some outside work to be done on her, such as caulking, and three new planks to be put on. When the work which could not be done except on the patent slip was completed, the ship-builders, for their own convenience, removed her to make room for another vessel. Accordingly they launched her into the wet dock, and when launched into it she was, by the orders of the deputy harbour master, removed to a berth at the north side of the dock opposite the patent slip. She lay there for a few hours, and then, because the master persuaded the harbour master, for the convenience of the carpenters, to have her shifted, she was removed to a berth at the foot of the slip, where she lay moored by her own ropes for some days. She was afterwards moved into the west corner of the dock. All that is said about her then is that her stern ropes were attached to pawls in the premises of the defenders. It seems to me that these pawls, though locally situated in the defenders' yard, were really a part of the ordinary dock apparatus. I am of opinion that as soon as she left the premises of the defenders she was no longer in that "actual possession" which is necessary to sustain a lien. In these circumstances, it appears to me she was no longer, after she left the slip, under the custody or control of the defenders—she was then under the orders of her master and the harbour master. The power of detention appears to me to be absolutely necessary to the right of lien.

For these short reasons I cannot concur with the view taken by the Lord Ordinary.

The other Judges concurred.

Counsel for Pursuer—Solicitor-General (Clark) and Mackintosh. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders—Watson and Balfour. Agents—Webster & Will, W.S.

Saturday, June 7.

FIRST DIVISION.

PETITION—FORDYCE BUCHAN'S TUTORS.

Tutorial Inventories—Next of Kin—Citation.

In an action for giving up tutorial inventories, a petition was presented to the Court to dispense with the citation of certain of the next of kin, who were stated to be resident in England, and were the nearest relations of the pupils, those who were resident in Scotland, and were called in the summons, being more distant in degree. The Court remitted to Mr Archibald Broun, P.C.S., to inquire into the practice in such cases, and the necessity of such a petition. He reported that though the course of practice was not very clear, still it seemed to indicate the necessity of such a petition; and the Court, adopting this view, ordered intimation in ordinary form.

Counsel for Petitioners—Pearson. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Saturday, June 7.

FIRST DIVISION.

[Sheriff of Edinburgh.

SHIRRA *v.* ROBERTSON.

Appeal—Competency—Sheriff-court Act, 1853, § 24 —*Court of Session Act*, 1868, §§ 53 *and* 54—*Final Judgment.*

In a case where the Sheriff on appeal recalled his Substitute's interlocutor, and allowed the defender in the action a proof before answer by the writ or oath of the pursuer—*Held* (after consultation with the Second Division) that an appeal to the Inner House was incompetent, on the ground that this was not a final judgment in terms of the Sheriff-court Act, 1853, and Court of Session Act, 1868.

This was an action raised in the Sheriff-Court of Edinburgh by Mrs Grace Edmonstone or Shirra against Mr George B. Robertson, for payment of £100, being the amount contained in a promissory note granted by him to the pursuer.

The defender averred, *inter alia*, "It is believed that the £100 contained in the bill sued for was a sum lent by the pursuer at the request of the defender's brother, James Robertson, merchant Glasgow, but it was not paid to the defender. The interest credited in the summons was not paid by or on behalf of the defender, but by the said James Robertson. The defender believes the interest has been paid by the said James Robertson since the date of the promissory note, and that the pursuer has dealt with and treated the said James Robertson as the proper debtor therein, as he was well known to be so by the pursuer. No demand was ever made by the pursuer on the defender for payment of the debt sued for till the summons in this case was served. The defender believes and avers that no debt is due to the pursuer in respect of the bill founded on, the same having been paid or otherwise extinguished by arrangement between the pursuer and the said James Robertson. In reference to the counter statement, it is explained that the first marking of interest was written by the defender at James Robertson's request, by whom the interest is supposed to have been paid. It was not paid by the defender. The second marking of payment of interest, which has been deleted, is in the handwriting of the said James Robertson. The present action has not been raised with the consent or authority of the pursuer. It has been raised at the instigation of the said James Robertson, who is the real *dominus litis*."

The Sheriff-Substitute (HALLARD) held the defender's statements to be irrelevant, and found for the pursuer.

The Sheriff (DAVIDSON) recalled the interlocutor, and allowed the defender a proof before answer of his averments by the writ or oath of the pursuer. She appealed, and the question before the Court was as to the competency of the appeal.

Argued for her, that the appeal was a competent one in terms of sec. 24 of the Sheriff Court Act 1853, and secs. 53, 54 of the Court of Session Act 1868, that the Sheriff's judgment was a final one within the meaning of those Acts, and one disposing of the whole cause, and that if his judgment were adhered to the pursuer would lose the advantage of any objection on the question of

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