26th January last the female pursuer was a passenger on the defender's line of railway by the train leaving Greenock at ten minutes past seven p.m., and arriving in Glasgow about an hour afterwards; that in the compartment occupied by the pursuer there were also her little girl, two young women named Smith, and a young man named Conchar; that on the arrival of the train at Main Street Station the usual stoppage took place to enable passengers to alight; that the defenders' officials then looked to see if all the doors were shut, and finding this to be so, gave the signal to start, both by whistle and lamp, in the usual way; that as the train was getting into motion, the guard noticed that the door of the carriage occupied by the pursuer was being opened, and ran forward to see what the reason was; that on getting to the spot he found one of the Miss Smiths on the platform, and the other Miss Smith in the act of coming out, with her foot on the footboard; that the guard, as it was then impossible at once to stop the train, did what he could to prevent mischief, and helped the second Miss Smith on to the platform; that the pursuer's little girl immediately followed, and the guard, though the train was then plainly in motion, succeeded in lifting her on to the platform in safety, and did his utmost by voice and gesture to induce the pursuer to remain in the train till he could get it stopped; that notwithstanding his efforts the pursuer came out, and that the guard then did his best to save her, but that in the effort so to do both the pursuer and he fell, and the consequence was that she received the injuries complained of—the guard himself being also injured; Found, in point of law, that the pursuer was herself the cause of the injuries she received, in respect she attempted to leave the carriage after the train was in motion; further, that the guard did all that could be expected of him in the circumstances; therefore recalled the judgment appealed against, and assoilzied the defenders from the conclusions of the action."

He added this note—"It seems to me proved that when the train stopped at Main Street it remained the usual time for passengers to alight. It has been maintained that the interval was not long enough; but on a careful perusal of the evidence I am inclined to believe that this is unfounded. It would rather appear from the evidence of Conchar, a fellow-passenger with the pursuer, and from other circumstances, that she and the others did not at once prepare to alight when the train stopped, but only began to do this after more than the ordinary interval had elapsed. It is also, I think, duly proved that the train did not start till after the signal, not only by lamp but by whistle, had been duly given, and that the latter might have been heard by the pursuer if she had been giving reasonable attention. But be this as it may, it is plainly established that the pursuer attempted to alight, and was in course of doing so, when the train was already in motion,

and that motion was quite perceptible. Now, if this be so, it necessarily follows that she contravened an important rule established for her own safety, and was therefore the direct cause of what occurred.

"On turning now to what took place on the part of the company, it is difficult to see in what respect they can be said to have been in fault. Before the signal to start was given, the officials, following the ordinary rule, looked and saw that all the doors were shut, and were therefore entitled to assume that no other person was going to leave the train. The signal to start was given accordingly, and the engine was set in motion. The train, of course, at first moved slowly, but every moment necessarily accelerated the pace. It was at this juncture that the guard, looking back, observed the door of the pursuer's carriage opening and persons coming out. Knowing the danger they ran, he hurried to the spot, and by the time he got there one of the Miss Smiths was already on the platform and the other was on the footboard. He was placed in a very serious dilemma, but seems to have done his best in the circumstances. He helped the second lady to the ground, but in the meantime the pursuer's child had already emerged from the carriage close behind her, and was in a state of great danger. Her he also succeeded in getting down to the platform in safety. But her mother, the pursuer, was also immediately behind, and though he shouted and gesticulated to her, she paid no attention but continued her course. He then did the best he could, and in the effort to save her both she and he rolled on the platform, and both received injuries. It must be kept in mind that all this proceeded continuously and in the course of a few seconds, during which a person of the most steady mind might have considerable difficulty in judging what was best to be done. It is suggested that the guard should not only have called to the pursuer to stay in, but should have closed the door on her or pushed her back. I doubt if such a thing were possible—the attempt would certainly have been attended with extreme danger. It must be noticed that the passengers came out one after the other in a continuous stream. It seems to me that the guard, placed by the act of the pursuer and her fellow-passengers in a position of great perplexity, did the best he could. It is said the pursuer, by the acts of the guard, was placed in such a position that to act or forbear to act was attended with equal danger. I think the very reverse was the actual state of the facts. It was the fault of the pursuer and her fellow-passengers that placed the guard in a position of great perplexity. The *origo mali* lay not with him, but with them in attempting to leave the train, not only after the signal to start was given, but when it was already in motion. . . .

"In the view I take of this case, it seems to me that the pursuer was solely to blame for what took place in attempting to leave the carriage while the train was in motion. It is important in the interests of the public and all those having occasion to travel by railway that the rule in reference to this should be strictly enforced."

The pursuer appealed.

At advising—

Lord Craighill—This is an appeal from the judgment of the Sheriff of Lanarkshire at Glasgow assoilzieing the defenders, the Glasgow and South-Western Railway Company, from an action against them brought by Mrs Anderson and her husband to recover damages for injury sustained through her having fallen from the footboard of the carriage when leaving the train in which she was a passenger at Main Street Station, Glasgow, on the evening of 26th January 1880. The Sheriff-Substitute pronounced an opposite judgment, having given decree in favour of the pursuer for the sum of £50, at which he assessed the damages to which the pursuer was entitled. There was, and there is now, no controversy as to the law of the case. The issue is one simply of fact. Were the defenders—that is to say, the servants of the defenders—in fault, and was their fault the cause of the accident? Upon consideration of the proof and argument which has been presented upon it, I have come to the conclusion that the pursuer is entitled to damages, and therefore that the appeal ought to be sustained. While thus coinciding in the result at which the Sheriff-Substitute arrived, I do not participate in the views which he has explained as his grounds of judgment. Those which I entertain can be shortly explained.

So far there is no controversy as to what happened on the occasion in question. The pursuer, her daughter, a girl of ten years of age, two young women of the name of Smith, and a young man named Conchar, were passengers in the same train, and all except the last were to leave the train at Main Street Station. After the train was stopped the two Smiths got out and reached the platform in safety unassisted. Up to this time the train had not again been put in motion. They were followed by the pursuer's daughter, whose descent from the train was assisted by Glendinning, the guard, and as he was lifting her from the footboard the train began to move. She, however, was placed on the platform in safety. The daughter, as she left the compartment, was immediately followed by her mother, who had placed one of her feet upon the footboard. At this point the guard urged her to keep in. But this course was not followed, and as she was endeavouring to reach the platform she and the guard, who was rendering what assistance he could, fell, and the result of the fall to the pursuer was the injury for reparation for which the present action was raised.

The first fault imputable to the servants of the defenders, according to my reading of the proof, is that reasonable time for the pursuer, and those who were with her leaving the train was not afforded. Glendinning, the guard, who was in the front, and Frater, who was in the rear, deponed that the usual time was allowed—that is to say, a minute was allowed to intervene between the time when the train was drawn up and the time when the signal was given for the train to be again put in motion. It is by no means clear upon the proof that even this minute was allowed, because though the arrival of the train at 8·9 and the departure of the train at 8·10 is noted in the time-book of the guard, it is explained that if the time exceeds half-a-minute, though it does not come up to a full minute, the full minute is entered in the note-book, and thus, for anything that appears to the contrary, all the

interval during which passengers were to leave the train may not have been a minute, which even when allowed is obviously short enough in any case, and in many cases much too short. In the present case, however, whether it was half-a-minute or a full minute that was allowed seems to me to be comparatively immaterial, because the signal for the advance of the train was given, and the train was set in motion, when the pursuer and those who were with her were in the course of leaving the train. There is a conflict in the evidence as to this. Conchar, who was examined as a witness for the pursuer, says there was delay on her part, and on the part of other passengers who were to leave with her, in making ready to go out. They, on the contrary, say that they took immediate measures for getting away, and one of the Smiths depones that she got on her feet even before the train was brought to a stand. The weight of the evidence, in my opinion, is in favour of the view that there was no delay whatever on the part of the passengers who were about to leave; they were ready to leave when the train was brought to a stand; they began to go out when the train was at a stand; and before the last party had descended the train was put in motion, and the result was the accident by which the pursuer was injured. The case of the defenders upon this point is extremely improbable. The pursuer and those who were with her knew that they had arrived at the station. There was no purpose to be served in their remaining in the train after it had been brought to a stand; and the fact that one party had got to her feet while the train was approaching the station is almost real evidence that her account of the matter is that which ought to be accepted. Even, however, if the view of the matter presented by Conchar were to be thought the one that ought to be taken, the conduct of the guard would still involve fault for which the defenders are responsible; for, according to Conchar, he was in the course of opening the door, his head being out at the window before the signal was given by Glendinning for the departure of the train. This must have been seen, and at anyrate ought to have been seen, by the guard, and if he, either seeing that the door was about to be opened, or not ascertaining whether or not it was in the course of being opened, gave a signal for starting the train, he acted rashly and improperly, and what he did was not only wrong in itself but was the cause of the accident. Considering the shortness of the time during which the train had been at the station, more than ordinary care that all had been allowed an opportunity to leave ought to have been taken by those who were in charge of the train.

A second fault which, in my opinion, was committed was, that even if Glendinning, the guard, was justified in giving the signal for setting the train a-going, he was not justified in leaving the signal unrecalled. He himself tells us that the door was opened just as he showed his green light, and the green light he adds is the signal for the train to start. This order to start and the opening of the door were simultaneous, and, as he tells us at another part of his deposition, when he saw the door opening he thought there might be someone coming out. Two things are thus made plain. One is that the signal for departure might have been countermanded on the very instant in which that signal was given. Another is that Glendinning without countermanding the signal, and knowing that passengers might be about to leave the train, took no measures whatever for their protection. True, the two first—the Smiths—were able to reach the platform before the train was actually in motion, and the little girl was lifted from the footboard just as the train began to move. They accordingly reached the platform in safety, but the pursuer was not so fortunate, and the error which was committed was that the train was allowed to be set in motion when it was plain from the opening of the door that passengers were about to leave the train. Upon either view there was fault on the part of Glendinning, and responsibility on the part of the defenders. If the signal to start was given too soon, that was a fault. Assuming that it was not given too soon, the neglect to countermand the signal when the door was opened that passengers might leave the train, which occurred simultaneously with the giving of the signal, was a fault. And in either case, as the accident by which the pursuer was injured was the consequence, the defenders are liable in reparation.

Lord Young—I am of a different opinion. As I understand my brother Lord Craighill, he is prepared to find in point of fact that the railway company's servants had time to stop the train, and ought to have stopped it as soon as they saw the door of the carriage open and people emerging from it. Now, I do not think that view is suggested in the evidence, and it is certainly not the view that has been taken by either of the Sheriffs, and I am therefore not prepared to adopt it on the evidence. The Sheriff-Principal finds that on the arrival of the train at Main Street Station the usual stoppage took place, and the company's servants, seeing that all the doors were shut, gave the signal to start by lamp and whistle in the usual way. That is also the Sheriff-Substitute's opinion, though he does not put it into his findings in fact, but adds it in his note. I agree with the Sheriff's finding, and I am prepared to affirm it in point of fact. Now, the ground of action is, that as the female pursuer was leaving the train it started off suddenly without any warning, and before due time was given for passengers to alight, and the result was the accident complained of. So far we find both the Sheriffs negative this in point of fact. The Sheriff-Substitute, however, is of opinion that the ground of action rests upon what followed, and what he characterises as the mismanagement of the company's servants. In his interlocutor he finds—"(2) that on arrival of the train at Main Street Station the pursuer proceeded to leave the train; and (3) that she was by the mismanagement of Glendinning, the guard, thrown on the platform, and thence fell between two of the carriages on to the ballast between the line and the platform, and was thereby much injured." In his note he says—"On the other hand, Conchar contradicts the other witnesses (the two Smiths), and says they did not attempt to get out at once. The railway servants say the same; and the fact that the train had begun to move before the rest

of the passengers had left the compartment in which the pursuer was, and that they on alighting did not see any of the other passengers who are said to have left the train, is, on the whole, perhaps better evidence to show that there had been some delay on the part of pursuer and the Smiths in alighting." He then says it is not necessary to decide this point expressly, because he thinks there are other materials adequate for the decision of the cause. He thinks, on the whole, that there is better evidence as to the mismanagement on Glendinning's part on which to base the ground of action. Now, the above being the Sheriff-Substitute's opinion as to the evidence taken before him on the question as to whether or not the pursuer delayed in leaving the compartment, I am not prepared to reverse it. I have no materials for so doing. I prefer Conchar's evidence to that of the two Smiths. It is true there is only a very short limit to come and go on—I mean in the time allowed for passengers to alight at the station; but it is not consistent with the means of conveyance afforded by railway companies that more should be given—at all events, I am not prepared without evidence to censure the company because more was not given. Moreover, I cannot say that Glendinning and the other guard were guilty of fault; indeed, I think they acted exactly as is usually done. Now, the Sheriff-Substitute being of the opinion which I have stated, says in his note:—"In my opinion, the bulk of the evidence points distinctly to the view that the train had begun to move before the little girl was put on the platform. It is shown that the guard beckoned the pursuer to stay in, and apparently called to her also, which would not have been necessary if the train had not been in motion. He says he had signalled for the train to stop, and looking to the fact that the signal consisted in moving the glasses of his lantern, this would readily account for the train being put some way on at the time when the pursuer was trying to leave the carriage." But is there any evidence to the effect (holding it proved that Glendinning and his colleague saw the door of the compartment open when the rest of the doors were shut), that the signal for starting could have been countermanded? There is not a word to this effect, and I believe it is scarcely possible that if a signal to proceed is given, and thereafter people get out of the train, there is time for the guard to countermand the order so that the train shall not budge. Being of opinion, with both the Sheriffs, that the guard did his duty in giving the signal when he did, and when he had reason to believe all the outgoing passengers had alighted, and not being able to charge him with misconduct up to that time, I cannot censure him for not countermanding the order for starting; indeed, I have no evidence that it was in his power. Therefore, I repeat, I cannot censure him here, and neither do the Sheriff-Substitute nor the Sheriff-Principal. The former in his note says,—"The guard seemed an active and intelligent young man, and I entertain no doubt whatever that what he did up to this period was intended for the best. But I think it was wrong, and that his error lay in not forbidding passengers to get out when he found them trying to leave a train which had begun to move. Indeed, it may be questioned whether his best course would not have been, by grasping the railing outside the doorway of the compartment, to have kept them in. Instead of that he lifted the child out, and thus by his actings invited the passengers to continue to alight." This is the mismanagement which is the ground of the Sheriff-Substitute's findings.

Now, I agree with the Sheriff-Principal that the man did his very best in the circumstances, and therefore on the whole matter I am of opinion that the grounds of action as libelled have failed in point of fact, and that the defenders are entitled to be assoilzied.

Lord Justice-Clerk—We are here to judge of the evidence in this case as a jury, and in that light I agree with Lord Craighill and differ from the Sheriff-Principal. In regard to the findings of the Sheriff-Substitute, I should naturally attach much importance to the view which he has adopted on the same materials as ourselves, for he is entitled to have additional weight lent to his conclusions in that he saw and heard the witnesses in the case. Impressed therefore with this view, though not of course bound by it, in a question where there is a serious question of credibility, I have leant rather towards him, and on the whole matter, while I differ from the grounds of his findings, I have without hesitation come to the same conclusion as he has arrived at.

The first question is, whether at the time when the guard gave the signal to start, the door of the compartment was open? On this point we have the evidence of three witnesses who were entirely disinterested in the case. Two of them were the sisters Smith, while the third was Conchar. Now, if Charlotte Smith is to be believed, she says expressly that she got to her feet before the train had stopped, and that she and her sister immediately got out before the train was in motion again. If so, it must have started when the door was open. Conchar, on the other hand, says there was some delay. This however Charlotte Smith denies, and I am inclined to believe the story told by the two sisters. But assume that the signal was given before the ladies got out, and that it was only reversed when the child was on the step. This is a matter of great importance to the public; luckily there are strong prohibitions against people getting out of railway carriages too soon, but it is essential that they shall not be hustled in the legitimate use of the modes of conveyance. As there was only a minute at the outside allowed, the guard should have reversed the signal immediately he saw the child on the step. I do not believe there are no means of signalling to the engine-driver once the train has started, because it must constantly happen where there is a crowd of travellers, or where there is a long train, that such stoppages have to be signalled from the rear of the train, and I must say in this case I believe the train could perfectly well have been brought to a stand-still. It comes then to this, that either I must give weight to the evidence of the Smiths or Conchar, and I prefer to trust the former. As to the period at which the train stopped, I do not wish to say anything strong, but it appears to me there was much haste, and I believe the train started sooner than it should have done. It is just one of those cases which

happen from time to time until at last a serious accident brings it forcibly into notice. On the whole matter, I think the pursuer here is entitled to prevail, and I arrive at the Sheriff-Substitute's result though on somewhat different grounds.

The Lords found that the accident to the pursuer was caused by want of due care on the part of the defenders, and ordained them to pay her £50 as reparation.

Counsel for Appellant and Pursuer—Solicitor General (Balfour, Q.C.)—Keir. Agent—John Gill, S.S.C.

Counsel for Respondents and Defenders—C. J. Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Thursday, June 30.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MAIN (FLEMING'S TRUSTEE) *v.* GALBRAITH AND OTHERS (FLEMING'S TRUSTEES).

Bankruptcy—Husband and Wife—Conjunct and Confident Persons—Fraud.

In an action at the instance of a trustee on a bankrupt estate it was averred that the bankrupt had, after he knew that he was insolvent, expended large sums on the improvement of heritable estate which had been conveyed to his marriage-contract trustees for behoof of his wife and children, and the Court was asked to declare that the heritable estate so far as so improved was held in trust for the trustee in bankruptcy—*held* (*diss.* Lord Deas) that the amount, if any, by which the value of the marriage trust-estate was enhanced by the expenditure fell under the sequestration as being a fraud at common law on the bankrupt's creditors, and a proof of the averments allowed.

Process—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 62—*Remit to Lord Ordinary to Allow a Proof.*

Where the Court recalled an interlocutor by a Lord Ordinary dismissing an action, the effect of the recall being that the case would be sent to probation, *held* that the 62d section of the Court of Session Act 1868 did not apply, and that it was not necessary that the proof should be taken by one of the Judges of the Division.

The pursuer in this case was the trustee on the sequestrated estate of James Nicol Fleming; the defenders were Mr Fleming's marriage-contract trustees. The following were the material averments of the pursuer:—In 1859 James Nicol Fleming, merchant, Bombay, then residing in Glasgow, was married to Miss Elizabeth Galbraith, daughter of John Galbraith, merchant, Campbeltown. Prior to their marriage an antenuptial marriage-contract was executed on 26th October 1859. By that deed Mr Fleming bound himself, in the event of his predecease, to pay his wife a free yearly annuity of £1000 (restricted to £500 in the event of her entering into a second marriage), payable half-yearly, at Martinmas and Whitsunday, with interest and penalty; also £50 as an allowance for mournings, and interim aliment at the rate of £1000 per annum, from the date of his death till the first term of Martinmas or Whitsunday thereafter. The contract then provided that "for the more effectual securing of the punctual payment of the above provisions in favour of his said intended wife, the said James Nicol Fleming obliges himself, within three months from the date of these presents, to assign, transfer, and make over to" certain persons as trustees—first, "Fifty shares in the Borneo Company, Limited, now belonging to, or which the said James Nicol Fleming has arranged to acquire, and to pay them on or before the 31st day of October 1859 the sum of £4000 in so far as is not already paid; and in the second place, and within twelve months from the date of these presents," Mr Fleming bound himself to effect an insurance on his life for £5000, and to assign the policy or policies to the trustees. He also bound himself to pay all calls or dividends on the Borneo Company shares, and to pay the premiums so as to keep the policy or policies of insurance in force during his life. The contract further contained the following provision in regard to the income of the trust funds:—"And with regard to the dividends, bonuses, or annual profits that may be derived from the said Borneo shares, or others, the same are to be allowed to accumulate in the hands of the said trustees during the life of the said James Nicol Fleming, as an additional and further security for the payment of the provisions hereby made in favour of the said Elizabeth Galbraith; with power, however, to the said trustees, if they think it right and proper or necessary, with consent of the said James Nicol Fleming, to pay to the said Elizabeth Galbraith, during the subsistence of the said marriage, the said dividends, bonuses, or annual proceeds arising from said shares or others, by way of alimentary provision, and exclusive always of him, the said James Nicol Fleming." The following provision related to the disposal of the trust-funds:—"And further, and with regard to the application of the sum or sums to be derived by said trustees from said Borneo Company shares or others, and to the sum or sums which may be received by them under the said policy or policies of insurance, it is hereby declared that the said trustees and their foresaids shall apply the same and interest, bonuses, dividends, and annual profits to be derived therefrom, and remaining in their hands—first, in the securing payment to the said Elizabeth Galbraith of the annuity and other provisions hereby conceived in her favour; and second, the balance, if any, after setting aside a sum sufficient for securing payment of the said annuity, and other provisions conceived in favour of the said Elizabeth Galbraith, shall, at the death of the said James Nicol Fleming, survived by his said intended spouse, be paid, assigned, or disponed to the issue of the said intended marriage, in such shares or proportions as he may direct by any writing under his hand, which failing, equally share and share alike, if more than one, and if only one, then the whole to such one child." There was a similar provi-