peremptory—*Don* v. *Richardson*, March 16, 1859, 21 D. 751.

The reclaimers moved to be allowed to amend by substituting the correct words of the interlocutor, and cited *Milne's Trustee*, November 12, 1842, 5 D. 68.

LORD JUSTICE-CLERK—I do not see how it is possible to sustain this reclaiming-note. A fundamental part of the interlocutor pronounced by the Lord Ordinary has been left out in the print of the interlocutor prefixed to the reclaiming-note. It is not a case of printing the initials of one of the parties incorrectly or anything of that kind. The mistake is a mistake in regard to what is of the essence of the interlocutor. Nothing at all is said about one of the defenders, while as regards the other defender the plea-in-law which is mentioned is not the plea that the Lord Ordinary sustained. Regularity of procedure must be attended to. In the words of the Lord Justice-Clerk in the case of *Don* v. *Richardson*, 21 D. 751, to which we were referred, "The omitted passage constitutes the whole sting of the judgment. If the omission arose through a clerical error, it deserves to be visited by the severest penalty." Here not having the correct interlocutor before us we can do nothing but refuse the reclaiming-note.

LORD TRAYNER—I agree. The interlocutor prefixed to the reclaiming-note must be the interlocutor pronounced by the Lord Ordinary. I regard the provision of the Act of Parliament as peremptory.

LORD MONCREIFF—I think that we have no alternative but to sustain this objection. Even if the respondents had not taken it, I think that we should have been bound to take it ourselves.

LORD YOUNG was absent.

The Court refused the reclaimers' motion, and dismissed the reclaiming-note as incompetent.

Counsel for the Pursuers—A. M. Anderson. Agents—Ritchie Rodger & Wallace, S.S.C.

Counsel for the Defender M'Kean—Kennedy. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Defender Weddell—Gunn. Agents—Mackay & Young, W.S.

*Saturday, June 23.*

## SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

## M'KEEVER *v.* CALEDONIAN RAILWAY COMPANY.

*Reparation—Negligence—Safety of Public—Unlighted Opening from Railway Platform leading to Dangerous Place—Invitation—Trap—Railway.*

In an action of damages against a railway company the pursuer averred that having left a train at a station on the defenders' line, and having given his ticket to the collector, he passed through a wicket gate, near which the collector was standing, under the belief that said gate was the exit from the station, and fell over an unfenced stair and was injured. He averred that the lamp at the wicket-gate was unlighted.

*Held* that the action was relevant.

Robert M'Keever, provision merchant's manager, Glasgow, brought an action in the Sheriff Court at Glasgow against the Caledonian Railway Company for damages on account of personal injuries sustained by him. The pursuer averred that on 1st December 1899 he was a passenger by one of the defenders' trains from Glasgow to Garnkirk, and that on the arrival of the train at the latter station about 6 p.m. he alighted therefrom and proceeded to leave the platform. "(Cond. 3) The pursuer had reached a point opposite to a wicket-gate on the north side of said station, and not far from the east end of the station platform, being the platform at which the said train arrived, when a ticket-collector in the employment of the defenders, and whose name is to the pursuer unknown, took delivery of the tickets of the pursuer and his two fellow-passengers. It was intensely dark at the time, and the pursuer, in the belief (induced by the fact that the defender's said ticket-collector was standing at the entrance therefrom and near thereto) that the said wicket-gate formed one of the exits from said station available to the public, passed, accompanied by his said two fellow-passengers, through said wicket-gate, which at the time was open, and at which the defenders' said ticket-collector was stationed as aforesaid, and was suddenly and unexpectedly precipitated over an unfenced stair on the north side of and adjacent to said wicket-gate, and forming the exit therefrom. The pursuer fell, and thereafter rolled down an open embankment on one of the sides of said unfenced stair, some 5 feet or thereby, and sustained the injuries after mentioned. (Cond. 5) The defenders, or those for whom they are responsible, were in fault in allowing the said wicket-gate to remain open. It ought not to have been open at the time of said accident, and particularly in the darkness of the night. The said station was frequented by members of the public and others, and said gate, by being left open in

the circumstances condescended on, constituted a serious danger and trap. The defenders were or ought to have been well aware of this, and ought to have had said gate closed, particularly on the arrival of a train by night. Their failure to do so on the occasion in question was the direct cause of the pursuer's injuries, but they culpably and in entire disregard of the safety of the public, and in particular of the pursuer, permitted said gate to remain open, with the result that pursuer was injured as aforesaid. There was nothing to indicate to the pursuer or his fellow-passengers that this gate did not form and was not one of the usual entrances to and exits from said station, and the pursuer received no warning, as he in the circumstances condescended on ought to have, from the defenders' said ticket-collector of the danger involved in passing through said gate. The lamp at said wicket-gate was not lighted as it ought to have been, and the defenders' said ticket-collector by standing at or near said wicket-gate, and collecting the tickets from pursuer and his fellow-passengers, thereby gave an invitation to pursuer and his fellow-passengers to pass through said wicket-gate, with the result that the pursuer was injured as aforesaid."

In defence the Railway Company pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant."

On 16th March 1900 the Sheriff-Substitute (STRACHAN) repelled the first plea-in-law for the defenders and allowed a proof.

The pursuer appealed for jury trial, and lodged an issue for the trial of the cause.

On the motion for the approval of the issue, the defenders objected to the relevancy of the action, and argued—The action was irrelevant, for the pursuer's averments did not disclose fault on the part of the defenders. It was not enough for the pursuer to say that he came to a dark place and fell down. He was bound to look where he was going, or to inquire if the place was unfamiliar to him—*Forsyth* v. *Ramage & Ferguson*, Oct. 25, 1890, 18 R. 21; *Fleming* v. *Eadie*, Jan. 29, 1898, 25 R. 500; *Driscoll* v. *Partick Burgh Commissioners*, Jan. 10, 1900, 2 F. 368; *Walker* v. *Midland Railway Company*, 1886, 2 T.L.R. 450.

Counsel for the appellant were not called upon.

LORD JUSTICE-CLERK—I think this is a very narrow case. I think it is a case in which there may be considerable difficulties in dealing with it with the aid of a jury, but I am not prepared to say that there is not a relevant case. The case, as I understand it, is that a person leaving a railway station and going up to the place where tickets were to be received, on giving up his ticket, stepped out through an opening in the fence, which was at the side of the ticket-collector—there probably being two openings—with the result that he tumbled down an embankment and was injured. I think that case is quite distinguishable from the other cases which were quoted to us. At a barrier where a ticket-collector is taking tickets there may be two gates, with a post in the middle, and the ticket-collector may be collecting tickets, expecting the people all to pass only the one side, but if the other side is left open, the natural suggestion to the passenger is that there is an exit that way. And if in these circumstances he steps that way, believing that a gate which is standing open there is an exit for passengers, and falls down an embankment, I think he is entitled to have an issue upon the question whether that place where the fall took place was not left open in these circumstances by the fault of the defenders. Therefore I think the case must go to trial.

LORD TRAYNER—I agree that the case is a narrow case, but I do not see my way to throw the case out upon the ground that it is irrelevant. The pursuer's averment is, that having left a train at this station, and delivered up his ticket to a person who was standing on the platform for the purpose of taking it, he came to a part of the station fence or enclosure which he found open. I think it was not unreasonable for the pursuer to think that that opening was left for the purposes of exit; he made use of it for that purpose, and fell over a steep embankment, and got himself hurt. I think if a railway company have a gate or opening at any part of their fence, which leads to a place which is dangerous, they should take care that the opening is closed or guarded in some way, and especially on the arrival of trains, when perfect strangers may be arriving at the station. The absence of this care may amount to fault, making them liable for resulting consequences. That is the kind of case the pursuer avers, and I am not able to say that it is not relevant.

LORD MONCREIFF—I am of the same opinion. I think it is an extremely narrow case. It would have been much better if the pursuer had rested content with the proof he was allowed by the Sheriff. But we cannot send the case back to the Sheriff simply because we think it better that it should be tried in that way. I am unable to say that the pursuer's averments are irrelevant. He not only states that the gate was left open and the platform badly lighted, but that he was led to go out at that supposed exit by the fact that a ticket-collector was standing and taking tickets at that spot. It may turn out at the trial that that was not so, but on the pursuer's averments—which are all we can look at—I think the averments are relevant, and that the case must go to trial.

LORD YOUNG was absent.

The Court approved of the proposed issue as the issue for the trial of the cause.

Counsel for the Pursuer—Salvesen, Q.C. —Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Dundas, Q.C. —Blackburn. Agents—Hope, Todd, & Kirk, W.S.