affirm said interlocutor: Find neither party entitled to expenses in the Inner House, and with these findings remit to the Lord Ordinary to proceed."

Counsel for Complainers and Respondents—Solicitor-General (Ure, K.C.)—Constable. Agents—Simpson & Marwick, W.S.

Counsel for Respondent and Reclaimer—Scott Dickson, K.C.—Orr Deas. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, December 20.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

NEILSON *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Railway—Passenger Alighting when Train not at Platform—Invitation to Alight—Relevancy.

A passenger in getting out of a train which had overshot the platform, fell and was injured. The accident happened about six p.m. on a September evening, and there was no averment that there was not daylight. In an action against the company the pursuer, *inter alia*, averred that the train ran past the platform unknown to her, that on the train reaching the station a porter called out its name, and that on the train coming to a complete standstill she proceeded to get out. There was no averment that when she proceeded to alight she did not know that the train was not at the platform.

Held that the pursuer's averment that the train ran past the platform unknown to her might be construed to mean that when she proceeded to alight she thought the train was opposite the platform, and did not know that it was not, and that the action therefore was relevant, but on that averment only.

Janet Kennedy or Neilson, wife of Thomas Neilson, 115 Great Western Road, Camlachie, Glasgow, raised an action against the North British Railway Company to recover £500 in name of damages for personal injuries. The pursuer was a passenger on the defenders' railway from Milnathort to Cupar, Fife, on 22nd September 1906, and met with an accident when getting out of the train at Cupar Station. She averred—"(Cond. 3) The train from Ladybank Junction, by which the pursuer travelled to Cupar, was timed to leave Ladybank at 5·38 afternoon, but it ran considerably behind the scheduled time. When approaching Cupar Station the train was running at a very high rate of speed, and it ran past the station platform, unknown to the pursuer. (Cond. 4) On the train reaching Cupar Station a porter in the defenders' service shouted out the name 'Cupar' several times, and thus invited passengers for Cupar to alight. After the train had been brought to a complete standstill the pursuer proceeded to get out of the carriage in which she had travelled from Ladybank Junction. She opened the carriage door, stepped on to the footboard, and held by the handrail alongside the carriage door as she stood on the footboard, while another passenger handed her out her bag from the carriage. The pursuer then proceeded to alight, but in consequence of the train having overshot the platform as before mentioned she fell a distance of about four feet on to the ground. (Cond. 5) By the said occurrence the pursuer sustained serious injuries to her person. . . . (Cond. 6) The foresaid injuries to the pursuer were caused through the fault and negligence of the defenders, or of their servants, for whom they are responsible. In particular (1) the driver of the engine of said train by which pursuer travelled from Ladybank Junction to Cupar was at fault in respect he failed to pull up the train—and particularly the carriage thereof in which pursuer travelled—opposite the platform at Cupar Station, and culpably and negligently drove beyond the platform the part of the train in which pursuer travelled; (2) the porter who on the foresaid occasion shouted out 'Cupar' several times on the arrival of the train there, was at fault in thus inviting the pursuer and other passengers for Cupar to alight from the train while said carriage or part of the train was not opposite the platform, and no proper landing stage or means had been provided for the pursuer alighting with safety; and (3) the stationmaster and other servants of the defenders at Cupar Station were also in fault in respect they failed to give warning to the pursuer as it was their duty to do, that she was not to alight while said carriage or part of the train was not opposite the platform."

The defenders pleaded that the action was irrelevant.

On 4th December 1906 the Lord Ordinary (MACKENZIE) approved of this issue—"Whether on or about 22nd September 1906, and at or near the Railway Station, Cupar, Fife, the pursuer sustained personal injuries through the fault of the defenders, to her loss, injury, and damage."

"*Opinion.*—I am of opinion that this case should not be withheld from a jury. In the case of *Muirhead* v. *North British Railway*, 11 R. 1043; *Siner* v. *Great Western Railway*, L.R. 3 Exch. 150, L.R. 4 Exch. 117; and *Cockle* v. *London & South-Eastern Railway*, L.R. 5 C.P 457, there was nothing of the nature of an invitation to alight. In *Whittaker's* case, L.R. 5 C.P. 464, note, there was, Bovill (C.J.) observing that it was a question for the jury whether the calling out of the name of a station amounts to an invitation to alight—see *M'Aulay* v. *Glasgow & South-Western Railway*, 23 R. 845; *Foy* v. *London, Brighton, & South Coast Railway*, 18 C.B.N.S. 225. No doubt in *Whittaker's* case it was dusk and in *Cockle's* case it was dark. In the present case there is no averment it was not daylight. Nor is there any averment that the place was not reasonably safe for passengers to alight.

There is, however, an averment that the train ran past the station platform unknown to the pursuer. I was doubtful whether this could legitimately be construed to mean that when she proceeded to alight she did not know the train was past the platform and was under the impression the train was opposite it, but I have come to the conclusion that it may.

"I am accordingly of opinion that the proposed issue should be approved,"

The defenders reclaimed, and argued—The action was irrelevant. The accident happened about six p.m. on 22nd September. At that hour there must have been sufficient light for the pursuer to see what she was doing. She ought to have looked before getting out of the compartment or stepping down. It was not averred that she stepped out not knowing that there was no platform. That was necessary to make the case relevant. The cases of *Whittaker* and *Cockle* cited by the Lord Ordinary were distinguishable. In the former there was an invitation to alight, and in the latter it was dark at the time of the accident. There was no invitation to alight here, for the train had overshot the platform. Further, it was not averred that the name of the station was called out after the train had stopped. Calling out the name of the station while the train was in motion was no invitation to alight—*Bridges* v. *North London Railway Company*, reported in a footnote to *Cockle* (*cit. supra*) at p. 459.

Counsel for respondent were not called upon.

LORD PRESIDENT—I am of opinion that this case must go to a jury. I think the Lord Ordinary has dealt so well with the question that I have little to add. There is no doubt that on the averments here this case is a very narrow one. The Lord Ordinary says—"In the present case there is no averment it was not daylight. Nor is there any averment that the place was not reasonably safe for passengers to alight. There is, however, one averment that the train ran past the station platform unknown to the pursuer. I was doubtful whether this could legitimately be construed to mean that when she proceeded to alight she did not know the train was past the platform, and was under the impression the train was opposite it, but I have come to the conclusion that it may." I entirely agree with what the Lord Ordinary there says, and I think it right to add that that is the only relevant averment; and, accordingly, unless the pursuer can prove that averment at the trial, I do not think she has any relevant case at all. In other words, if she proposes to prove condescendence 4 in any other way she will not have a relevant case. But that may be safely entrusted to the Judge at the trial, and if the facts are—as Mr Cooper says they are—that the lady, knowing that she had to go down four feet, stepped off and thus fell, it is clear that there would be no evidence of fault against the Railway Company. But that is on the facts and not on the averments. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD KINNEAR—I also think that this case must go to a jury. I agree that it is a narrow case on the point of relevancy. It is very clear that questions of fact may be raised at the trial which may be of some difficulty, and the jury will have to consider whether the accident was due to the negligence of the railway company or to the pursuer's own rashness in alighting where she was never intended to alight. That is a question of fact, and I think a question for the jury.

LORD PEARSON concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuer and Respondent—Orr, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders and Reclaimers—Cooper, K.C.—Grierson. Agent—James Watson, S.S.C.

Friday, December 21.

FIRST DIVISION.

[Lord Johnston, Ordinary.

FIFE COAL COMPANY, LIMITED *v.* BERNARD'S TRUSTEES.

Superior and Vassal—Casualty—Implied Entry—Last-Entered Vassal still Alive—Holding Prohibiting with Irritancy Subinfeudation or Delay in Entering, but not Expressly Stipulating for Payment of a Casualty—Liability of Representatives of Impliedly Entered Vassal for Casualty not Demanded during his Lifetime in Addition to that Due in respect of their Own Implied Entry—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94) *sec.* 4, *sub-secs.* (3) *and* (4).

A feu-charter contained a clause against subinfeudation protected by an irritancy, and a clause providing that the disponees of the vassal must enter with the superior within a year and a day of their dispositions on pain of irritancy of their rights. There was no expressed obligation to pay a casualty on entry. In 1901 the feu was disponed by a duly entered vassal, and the disponee recorded his disposition; and on his death in 1903 leaving a trust-disposition and settlement, his trustees made up a title by notarial instrument which they recorded. While the vassal who had been duly entered and had disponed was still alive, the superior claimed from the trustees two casualties, the one in respect of the truster's implied entry, the other in respect of their own. The trustees denied that any casualty was due, or alternatively more than one.