

£80, leaving a balance due to the pursuer of £12, 7s. 11d.; decerns against the defenders for the said sum of £12, 7s. 11½d., and assoilizes them from the whole other conclusions of the summons; finds neither party entitled to expenses."

The pursuer appealed.

WATSON and D. CRICHTON for him,
SOLICITOR-GENERAL and R. V. CAMPBELL for the defenders.

At advising—

LORD PRESIDENT—This dispute chiefly turns on the construction of the letter of 3d December 1869—with its acceptance. The pursuer, who was not specially acquainted with a bleacher's business, was to go to Albion Mills for a month to be instructed in the process. He was then to go to Pollokshaws to begin his duties. Then comes the part of the letter which specially requires to be construed—"In consideration of my so doing" (reads letter of 3d December 1869). The question is,—was this an engagement for three months, or one for twelve months? The view of the defenders is, that it was an engagement for three months only, but that if the parties consented to renew it for nine months longer, it was provided by anticipation that the salary for the nine months was to be at the increased rate of £150 per annum. The pursuer's view is, that the engagement was for a year, unless the employers should take advantage of the break provided at the end of three months, and terminate the engagement. I am in favour of the pursuer's view. I think the fair and reasonable construction of the agreement is, that it was an engagement for twelve months, with a period of one month's instruction, thereafter a period at a salary of £120 per annum, during which he should be on trial, with a break at the end of the trial period. It appears to me that if the defenders did not avail themselves of their right to terminate the engagement at the end of three months, but went on saying nothing, the engagement for nine months took effect, and could not subsequently be interrupted, but must run its course. Mr James Cochrane speaks to some conversation which took place about the 30th April 1870, which the pursuer does not recollect. I do not doubt that some conversation took place, but what was the result of it? Mr Cochrane says that he intimated to the pursuer that he was not to go on with the agreement, but if he chose he might remain on at the old rate, subject to dismissal at pleasure. That would have been the substitution of a totally different agreement. But considering the vague manner in which this new agreement is averred, and the still more vague manner in which Mr Cochrane speaks of the conversation alleged to embody it, I cannot hold that there was any new agreement varying the terms of the old. It was at least the proper course to make the new agreement in writing. I do not say that it is incompetent to supersede a written agreement by a verbal agreement, but it is very inexpedient. It is important to observe what, according to the true construction of the agreement, the defenders were bound to do. They ought to have intimated to the pursuer that they were not going on with the agreement, and insisted that he should leave, or, if they allowed him to remain they ought to have recorded the terms on which he was remaining. If they did neither, the proper inference is that he remained at the works on the old agreement. Consequently, I think that the Sheriff-Substitute

was right, and that the pursuer is entitled to his salary.

The other Judges concurred.

The Court substantially reverted to the interlocutor of the Sheriff-Substitute.

Agent for the Pursuer—A. Kirk Mackie, S.S.C.
Agent for the Defenders—John Martin, W.S.

Wednesday, November 1.

SECOND DIVISION.

WHITELAW v. FULTON.

Lease — Renunciation — Possession — Landlord's Hypothec. Circumstances in which held that a party who had taken a sub-lease of premises, with a deduction of rent for the first year for repairs, and without "further recourse," and who entered into possession in June, proceeded to make alterations, and occupied until August, was debarred from renouncing the lease on the ground that the premises were not in a tenable condition; and further, ordained to replenish the same with furniture equal to the current year's rent, and fire and air the same to prevent deterioration from damp.

Whitelaw, a pawnbroker in Wishaw, brought the present petition before the Sheriff-Substitute at Hamilton, craving him "to decern and ordain the respondent, within such short space as your Lordship may appoint—(1) To place sufficient furniture, goods, and plenishing within the said shop and other premises situated at No. 15 Glasgow Road, Wishaw, equal at least in value to the current year's rent thereof; (2) as also to decern and ordain the respondent to open the said shop and other premises, and carry on his business therein, and (3) to keep proper fires lighted therein, and air the same in such manner as shall prevent deterioration from dampness."

The respondent, who was also a pawnbroker in Wishaw, stated in defence—"That the conclusions to decern and ordain the respondent to open the shop and other premises referred to in the petition, and carry on his business therein, and to keep proper fires lighted therein, and air the same, are incompetent. The shop and premises referred to were, at the time when the defender should have entered thereto, and have since been, uninhabitable and unusable in consequence of their not being in a proper state of repair. In particular, the walls were and are excessively damp, and goods could not be placed near or against them. The floor of the premises also requires to be renewed. The defender has all along been ready and willing to occupy and stock the premises if they were put into a proper state of repair."

It appeared from the proof that Fulton had taken the house in question from a Mrs Deans on lease for five years from Whitsunday 1870, on the understanding that he was to execute certain repairs, while Mrs Deans undertook, as her share of the expense thereof, to allow an abatement from the first year's rent to the extent of £7. Fulton, however, determined not to occupy the premises himself, and a sub-lease was entered into between him and the appellant Whitelaw by the two following missives:—

"Memorandum, Lachlan Taylor (cautioner for James Fulton) to Matthew Whitelaw.

"June 6th, 1870.

"I was sorry at not being at hand when you called again, but expected Mr Fulton would arrange with you, but I have seen him since, and he is quite agreeable that you should have the premises, No. 15 Glasgow Road on the same terms every way that he had them taken from Mrs Deans, and he just asked me to write and let you know, and, if suitable, to send acceptance."

"Letter, Matthew Whitelaw to Lachlan Taylor.

"Glasgow, 7th June 1870.

"Sir,—I have your letter this morning. I accept the premises for five years at Twenty-four pounds sterling per annum, with deduction of Seven pounds sterling for the first year, without any further recourse. I will be in Wishaw tomorrow night, when I will call and take possession.—Yours truly,
MATTHEW WHITELAW."

Whitelaw thereafter got possession of the premises, and proceeded to make certain alterations thereon, and finally, on 17th August, instructed his agents to write to Mr Fulton, to the effect that the premises were not in a fit state for occupation, and unless considerable alterations and repairs were made thereon that he would rescind from his lease.

Mr Fulton having refused to make those alterations, on the ground that Whitelaw had agreed in the lease to make all the repairs at his own expense in consideration of an abatement of £7 from the first year's rent, brought the present action, concluding as above stated.

After a proof, the Sheriff-Substitute (SPENS) issued the following interlocutor and note:—

"Hamilton, 21st February 1871.—Finds this is an action brought by the pursuer against the defender, craving that the latter be ordained (1) to place sufficient furniture, goods, and plenishing within the shop and premises situated at No. 15 Glasgow Road, Wishaw, so as at least to equal the current year's rent; (2) to open the said shop and other premises, and carry on business therein; and (3) to keep proper fires lighted therein, so as to air the same, and prevent deterioration from dampness; finds it was stated in defence that said premises were, at the time when the defender should have entered thereto, viz., 7th June 1870, and have since been, uninhabitable and unusable in consequence of their not being in a proper state of repair; finds a proof of this was allowed to the defender before farther answer, and to the pursuer a conjunct probation; finds that under the letter No. 5-1 of process, now duly stamped, and relative letters, the pursuer and defender entered into a lease for five years of the premises in question; finds that said premises were thereby let to the defender by the pursuer at a rent of twenty-four pounds, under deduction of seven pounds for the first year from said date of lease up to Whitsunday 1871; finds that anterior to said lease being entered into, the pursuer personally inspected the premises; finds that thereafter he employed tradesmen to alter the premises, so as to suit him for the carrying on of a pawnbroking business; finds that he states, while these operations were going on, and about the end of June, he discovered there were appearance of dampness on the wall of the shop, and the 'floor was far from level, the bricks crumbled away when touched, and there were hollows here and there throughout the floor'; finds that these operations

were extensive, and were made without any direct intimation to pursuer, who was a tenant of Mrs Deans, the landlord of the premises in question, or to Mrs Deans herself; finds that the defender himself states, with reference to the extent of these operations, 'I took down the partition, and there are now five apartments (from six previously); I made a door in an adjoining brick building of one storey and one apartment, and also a window in the gable of the house itself'; finds that by conducting such extensive alterations at his own hands, the defender implicitly admitted the habitableness of the premises taken, at all events that this is a bar to the plea now urged; finds, further, that damp is not proved to such an extent as to have rendered the premises unusable by the defender for a pawnbroking establishment, or at least that strapping or lining the wall would have rendered them useable; finds that defender obtained a deduction of £7 for the first year, as the pursuer also had from Mrs Deans, on account of the premises not being in a state of full repair; finds that the defender contemplated strapping the wall where the damp existed, and of laying a wooden floor, and that he made a statement to the witness David Mitchell, after noticing the damp on the wall, in his presence, to the following effect—'It would be cheaper to strap the wall where the damp was, than to line it, and he would do that.' And, farther, he spoke of lifting the floor, which was of brick, 'taking out the earth, and laying a wooden floor, and making the shop more lofty,' to the same witness; finds that the tenement in question is an urban one, and was taken by Lachlan Taylor (with whose consent the action is brought) on behalf of the pursuer, for five years, but that said arrangement was never reduced to writing; finds that although, according to his own statement, defender knew the state of the premises in the month of June, he made application to Mrs Deans (which he seems to have thought necessary), in the end of July or beginning of August, to be accepted as tenant; finds that no complaint as to the state of the premises was ever preferred by the defender to pursuer until the reception by the latter of the letter of which No. 5-4, dated 17th August, is a copy, addressed to Mrs Deans; finds that the key of the premises in question was only returned, or attempted to be returned, on or about the 8th of September 1870; finds therefore, and apart from the findings, that the defender's actings as regards alterations have implied his acquiescence in the habitableness of the premises, that the alleged objection as to premises not being habitable was not timeously made; deems, therefore, against the defender, in terms of the first craving of the petition, viz., to place sufficient furniture, goods, and plenishing within the said shop and premises as may be equal in value to the current year's rent: *Quoad ultra* dismisses the petition for the reason in the subjoined note; finds the defender liable in expenses, including the expense of stamping No. 5-1.

"Note.—The Sheriff-Substitute has been unable to find any authority for the last two cravings in the prayer of the petition, and has accordingly dismissed the petition as regards them; but as it has caused no expense to the parties, no difference in the finding for expenses has been allowed. It is thought that the above findings sufficiently indicate the grounds of judgment otherwise."

On appeal, the Sheriff-depute (GLASSFORD BELL) adhered, with certain slight modifications.

Whitelaw appealed.

WATSON and ASHER for him.

SHAND and KEIR in answer.

The Court adhered.

Agents for Pursuer—Millar, Allardice, & Rob-
son, W.S.

Agent for Defender—A. Morison, S.S.C.

Saturday, October 28, and Thursday,
November 2.

FIRST DIVISION.

MACKINTOSH and OTHERS v. MOIR.

(*Vide ante*, vol. viii, pp. 382 and 428.)

Process—Jury Trial—New Trial—Expenses—Road—Public Right of Way—Remit to Engineer to lay down line of Road. Where, in a declarator of a public right of way for carts as well as foot-passengers, owing to the insufficiency of the evidence adduced at the first trial, a new trial had been granted—*Held*, on a motion for a second new trial, that the evidence on all the controverted points having been materially strengthened at the second trial, and the same verdict pronounced by the jury, the Court were not warranted in disturbing it, though they expressed themselves still dissatisfied with the result, particularly as regarded the right of way "for carts and other conveyances."

Held, as to expenses, (*diss. Lord Deas*), that the mere difference in the amount of evidence adduced at the second trial was not enough to take the case out of the general rule; and full expenses given to the pursuers accordingly.

A new trial in this case was granted upon February 28th last, (*vide supra*, vol. viii, p. 382,) and upon May 24th and subsequent days the second trial took place, before Lord Gifford and a special jury. The issue was, as on the previous occasion—"Whether for forty years or for time immemorial, prior to 1844, there existed a public road or right of way for horses, carts, and other conveyances, and also for foot-passengers, or for any and which of these purposes, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill to Argyll Street of Dunoon, in or near the direction shown by the red line on the plan No. 6 of process?"

The jury unanimously brought in a verdict finding for the pursuers in terms of the issue.

The defenders thereafter moved for a rule to shew cause why this verdict should not be set aside and a second new trial granted. The rule having been granted, parties were heard thereon towards the close of the summer session, when the Court required counsel for the pursuers to state whether they would be content to accept a public right of foot-road, provided the verdict were sustained to that effect, and give up their demand for a cart-road. The case was continued through the summer vacation in order to allow the pursuers to consider this suggestion.

At the meeting of the Court, HUNTER, for the pursuers, informed their Lordships that they declined to accept the above mentioned suggestion. The case was accordingly put out for advising on Saturday, October 28th. The evidence adverted to in their Lordships' opinions was the same in kind, though different in extent, and slightly different in substance, from that adduced at the previous trial.

At advising—

LORD GIFFORD—In this case I have come to be of opinion, although not without difficulty, that the verdict ought to be allowed to stand, and that the rule for a new trial should be discharged.

The verdict in question is the second verdict which the pursuers have obtained, the issue having now been twice tried. The second trial took place with a special jury, and I think both parties agree that the jury had every possible advantage, and that the case was fairly and fully tried. Now, of course, these circumstances would not prevent the Court from setting aside the verdict, and granting a third trial, if the verdict were clearly against evidence. I do not at all doubt the power or the duty of the Court to set aside any number of perverse verdicts when the interests of justice require it. But the fact that successive juries have returned the same verdict strengthens, to say the least, the presumption in their favour, and creates a probability, more or less strong, that the jury had some evidence on which they proceeded. In such cases I think the Court must be fully satisfied that the jury had absolutely no evidence on which they could legitimately go before sending the case for a third trial.

Now, in the present case I think that at the last trial there was evidence to go to the jury,—evidence which the jury might honestly and fairly consider as establishing the affirmative of the issue submitted to them. It is of course no ground for setting aside a verdict on a pure question of fact that the Judge or the Court have formed a different opinion upon the evidence. The jury are the proper judges of the evidence; and if there was room for a fair and honest difference of opinion on the evidence, this will be enough to support the verdict.

The verdict returned by the first jury was unanimously set aside by the Court; and if the evidence led at the second trial had been a mere repetition of what was laid before the first jury, I would have been for granting a third trial. But it appears to me the pursuers made a very different case at the last trial, and a much better case than that presented on the former occasion; and, without going at all into the evidence, I think it right to mention some of the particulars in which the case at the second trial was improved.

(1) There was new and better evidence explanatory of the old titles, and relative to the old names which occur in the old descriptions. The pursuers succeeded in raising a possibility that the titles might refer to an old road in the direction, or somewhat in the direction, of that now claimed by them,—an old road which was described as a hiegate descending from the Gallowhill. This would be of great importance to start with, and the jury might fairly give some weight to the old titles.

(2) There was better evidence regarding the bad and often impassable condition of the old Ferry Brae, rendering it likely that the line of road claimed would be taken both by foot-passengers and by vehicles; and there was better evidence that the line claimed was always a good and passable road.

(3) The evidence of the use and enjoyment of the right of way claimed was much better and stronger at the second trial than at the first. The pursuers judiciously excluded mere use by tenants of the estate of Milton, and by parties connected therewith, which bulked very largely at the first trial. The use founded on before the second jury