further provided by the Act of Sederunt (section 17 (*h*)) that the appellant, having that certificate in his hand for the information of the Court as to why a stated case was refused, may come here and state to the Court the class of case he wishes to have stated, and ask for an order on the other party to show cause why a case should not be stated.

The Sheriff refused to state a case, but embodied that refusal in the interlocutor which he pronounced, so there is no other record of his refusal than the interlocutor sheet, and the interlocutor sheet, of course, could not be sent to this Court. The appellant now comes to this Court and says that he cannot comply with the rules of the Act of Sederunt, as the Sheriff refused to give him a separate certificate which he could produce, and he asks the Court to deal with his application in the condition in which we find it.

I think it as well to go into this matter, because I look on what has happened as the result of a mere misunderstanding of the meaning of the Act of Sederunt. I think the Sheriff only wished to do as the Act of Sederunt directed; but it will be seen that what he did was practically useless, as his interlocutor could not be taken away, and it is therefore necessary that he should write his certificate, stating the reasons of his refusal on a separate paper, which can be taken away and shown to this Court.

It is unnecessary to multiply procedure, and as we have here a copy of the Sheriff's interlocutor, I propose that in this case we should make the usual order on the other party to show cause, and should allow the appellant to lodge simply a copy of what the Sheriff has written on the interlocutor sheet.

LORD DUNDAS and LORD JOHNSTON concurred.

LORD M'LAREN and LORD KINNEAR were absent.

The Court pronounced this interlocutor—

"Appoint the note to be intimated to the respondents, and allow them; if so advised, to lodge answers within eight days after such intimation; allow the appellant to lodge in process, instead of a certificate of refusal to state a case by the arbitrator as required by subsection (*c*) of section 17 of the Act of Sederunt dated 26th June 1907, a copy of the arbitrator's refusal to state a case as contained in his interlocutor."

Counsel for Appellants—J. A. Christie. Agents — St Clair Swanson & Manson, W.S.

Wednesday, March 9.

SECOND DIVISION.

[Lord Johnston and a Jury.

MITCHELL *v.* CALEDONIAN RAILWAY COMPANY.

STRACHAN *v.* CALEDONIAN RAILWAY COMPANY.

(See *ante*, March 11, 1909, vol. xlvi, p. 517.)

Process—Jury Trial—Motion for New Trial — Third Trial Allowed—Withdrawal of Case from Jury—Contributory Negligence.

The pursuer in an action of damages for personal injury obtained a verdict which was set aside on the ground that contributory negligence on his part had been proved. At the new trial the pursuer upon practically the same evidence again obtained a verdict.

The Court *set aside* the second verdict as contrary to evidence, and *granted* a third trial.

Observations by the Lord Justice-Clerk and Lord Johnston on the practice of withdrawing a case from the jury.

John Mitchell, measurer, Greenfield Street, Alloa, brought an action against the Caledonian Railway Company for £1000 damages in respect of personal injury sustained through his having been knocked down and run over while crossing a line of rails in Grangemouth Docks, the property of the defenders, owing as he alleged to the fault of the defenders' servants. A similar action at the instance of Nathan Strachan, mill-hand, who was also run over and injured on the same occasion, was tried along with Mitchell's action, the evidence in the latter case being held as evidence in the former. The jury returned verdicts for the pursuers. In both cases the defenders obtained a rule, and on 11th March 1909 the First Division ordered new trials —see *ante*, vol. xlvi, p. 517.

At the second trials, on 27th and 28th December 1909, before Lord Johnston and a jury, the jury again returned verdicts for the pursuers, assessing the damages due to Mitchell at £400 and to Strachan at £200. In both cases the defenders again obtained a rule.

The averments of the pursuers are given in the previous report, and the import of the evidence sufficiently appears from the opinions of the Lord President in the previous report and from the opinion of Lord Johnston (*infra*).

At the hearing on the rules the pursuers argued—The sole question here was whether there was contributory negligence. It was a question of fact and was purely for the jury, who were the tribunal saddled by the Legislature with the duty of determining the matter. They had done so in favour of the pursuers. Their verdict was conclusive, unless it could be shown that there was absolutely no evidence upon which they could have arrived at the result at

which they did. The defenders here were the pursuers in the issue of contributory negligence, and must prove negligence on the part of the men. A third trial had been granted in *Watson* v. *North British Railway Company*, December 6, 1904, 7 F. 220, 42 S.L.R. 165, but in that case the circumstances of the accident were such as to show that the man must have been careless. But even though the Court was against the pursuers on the merits, it was their duty to put an end to the litigation, there being no question of law—*M'Quilkin* v. *Glasgow District Subway Company*, January 24, 1902, 4 F. 462, 39 S.L.R. 328; *Grant* v. *Baird & Company*, February 20, 1903, 5 F. 459, 40 S.L.R. 365.

Argued for defenders—The verdict was contrary to evidence. On the admitted facts there must have been contributory negligence. The evidence was all one way. No new evidence was added at the second trial. The case should have been withdrawn from the jury—*Flood* v. *Caledonian Railway Company*, November 30, 1889, 27 S.L.R. 127; *Tully* v. *North British Railway Company*, July 17, 1907, 46 S.L.R. 715.

LORD JOHNSTON—I had no doubt at the time this verdict was given that it was as plainly against the evidence as a verdict could well be. What I have heard from Mr Anderson to-day has only confirmed that view, and I am clearly of opinion that a new trial, notwithstanding that two trials have already taken place, must for the sake of even justice be allowed. Whether there is anything exceptional in granting a second new trial need not be considered, for there is something else so exceptional in this case that it precludes any such question. That something is that contributory negligence in the present case is not merely clearly proved but is admitted, nay averred, by both pursuers in the very forefront of their evidence. They allege an initial circumstance which no conceivable reasoning can prevent being a grave act of contributory negligence, viz., that to reach the road which they claim is, either of right or tolerance, their road to their day's work, they trespassed on the railway line, and that in order to get behind a train passing on the off line of rails walked slantways down the near line of rails with their backs half-turned to the direction from which any train using the latter line of rails would come, and were consequently knocked down by such an advancing train. As I have said, it did not need evidence to prove this. It stands on the face of their own avowal, and is in fact the foundation of their case on evidence though not on record.

If I had been aware at the time of the trial of the case of *Tully* v. *North British Railway Company*, 1907, 46 S.L.R. 715, I should have acted upon that case, and I should have withdrawn the case from the jury. I was very much disposed to do so upon my own authority, but I hesitated to take that, in Scotland, unusual course on the spur of the moment. I had never personally had experience of a case being withdrawn from the jury, and the comparative want of elasticity of jury practice in Scotland made me hesitate lest I should be taking a course for which there was no adequate precedent. That that course should have been taken in this case, even if it were to create a precedent, I have not the slightest doubt; and on more deliberate consideration I am enabled to say that though rarely taken, the course is competent, and that I should have taken it.

This case in its circumstances appears to be extremely like that with which the Lord President was dealing in *Tully's* case. Issues ought never to have been allowed in it, and had the case been ingenuously stated upon record issuable matter would not have been found. The issue was obtained by reason of the specious way in which certain facts were stated and others suppressed. Once the real facts are ascertained it is seen that there is really no issuable matter. In England, where there is no preliminary consideration of relevancy, but the question is left to arise at the trial, the judge would, when the facts were seen, have at once withdrawn the case. Unfortunately, according to our practice the relevancy has to be considered *ab initio*, and therefore the question is—Do the facts stated if proved support the conclusion in law? and not, Do the facts as proved lead to the legal result assumed?

Now the misleading statements in this record are two. The first is—"On the morning in question the pursuer entered the dockyard by the main entrance thereto from the highway, crossed an overhead bridge, and descended by a stair into the dockyard. In order to reach the said public road or pathway he had to cross the double line of railway before referred to at a point nearly opposite the defenders' goods shed in said dockyard"; and the second misleading statement is that the pace of the train which ran over the two men, and which is treated as a passenger train, and not merely as an empty passenger carriage attached to an engine, was fifty miles an hour.

What was proved with regard to the first statement to which I have referred, was this—and I take to aid the explanation, not the defenders' plan, which was laid before your Lordships, but the pursuers' plan, because it is really more distinct. The dockyard is fenced throughout; but as a dockyard it is of large extent, extending to 300 or 400 acres, and it has numerous sidings on it; and in respect that it is entirely or almost entirely a dockyard for the shipment of coal *ex* rail it is covered with railway lines and sidings. It has one so-called through line, connecting the main lines at Grangemouth station with Grangemouth dock. It is not to be supposed that within the dockyard the through line should be fenced from the sidings; it would be inconsistent with the object of either that it should be so. The dockyard is reached by a gate. You come out of Grangemouth by what is known as the Bo'ness road, cross the main line of the railway proper by a bridge a little to the

east of the Grangemouth station, and then find a side road leading down to the dockyard gates, the dockyard being practically all to the north of said main line. The dockyard gates are at the entrance to a level-crossing, which crosses first of all a siding with two sets of rails, and then crosses what I may call the dockyard through line, and then continues as a regular causewayed road round the dock face, giving access to the shipping lying at the quays, and intended for vehicular and pedestrian traffic, and in constant use for such. That level-crossing is closed when necessary by gates worked from the adjoining signal-box. These gates absolutely close the road and therefore the access to the dockyard when a train is passing the level-crossing on the dockyard through line. But when these gates are open and traffic is permitted across the level-crossing, the gates do not entirely meet for the reason which I have explained, that the level-crossing is first over the siding and then over the through line, and then over more sidings, and the length is too great for the gates when open completely to close all these. But that the closing of the gates when traffic is expected may not delay foot-passengers, there is an overhead foot-bridge from one side of the crossing to the other, covering not merely the dockyard through line but some of the sidings immediately adjoining. A passenger crossing this bridge and reaching the other side descends again to the dockyard road and makes his way unimpeded to the quays. But from this overhead bridge there are one or more sets of steps down to the yard for the use of the railway company's servants. Accordingly any person from the bridge can descend to the yard, and if he does so, can if he pleases, just as anyone can who is crossing the level-crossing when the gates are open, or just as anyone can from the side of the dockyard road find his way not only in among the sidings but on to the dockyard through line. Of course if he is a member of the public he has no right to do so, and is trespassing.

The public road alleged is the usual beaten track which surfacemen, shunters, and others employed in railway and dockyard work make alongside a line in going to and fro in connection with their work. This track is well worn, and runs from the level-crossing along the south side of the dockyard through line, crossing points and and signal wires past Gibb & Austin's works, at which the two pursuers were employed, and on to the dock eastward, and I have no doubt it runs westward also towards Grangemouth station. But there has been a great deal of promiscuous use of this track as a short cut by all and sundry, and latterly by Gibb & Austin's workmen, the railway company having failed to check trespass, with which they are much troubled at this and other points in the dockyard.

Let me now contrast the pursuers' allegations with the facts which they themselves state in their evidence. They allege that on the morning in question they entered the dockyard by the main entrance thereto from the highway—this they did; that they crossed an overhead bridge—this they did not; and descended by a stair into the dockyard—this they did, but in this wise, instead of crossing the bridge and coming down on the road on the other side and following it round the quay to the proper entrance to Gibb & Austin's works, they stepped down one of the side sets of steps meant for the railway company's workmen and got among the sidings and eventually on to the dockyard through line. They then go on to allege that in order to reach the said public road or pathway they had to cross the double line of railway before referred to at a point nearly opposite the defenders' goods shed in the said dockyard. But what they state in evidence is that having got in among the sidings they walked on till they found themselves abreast of the goods shed, and then, assuming the aforesaid track to be a public road, they had, in order to reach it, to cross the dockyard through line. This is what is meant by had to cross. And this is how they themselves tell us they did attempt to cross it. A goods train was passing on the up or far side line of rails, so they could not go straight across, but they made an oblique crossing of the down or near side line of rails to cut in behind the goods train when it had passed, and walked on regardless of the fact that a train might be coming on that near side line of rails, and if it did, that they had practically their backs to it. A train did unfortunately come up at the moment—at least an engine and an empty passenger carriage, which so far as they were concerned was just as bad. It knocked them over and severely injured both. But mercifully they were not killed.

The accident, then, did not happen on the alleged public road, but in course of a manifest trespass upon the railway lines in order to reach the alleged public road at a time when the level-crossing gates were shut, showing that through traffic was expected. Had this been candidly stated on record, there can be no question that the case would have been thrown out without ever being allowed to go to trial, for a more crying case of contributory negligence could not be conceived.

I do not think it necessary to refer further to the evidence, or to touch at all upon the ludicrously false statement that the offending engine and carriage were travelling at the rate of fifty miles an hour.

It appears to me that the case is exactly where the Lord President, the last time the case was before the Court, put it (1909 S.C. 746). If there is a difference between the evidence in the two trials, it is this—At the second trial the facts with regard to the *locus* were cleared up, whereas they were left in some doubt at the first trial; and the facts with regard to the conduct of the pursuers themselves and to the approaching train were also cleared up, whereas they were not very clear at the

first trial. The Lord President assumes as his reading of the situation what has proved to be the true state of the facts, and upon that assumption he bases his judgment. His assumption was proved in the second trial to be absolutely correct. And the attitude which he takes towards contributory negligence, if repeated in the present case, would be repeated upon facts proved, and not upon facts more or less surmised. Accordingly if a case of contributory negligence was made out in the last trial, and ought to have been accepted by the jury, *a fortiori* it was made out, and should have been accepted here. But a majority—I am glad to say only a majority—were found to deny their legal effect to the pursuers' trespass, rashness, and negligence, though that effect was carefully explained to them.

For the reasons which I stated at the outset, although there have already been two trials, justice, in my opinion, requires that a third be granted. I think, therefore, that the rule should be made absolute.

LORD LOW—I am of opinion that the Court have no option but to set aside the verdict in this case. I think that there could not be a clearer case of contributory negligence than that which is disclosed by the evidence. I am further of opinion that upon no reasonable view of the evidence could a contrary conclusion be arrived at. Accordingly I think the verdict ought to be set aside.

LORD ARDWALL—I concur.

LORD DUNDAS—I concur.

LORD JUSTICE-CLERK — I should like to say one or two words about this case. It seems to me that what Lord Johnston has said is conclusive upon the matter, but one or two things in the case struck me so forcibly that I think I had better call attention to them.

The case is that these pursuers were run down by a train in circumstances in which they could not avoid it. I am very clearly of opinion that that was not so; my opinion is that they could not have been run down if they had taken reasonable care of themselves. In the first place, this train was visible for a considerable distance to anybody if there was nothing to obscure the view—visible at least for 100 yards—and no man who can see along a line for 100 yards, and who wishes to cross the railway, should step on to the line without first seeing that it is clear. He is not entitled to run any risk because a train may go faster one day than another.

But then it is said—I do not know whether this point came out in the last trial or not—that the line was obscured by two causes. One was that there were heavy bales of hay projecting over the trucks in the goods train and tarpaulins blowing in the wind, and the other was that the smoke from the goods train was obscuring the line so that they could not see. I can see no two stronger reasons, if they were true, for holding that these men were guilty of contributory negligence in crossing the line in such circumstances. If the view was obscured by projecting goods or tarpaulins of a train moving on the other line, then that is an additional reason for not crossing the line until assured that no train is on it. Strachan says that the smoke was coming down all the length of the line, and that it ran straight to the ground on the line. If we are to take that as true, nothing can be more plain than that the parties who went across the line in these circumstances were guilty of gross contributory negligence. But we know that all that evidence, both as to hay and tarpaulins and smoke, is untrue.

Now the evidence of contributory negligence is supposed to be set aside by another extraordinary contention, and that is that a party going to cross a line is entitled to cross it in circumstances of extreme danger to himself. Strachan says—"We were in a hurry to get to our work, and when we did not see anything coming behind us, why should we stop and lose the morning's work?" When we come to see what was done, we must conclude that nothing could be more extraordinarily dangerous than what they did. According to themselves, they were not able to see, yet they stepped on to the line and walked along it with their backs to the train that we now know was coming, because they were in a hurry. Of course they say that they looked round, but how comes it that they never saw the train at all, and that at the moment it struck them they had no idea it was coming. That goes to the question of credibility as bearing on the question of contributory negligence.

They seem to suggest that they were never on the four-foot way. Strachan says this—"(Q) Did you keep your head over your shoulder the whole time you were walking on the four-foot way?—(A) No; I was not on the four-foot way; I got knocked down when I came to the four-foot way." That means that he must have stepped on to the four-foot way when the train was on him, which would not have been the case if he had been keeping a good look-out.

I am clearly of opinion that this verdict must be set aside.

With regard to the taking of a case from the jury, such action has never been encouraged in this Court. I only did it once, and I did it with some trembling as to what my brother Judges would say if the case came up again. There was one case in which Lord Moncreiff withdrew the case from the jury, and I remember he had a very uncomfortable time in this Division. But although it may not be a regular practice, I think there is no case in which it could be said to be more reasonable to do it than in a case in which two juries, upon practically the same evidence, have given two verdicts which cannot be supported. Mr Anderson can always make a good argument when he has got a case, but in stating this case he made it very plain to me that no sound argument in favour of this verdict could be stated. The rule will be made absolute for a new trial.

The Court set aside the verdicts and granted new trials.

Counsel for Pursuers—Anderson, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders—M'Clure, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, March 16.

SECOND DIVISION.

(SINGLE BILLS.)

GAVIN *v.* P. HENDERSON & COMPANY AND OTHERS.

Process — Sheriff Court — Expenses — Remitted Cause—Expenses of One Defender who has been Assoilzied in the Sheriff Court—Successful Defender Unable to Obtain Extract.

In an action in the Sheriff Court against three defenders, one of the defenders was of consent assoilzied, and the Sheriff allowed a proof against the remaining defenders. The cause was then, on the application of the pursuer, remitted to the Court of Session, and on the same date the successful defender, having applied for extract, was informed that it could not be obtained. On the motion of the successful defender in the Single Bills the Court of new *decerned* for the Sheriff Court expenses, and *found* the said defender entitled to the expenses of the appearance in the Single Bills modified at £3, 3s.

In July 1909 Joseph Gavin brought an action in the Sheriff Court at Glasgow against P. Henderson & Co., shipowners there, to which action of 6th October 1909 he was allowed to add other two defenders. On 26th January 1910 P. Henderson & Co. were of consent assoilzied and found entitled to expenses, and on 8th February 1910 the Sheriff-Substitute (BOYD) approved of the Auditor's report on the account of expenses and decerned against the pursuer for the taxed amount, £13, 10s. 7d. On 23rd February 1910 the Sheriff-Substitute allowed a proof against the remaining defenders, and on the following day the pursuer required the cause to be remitted to the Second Division of the Court of Session. On the same date P. Henderson & Co. applied for extract of their decree for expenses and were informed that it could not be obtained, because a note requiring the cause to be remitted had been marked on the process. On the case appearing in Single Bills the successful defenders moved the Court to find them anew entitled to expenses. The pursuer opposed the motion and argued that P. Henderson & Co. were no longer parties to the process and could not be heard.

The Court pronounced this interlocutor:—

"Having heard counsel in the Single Bills, affirms the interlocutor of the Sheriff-Substitute dated 8th February 1910, and in terms thereof of new decern against the pursuer for payment to the defenders P. Henderson & Co. of the sum of £13, 10s. 7d., the taxed amount of the said defenders' account of expenses; further, find the said defenders entitled to the expenses of this appearance; modify the same at £3, 3s, and decern and ordain the pursuer to make payment of the same to the said defenders; dispense with the reading in the Minute Book, and grant warrant for immediate extract."

Counsel for Pursuer—Aitchison. Agents—Balfour & Manson, S.S.C.

Counsel for P. Henderson & Co.—Paton. Agent—Campbell Faill, S.S.C.

Thursday, March 17.

FIRST DIVISION.

[Sheriff Court at Ayr.

MAGISTRATES OF CUMNOCK AND HOLMHEAD *v.* MURDOCH.

Burgh — Appeal — Competency — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 339—*Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, cap.* 33), *sec.* 104 (2) (*s*) — *Summary Prosecutions Appeals (Scotland) Act* 1875 (38 *and* 39 *Vict. cap.* 62)—*Summary Jurisdiction (Scotland) Act* 1908 (8 *Edw. VII, cap.* 65), *secs.* 3 *and* 4, *and Schedule A.*

The Burgh Police (Scotland) Act 1892, sec. 339, as amended by the Burgh Police (Scotland) Act 1903, sec. 104 (2) (*s*), provides for a right of appeal to the Court of Session, "in terms and subject to the provisions of" the Summary Prosecutions Appeals (Scotland) Act 1875. The last-mentioned Act is repealed by the Summary Jurisdiction (Scotland) Act 1908, which enacts, sec. 4, that "where any statute provides for . . . appeal under the Summary Prosecutions Appeals (Scotland) Act 1875, such . . . appeal shall be taken under this Act" (*i.e.*, to the High Court of Justiciary).

Held that an appeal under sec. 339 of the Burgh Police (Scotland) Act 1892, as amended by sec. 104 (2) (*s*) of the Burgh Police (Scotland) Act 1903, which had been taken to the Court of Session in terms of the Summary Prosecutions Appeals (Scotland) Act 1875, had been competently presented to that Court—the repeal of the last-mentioned Act by the Summary Jurisdiction (Scotland) Act 1908 not affecting the independent right of appeal to the Court of Session given by the Burgh Police (Scotland) Acts of 1892 and 1903.