tator to whom an additional child is born after the date of his will, as in the case of a testator who was childless when he executed his settlement but afterwards has issue. If that is so, then the special circumstances which are habile to rebut the presumption must be sought for after the date of the child's birth if the will is to stand. The case of *Stewart Gordon* (1 F. 1005, 36 S.L.R. 779) is not really an exception. As Lord Young puts it in *Crow* v. *Cathro* (5 F. 950, at 954, 40 S.L.R. 687, at 690) the testator must say or do something to show that he considers his former will still good. It may be that in the present case he would have preferred his wife to two children just as he did to one. But that is mere conjecture in the absence of any indication of what was in the testator's mind subsequent to the birth of the second child. For the like reason I think no assistance can be obtained from a consideration of the will of 13th February 1917.

The second question, Whether in the event of an affirmative answer being given to the first question, the trust-disposition and settlement of 13th February 1917 is operative as an effective disposition of the testator's estate, or does the estate fall to be dealt with as intestate succession? is to my mind one of great difficulty. In the second report of *Elder's Trustees* (22 R. 505, 32 S.L.R. 365) the effect of the revocation, implied by the birth of a child, of a testator's will which contained no provision for children *nascituri* on an earlier will which did contain such a provision was considered, and it was decided that the earlier will did not become operative. But in the will impliedly revoked by the birth of the child there was an express revocation of all prior deeds, and the express revocation it was held did not itself suffer implied revocation along with the provisions affecting the disposal of the estate. My first impression was that the present case was covered by the reasoning of the judges in *Elder's* case, although Mr Nicolson's will of 31st July 1917 contained no words expressly revoking the prior settlement of 13th February 1917. It was a universal settlement, and therefore impliedly revoked the prior will. On principle therefore I was inclined to think that revocation being plainly the intention of the testator and being just as effectively secured as if he had used the words "I revoke the will of 13th February 1917," and further, as the deed expressing that intention was not set aside by any act of the testator himself, but by a rule of law which presumes a change of intention on the testator's part in the altered circumstances with regard to the disposition of his estate and nothing else, his implied intention ought still to be effective and that the result would be intestacy. But the opinions of the judges must be read with reference to the precise terms of the deed with which they were dealing. So reading them, the question now to be determined was not matter of decision, though there is a clear expression of opinion on it by Lord M'Laren. Having in view the law as to express revocation laid down by the Lord Justice-Clerk (Inglis) in *Leith* v. *Leith* (1 Macph. 949, at p. 955), and the distinction drawn by him between express revocation and implied revocation, I have come, though with some hesitation, to agree with your Lordship that Mr Nicolson's settlement of 13th February 1917, which contains provisions for children *nascituri*, and is not therefore affected by the presumption *si testator sine liberis*, has become operative as an effective disposition of his estate.

LORD HUNTER—I concur. The first decision in *Elder* is authority for the proposition that the birth of a second child creates a presumption in favour of the settlement being revoked, just as if the case were that of a childless man who having made a settlement has a child subsequent to the date of the settlement. And I agree with your Lordship that in this case there are no special circumstances to take it outwith the scope of the presumption.

As regards the second question, I agree that there is some difficulty, particularly in view of the expressions of opinion in the second case of *Elder*. But it appears to me that the sound way of looking at the matter is, that as the deed that is being revoked by the birth of the second child did not expressly revoke the previous settlement, the implied revocation is swept away and the earlier deed is restored as your Lordship has indicated.

The Court answered the first question in the affirmative, branch (*a*) of the second question also in the affirmative, and branch (*b*) thereof in the negative.

Counsel for the First Party — Black. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Second Party—Duffes. Agent—Charles N. Cowper, W.S.

Counsel for the Third Parties—Gilchrist. Agents—Winchester & Nicolson, S.S.C.

Friday, July 14.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

ADAIR *v.* DAVID COLVILLE & SONS, LIMITED.

Process — Sheriff — Jury Trial — Appeal — Competency — Exclusion of Review — Nobile Officium — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *First Schedule, Rules* 137, 147, *and* 148.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, provides—Rule 137—"The law and practice relating to the taking of evidence in proofs before the sheriffs shall apply to jury trials. Unless all the parties appearing put in a minute . . . dispensing with a record of the proceedings, the same shall be taken by an official shorthand writer of the Court. . . ." Rule 147—"Where no shorthand notes of the proceedings have been taken,

the interlocutor applying the verdict shall not be subject to review." Rule 148—"If shorthand notes have been taken it shall be competent for any party . . . to appeal to a Division of the Court of Session by lodging . . . a note of appeal in the form M. . . ."

In a jury trial in the Sheriff Court, in which a widow and her children claimed damages from the employers in respect of the death of the father of the family, the pursuers lodged a minute in terms of Rule 137 of the Sheriff Courts (Scotland) Act 1907 dispensing with a record of the proceedings. The jury thereafter returned answers to questions proponed to them by the Sheriff, of which the leading question was—"Whether the personal injuries sustained by the deceased . . . were caused by reason of the defective condition of the outside pit in the defenders' works, and if so in what respect?" and the answer thereto was—"We are of opinion that the accident was caused by the pit being unsuitable owing to dampness through the works having been closed and the pit not in use." The jury assessed the damages (1) under common law at £800, and (2) under the Employers' Liability Act at £566, 3s. 11d. The Sheriff found in law that the verdict was for the defenders and applied it accordingly. The pursuer appealed to the Court of Session on the ground that the Sheriff had erroneously applied the verdict, using form M so far as applicable. *Held* that the appeal was incompetent either as an appeal under the Act or as invoking the *nobile officium* of the Court.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—Section 31—"*Jury Trial in Sheriff Court.*—. . . The verdict of the jury shall be applied in an interlocutor by the sheriff . . . and may, subject to the provisions of this Act, be appealed to either Division of the Court of Session, but that only upon one or more of the following grounds—(1) that the verdict has been erroneously applied by the sheriff."

Rules 137, 147, and 148 contained in the First Schedule are quoted *supra in rubric.*

Mrs Jeanie M'Ghie or Adair, Glengarnock, and James Adair and others, the widow and children respectively of the deceased Robert Adair, *pursuers,* brought an action in the Sheriff Court of Ayrshire at Kilmarnock against David Colville & Sons, Limited, Dalzell Steel and Iron Works, Motherwell, *defenders,* in which they claimed £1000 at common law, or alternatively £780 under the Employers' Liability Act 1880, as damages in respect of the death of Robert Adair. The deceased was employed in driving a tractor engine which carried steel ladles filled with molten metal from the furnace to moulding pits into which the metal was run. All the pits were under cover except one which was seldom used. The accident which caused deceased's death was due to an explosion in this pit, which occurred while the deceased was emptying molten metal into the pit on the instructions, as the pursuers averred, of the foreman in charge, David Graham, Glengarnock. They averred that the pit was defective owing to dampness, and that the dampness generating steam through contact with the molten metal, caused the explosion, that the defenders were responsible for the defective condition of the pit, of which they knew or ought to have known, and that they made no sufficient inspection of it before allowing it to be used; and further, that their foreman, whose instructions the deceased was bound to obey, was negligent (1) in using the pit for the purpose, (2) in not making certain that the pit was free from dampness.

On 20th December 1921 the Sheriff-Substitute (DUNBAR) appointed the cause to be tried before a jury of seven persons, and on 6th March 1922, a jury having been empanelled, the case was tried before the Sheriff (LYON MACKENZIE).

The agents for the parties lodged in process a minute agreeing to dispense with a record of the proceedings.

At the close of the trial on 7th March the Sheriff proponed the following questions to the jury:—"1. Whether the personal injuries sustained by the deceased Robert Adair while employed as a tractor engineman at the furnaces of Glengarnock belonging to the defenders, on the 22nd day of November 1920, which resulted in his death, were caused by reason of the defective condition of the outside pit in the defenders' works, and if so in what respect? 2. Whether the personal injuries sustained by the deceased Robert Adair, resulting in his death, were caused by the negligence of David Graham, Glengarnock, in the exercise of superintendence entrusted to him by the defenders, and if so in what respect? 3. Whether the personal injuries sustained by the deceased Robert Adair resulted from the deceased having conformed to an order negligently given by the said David Graham, to whose orders or directions at the time of the injury he was bound to conform, and what was that order?"

The jury returned the following answers:—"1. We are of opinion that the accident was caused by the pit being unsuitable owing to dampness through the works having been closed and the pit not in use. 2. We answer this question in the negative. In our opinion there was no negligence on the part of David Graham, who we consider did all that was possible in the circumstances. 3. We answer this question in the negative, not being satisfied that David Graham gave any order, but that the deceased Robert Adair returned to his position from a sense of duty. The jury assess the damages (1) under common law at £800, and (2) under the Employers' Liability Act at £566, 3s. 11d."

On 7th March 1922 the Sheriff pronounced this interlocutor—"The Sheriff having heard parties' agents on the motion of pursuers' agents to have the foregoing verdict applied, makes avizandum."

On 16th March 1922 the Sheriff pronounced this interlocutor—"Finds in law that in respect the answers returned by the jury to the questions proponed to them do not

support the case laid on record either at common law or under the Employers' Liability Act 1880, the verdict is for the defenders: Applies the verdict accordingly, reserving to the pursuers any rights competent to them under section 1 (4) of the Workmen's Compensation Act 1906: Therefore assoilzies the defenders from the conclusions of the action, and decerns."

Note.—"The only question of difficulty in applying the verdict of the jury in this case arises from their answer to the first question proponed to them.

"It was strenuously argued on behalf of the pursuers that upon a true interpretation thereof they were entitled to a verdict both at common law and under the Employers' Liability Act 1880, and there were cited to me in support of that contention the following authorities, viz.—*Brydon* v. *Stewart*, (1855) 2 Macq. 30; *Wilson* v. *Merry & Cuninghame*, (1868) 6 Macph. (H.L.) 84, L.R., 1 H.L. Sc. 326; *Smith* v. *Baker & Sons*, [1891] A.C. 325; *Williams* v. *Birmingham Battery and Metal Company*, [1899] 2 Q.B. 338; *Duthie* v. *Caledonian Railway Company*, (1898) 25 R. 934, 35 S.L.R. 726; and *Black* v. *Fife Coal Company, Limited*, 1909 S.C. 152, 1912 S.C. (H.L.) 33, 49 S.L.R. 228.

"Premising that at common law it is the duty of a master towards his servant to use reasonable care to see that the plant is fit and sufficient, and if that condition is fulfilled a master will not be liable for a defect, he will be liable only if it were known to exist or was such as should have been discovered by him, and if having provided sufficient plant which was available the plant has not been properly used, the master will not be liable—*Weems* v. *Mathieson*, (1861) 4 Macq. 215, and *Wilson* v. *Merry & Cuninghame*, *supra*. I come to consider whether the pursuers are entitled to a verdict at common law.

"When the first answer of the jury is examined they do not say that the pit was defective. All they do affirm is that the accident was caused by the pit being unsuitable owing to dampness through the works having been closed and the pit not in use.

"Now in my opinion this answer does not establish any proposition which imputes legal liability to the defenders, as there is a wide distinction betwixt a pit being defective in construction, and unsuitable to the purpose for which on a particular occasion it is used. . . .

"To entitle the pursuer to a verdict under the Employers' Liability Act 1880 they would require not merely to obtain an affirmative answer to the first question, but would also, to satisfy the requirements of section 11 (1) of the Act, require to prove that the defect found to exist arose from or had not been discovered or remedied owing to the negligence of the defenders, or of some person in the service of the defenders and entrusted by them with the duty of seeing that the plant was in a proper condition. This was not proved, and no such case is averred on record.

"As the jury answered questions 2 and 3 in the negative any case under these heads also fails."

The pursuers appealed to the Court of Session. The note of appeal was based on Form M of the First Schedule to the Sheriff Courts (Scotland) Act 1907, as prescribed by section 148 of the First Schedule, quoted *supra in rubric*.

The note of appeal, after narrating the proceedings of which an account is given *supra* and stating that the agent for the pursuer proponed certain questions to the jury which the Sheriff declined to put, continued—"The said Mrs Jeanie M'Ghie or Adair and others, the pursuers, appealed to the First Division of the Court of Session upon the following grounds:—

"(*a*) That in the interlocutor complained of, the verdict was erroneously applied, in that (1) It is bad in law. (2) Rule 145 of the First Schedule to the Sheriff Courts (Scotland) Act 1907 (7 Ed. VII., cap 51) as amended by the Sheriff Courts (Scotland) Amendment Act 1913 (2 and 3 Geo, V., cap. 28) was not complied with, as the jury was discharged before the verdict returned by them was recorded on the interlocutor sheets and signed by the Clerk of Court, and that David Carruthers, who signed the interlocutor sheets as Clerk of Court recording the verdict of the jury, was not present in Court when the jury gave their verdict and did not hear the verdict given by the jury. (3) At the trial the Sheriff refused to put certain questions to the jury which he was asked to do by the agent for the pursuer. (4) At the trial the Sheriff insisted on putting a construction on the jury's answer to the first question contrary to the meaning intended by the said jury. (5) At the trial the Sheriff refused to note the objection of the pursuers' agent to the wrong construction which he was putting on the jury's answer to the first question.

"(*b*) That the Sheriff misdirected the jury in regard to (1) The questions put by him to the jury. The questions were framed as for a special instead of a general verdict. The questions were not framed in terms of the record and were liable to mislead the jury, or to induce them to so frame the answers thereto that they might be misconstrued. Further, the Sheriff refused to put certain questions to the jury proponed by the pursuers' agent, and if the Sheriff had put these questions no misconstruction of their answers would have been possible. (2) The answer returned by the jury to these questions. The first answers were given verbally by the foreman of the jury, and the answer to the first question was in the affirmative. The Sheriff wrote it out, and it is so framed by him that it is liable to be construed in a way quite different from what was intended by the jury. Reference is made to the note at the foot of the Sheriff's questions—'The jury awarded £800 as damages.' (3) The Sheriff's .nsistence that the construction which he put on answer 1 was the correct one. It was pointed out by pursuer's agent that such construction was wrong. The Sheriff refused to listen to such objection and on being asked to note the objection he refused.

"In the event of the Court refusing the appeal on the ground of incompetency, the

pursuers crave the Court to hear and sustain the appeal against the said interlocutor in the exercise of the Court's *nobile officium* in order to prevent what would operate as a gross injustice towards the pursuers by the Sheriff's refusal to apply the verdict brought in by the jury, and intended by them to be in favour of the pursuers."

The defenders objected to the competency of the appeal, and argued—By lodging their minute dispensing with shorthand notes the pursuers had barred themselves from appealing—Rule 147 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule. There might have been a certain irregularity of procedure in the present case, but there being no record of the proceedings it was impossible to review it. Rule 147 had been enacted for the very purpose of preventing such inquiries as this. The pursuers should have proceeded by way of reduction. The *nobile officium* could not be invoked to override an express statutory exclusion of appeal—*MacGown* v. *Cramb*, 1897, 24 R. 481, and *per* Lord Adam, at p. 482, 34 S.L.R. 345.

Argued for the pursuers—The appeal was competent. The procedure followed had been quite *ultra vires*. Where irregularities had been committed by a judge of an inferior court of so grave a nature as would lead to a miscarriage of justice, the Court of Session had power to review it—*Brown* v. *Heritors of Kilbery*, 1825, 3 S. 480, *affd.* 1829, 3 W. & S. 441; *Hattie* v. *Leitch*, 1889, 16 R. 1128; *United Collieries, Limited* v. *Gavin*, 1899, 2 F. 60, 37 S.L.R. 47. The interlocutor purported to apply the verdict, but it was really the Sheriff's verdict. In such a case reduction was not necessary, and procedure by way of appeal could not be said to override the statute, because the statute assumed that the procedure was correct.

LORD JUSTICE-CLERK—In this case the question we have to consider is, whether this is a competent appeal. The record of the proceedings in the inferior Court appears to have occupied a number of pages of the minute book of that Court, which are represented by some eight or ten pages of the print in the note of appeal. They purport to set out that the jury trial was carried through in ordinary form, and a verdict of the jury got and applied in ordinary form also. The Statute of 1907, which introduced jury trials into the Sheriff Court, sets out (section 31) that the cause, after the prior steps have been taken, may be required to be taken before a jury, "in which case the sheriff shall appoint the action to be tried before a jury of seven persons. The verdict of the jury shall be applied in an interlocutor by the sheriff, which shall be the final judgment in the cause, and may, subject to the provisions of this Act, be appealed to either Division of the Court of Session, but that only upon one or more of the following grounds." The only one of these grounds that applies here is "that the verdict has been erroneously applied by the sheriff." Then the statute goes on to say further—"Upon such an appeal the court may refuse the appeal, or may find that the verdict was erroneously applied, and give judgment accordingly." The procedure is subject to certain rules, which are called in section 39 "procedure rules." These rules apply to all civil causes, and are to be construed and have effect as part of the Act. Rule 133 and the succeeding rules are the rules which deal with jury trials. Of these section 137 says—"The law and practice relating to the taking of evidence in proofs before the sheriffs shall apply to jury trials. Unless all the parties appearing put in a minute (which may be signed by their agents) dispensing with a record of the proceedings, the same shall be taken by an official shorthand writer of the court, but the notes need not be extended unless in the case of an appeal their production shall be ordered by the appellate court, in which event it shall be the duty of the appellant to procure the extended notes, certified by the shorthand writer, and to lodge the same with the Principal Clerk of Session." In this case the parties adopted the course which was suggested in that rule, and lodged a joint-minute in these terms — "Aitken for pursuers, and Spens for defenders, agree to dispense with a record of the proceedings." That was signed by the two agents. The case then proceeded. By rule 145 — "The verdict returned by the jury shall be recorded upon the interlocutor sheets, and signed by the clerk of the court, and this having been done the jury shall be discharged." Rule 146 provides—"Any party in the cause may, so soon as the verdict has been so recorded, or within fourteen days thereafter, move the sheriff to apply the verdict, and upon this motion the sheriff may hear parties and may make avizandum. As soon as practicable the sheriff shall issue an interlocutor applying the verdict and grant decree accordingly. In this interlocutor the sheriff shall also dispose of the question of expenses." Rule 147 provides—"Where no shorthand notes of the proceedings have been taken, the interlocutor applying the verdict shall not be subject to review." And rule 148, which deals with grounds of appeal to the Court of Session, is—"If shorthand notes have been taken, it shall be competent for any party in the cause, within fourteen days after the date of the final interlocutor of the sheriff applying the verdict (but not later), to appeal to a Division of the Court of Session by lodging with the sheriff-clerk a note of appeal in the form M annexed thereto." It seems to me that an appeal to our jurisdiction is conditional on the proceedings having been recorded in shorthand notes, and that if that is not done, the statute says expressly that the interlocutor applying the verdict shall not be subject to review. The appeal in this case is nothing else than an attempt to subject the interlocutor applying the verdict to review of the Court of Session in one of its Divisions. The note of appeal follows, as far as it could, form M. But form M is quite inapplicable, and accordingly that form is almost immediately departed from and a

new form, which is not statutory, is adopted with a view to making the note of appeal conform to the facts of this particular case. The Sheriff's interlocutor applying the verdict, which is dated 16th March 1922, is quoted, and then it is said—"The said Mrs Jeanie M'Ghie or Adair and others, the pursuers, appeal to the First Division of the Court of Session upon the following grounds—that in the interlocutor complained of, the verdict was erroneously applied." This is exactly the language of section 31, and is one of the grounds of review upon which the Court of Session may proceed if they disagree with what the sheriff has done. In that state of matters, it seems to me that this appeal is nothing but an appeal against the judgment of the Sheriff applying the verdict. That is the nature of the application to us. *Brown* v. *Heritors of Kilbery* ((1825) 3 S. 480) was referred to as the nearest to the present case. But in that case the form of review was not by way of appeal at all, but was a reduction of a sentence of deposition pronounced by a presbytery. Whether a reduction would be competent here or not I do not think it is necessary for me to say, but I am quite clear that this appeal, which purports to be a statutory appeal, is not in the circumstances competent.

The appellants themselves seem to have been aware of this, because they conclude their note of appeal thus—"In the event of the Court refusing the appeal on the ground of incompetency, the pursuers crave the Court to hear and sustain the appeal against the said interlocutor in the exercise of the Court's *nobile officium* in order to prevent what would operate as a gross injustice towards the pursuers by the Sheriff's refusal to apply the verdict brought in by the jury, and intended by them to be in favour of the pursuers." I appreciate thoroughly the value and the province of the *nobile officium* of the Court, but I agree with what Lord Adam said in the case that was cited to us —*MacGown* v. *Cramb*, (1897) 24 R. 481—that I never heard of the *nobile officium* being appealed to in order to override the express provision of a statute, and I think it is quite incompetent for the Court to exercise the *nobile officium* to do so.

In my judgment therefore the appeal fails on the ground of incompetency.

LORD ORMIDALE — I concur, and have really very little to add. An interlocutor was pronounced by the Sheriff on the 16th March 1922, purporting to apply the verdict of a jury in proceedings before him. An appeal was taken in ordinary form from that interlocutor on the 28th March. We have heard objections to the competency of that appeal. I agree with your Lordship that there certainly appeared (on the *ex parte* statement of Mr Maclean) to have been some irregularities in the course of the trial before the Sheriff. I do not know whether they are well founded or not, although I do not doubt that Mr Maclean was speaking according to his information. But section 31, read with section 39, and with rules 147 and 148, seems to make it *luce clarius* that the interlocutor of 16th March is not subject to review, and therefore I agree with your Lordship.

I also entirely agree with what your Lordship has said about the power vested in the Court under its *nobile officium*. We cannot interfere with the provisions of an Act of Parliament and either supplement them or derogate from them.

LORD HUNTER—I concur. The only question in this case is whether the appeal is competent. There can be no question, on the assumption that the appeal is barred by a statute of Parliament, of our exercising the *nobile officium* contrary to the provisions of that statute. As your Lordship has pointed out, that is entirely beyond our jurisdiction.

On the question whether the appeal is or is not competent, I think the terms of rule 147 of the Sheriff Courts Act of 1907 are quite clear, and explicitly exclude us entertaining such an appeal as the present. The terms of that section are that if no shorthand notes of the proceedings have been taken the interlocutor applying the verdict shall not be subject to review. In the present case there was an agreement between the parties that the proceedings should not be recorded by way of shorthand notes. The appeal is therefore expressly excluded.

I am not certain that that is an entirely satisfactory state of affairs. Nor am I sure that the Legislature quite contemplated that that was to be the result in such an action as the present. In section 31 of the Sheriff Court Act you find that after a verdict of the jury has been returned it falls to be applied, and then an appeal may be taken to the Court of Session on the ground, *inter alia*, that the verdict has been erroneously applied by the Sheriff. There are in the statute itself provisions to the effect that a sheriff may either allow a jury to return a general verdict in favour of one or other of the parties, or he may put specific questions to the jury, and on the answers from them may enter up the verdict for one or other of the parties according as he thinks that the logical result of the special verdict leads to one or other of the two conclusions. It is clear that where a sheriff has framed the questions himself he may have framed them so that the answer to the questions may be difficult of construction, and it seems to me rather a peculiar thing that on the assumption that the notes of evidence are not necessary in order to know whether the Sheriff has been right or wrong in entering up the verdict an appeal from what he does should be entirely excluded. In fact, although in no part of the practice of Sheriff Court procedure is the Sheriff put in a position so powerful as that of arbiter, it seems to me that in this particular case he is put in that position. If he goes wrong in law (and he may readily go wrong in the way of applying the verdict if there have been certain answers given to specific questions) he cannot be put right. But that is the misfortune of litigants in respect of having assented to this form of procedure.

In the present case I may say for my own part that I think the questions were unfortunately framed for the purpose of obtaining from the jury answers to the questions of fact that would have a direct bearing upon what was the main question in the case, namely, whether there was common law liability upon the defenders in respect of the defective condition of one of their pits. I further think that the answer which was given by the jury to the first question—and I am quite prepared to take that answer without qualification as being the answer that in fact they gave, and in an appeal we can do nothing else than so take it—is ambiguous, because instead of being a direct answer to the question whether the pit was defective, it was an answer to the effect that the pit, owing to the damp state in which it was, was unsuitable. I think it may depend upon answers to other questions of fact whether that unsuitability amounted to such a defect as constituted a common law liability upon the defenders, or whether it did not merely amount to such defect as was curable and should have been cured by the act of some fellow employee of the deceased, in which case there would have been no common law liability at all. But all these matters are beyond our cognisance, as I think on the face of the proceedings as they appear before us and as a pure question of appeal it is quite out of our power to interfere with what the Sheriff has done.

LORD ANDERSON—I have a strong impression that the verdict recorded in this case and embodied in the interlocutor of 16th March 1922 is that of the Sheriff and not of the jury, and that the pursuers have thereby been improperly deprived of the award of £800 which I think the jury meant to give them. But I am quite clear that I am debarred from determining whether or not that impression is well founded by the explicit and plain terms of rule 147 of the Statute of 1907, the effect of which is, in my judgment, to make the Sheriff final in so far as an appeal is concerned in a case where the parties have agreed to dispense with shorthand notes of the proceedings being taken. I therefore agree with the judgment proposed.

LORD JUSTICE-CLERK—I should like to add to what I have said that what we were asked to do here was to allow a proof of an *ex parte* statement. In my opinion that is a form of procedure which so far as my experience goes is quite unknown in Scotland in connection with procedure affecting jury trials, and ought not to be adopted.

The Court dismissed the appeal.

Counsel for the Pursuers and Appellants—M. P. Fraser, K.C.—Maclean. Agents—Warden, Weir, & Macgregor, S.S.C.

Counsel for the Defenders and Respondents—Dean of Faculty (Sandeman, K.C.)—Russell. Agents—J. & J. Ross, W.S.

Saturday, July 15.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

COCHRANE *v.* YOUNG.

Reparation—Slander—Privilege—Malice—Meeting of Sub-Committee of Public Body—Duty to Communicate and Interest to Receive Communication of Statements Complained of.

The secretary of a War Pensions Committee brought an action of damages for slander against the vice-chairman of the War Pensions Committee, in which he averred that the defender, while acting as chairman of a meeting of a sub-committee, read to the meeting a letter from certain employees of the War Pensions Committee which contained defamatory statements regarding the pursuer's behaviour in the office of the War Pensions Committee; that the defender, who was not a member of the sub-committee, had no right to act as chairman of the meeting; and that there were present at the meeting, in addition to the members of the sub-committee, the Regional Director and two other representatives of the Region Office of the Ministry of Pensions. The letter had been sent to the chairman of the sub-committee, whose place at his request the defender had taken, and a similar letter had been sent to the Regional Director.

Circumstances in which the Court *dismissed* the action, *holding* (1) that the pursuer's averments disclosed a case of privilege, in respect that the defender had a duty to communicate the letter to the persons present at the meeting, and that they had an interest to receive the communication; and (2) that the pursuer had not averred facts and circumstances from which malice could be inferred.

Captain Roy Cochrane, Edinburgh, *pursuer*, brought an action against Dr William Young, West Calder, Midlothian, *defender*, for payment of £5000 as damages for slander.

The pursuer averred, *inter alia*—"(Cond. 1) The pursuer when the present action was raised was the secretary of the Midlothian War Pension Committee. He is married and resides in Palmerston Place, Edinburgh. The defender is a member of the said Committee. On or about 9th November 1921 No. 2 Standing Committee of the said War Pension Committee appointed a small Sub-Committee for the purpose of considering a letter from the Ministry of Pensions with reference to the reduction for reasons of economy of the staff of the Committee. The said Sub-Committee consists of T. W. H. M'Dougal, Esq., of Raeshaw, Gorebridge, chairman of the main Committee and No 2 Standing Committee, Mrs Stuart, Borthwick Castle, Gorebridge, and Mr Robert Hood, Burnbank Cottages, Ratho. The pursuer acted as secretary to the said Sub-Committee. The