

a heritable creditor. Roy and the rest of the family repudiated the settlement, and an action was raised in the Sheriff Court by another daughter to have it set aside, which was unsuccessful.

The first question is, Was Roy tenant, or only possessor on the terms maintained by himself? This seems the only question raised directly in the case. Without going into the evidence, I think that his plea cannot receive effect. Headmits he was in occupation, and the presumption of law is that he was tenant, whether he had a written title or whether there was only a verbal agreement, or neither of these. That was the principle of the decision, cited by the Sheriff-Substitute, of *Cockburn v. Young*, where it was held that an occupant, though under no direct obligation to pay rent, is bound to pay the annual value of the subject, the *onus* lying on him to prove that he got it for less or, as in this case, for nothing. It therefore lay on Roy to prove that he was not a tenant, and I think he has failed entirely to make good his allegation on this head. He says that he was his father's creditor, and that his occupation was in payment of his father's debt to him, but there is nothing to raise even a probability of this. I think it is clear that he did not consider himself a creditor or his father a debtor. Besides, a letter is produced by the pursuer, dated December 1876, in which he directly makes an offer of £30 of rent for the house. I find also in the evidence that when asked by the Court—[reads "When you were examined," &c., above quoted]. This seemed so remarkable a piece of evidence that I referred to the process in *Morrison v. Roy* to see how far it was borne out, and I found it was not only borne out, but a great deal more than borne out by what I read there. I have thus no hesitation in finding that the appellant has failed to prove that he was occupant under no obligation to pay rent, and therefore the presumption must apply.

Then there remains a question of some difficulty—whether the wife of the tenant, having become liferentrix under a personal title, the debt was not thereby extinguished *confusione*? But the *jus mariti* of the husbands of his female dispoonees is expressly excluded by old Roy's settlement, and this would not therefore make any change in the position of the husband, for the wife might be proprietrix and the husband possessor, and he be liable to pay rent or account for rent to his wife. The only result would be that the wife should have been called as a party to the action. It would have made no difference in my opinion on the result of the case; but it is not necessary to discuss that, though a question of some subtlety, for as a fact Mrs Roy never took possession under the will. On the contrary, she and her husband repudiated the settlement, and the possession continued to be as before the old man's death, with consent of Mrs Roy. I am not, however, indisposed to give some effect to the plea that the appellant's wife has a title to possession. It is true the right never was acted on, but if she had taken possession on her personal title she would not have had to pay interest on the whole debt, but only on a certain portion, and £22, 10s. is the share which she would have had to pay. I am of opinion, therefore, that we should adhere to the Sheriff's judgment, reducing

the amount payable by the defender to that sum.

LORDS YOUNG and CRAIGHILL concurred.

LORD RUTHERFURD-CLARK—I have no doubt that the appellant was tenant during his father's lifetime, but I have grave doubts as to whether his wife's liferent did not extinguish the tenancy so as to relieve him from liability for rent after his father's death, but as your Lordships have decided the question it is not necessary for me to say more.

Their Lordships pronounced the following interlocutor:—

"Find that the defender has failed to prove that he possessed the subjects in question otherwise than as tenant, and is bound to account for the fair value of his occupation: Fix the same at £22, 10s., and to that extent vary the interlocutors of the Sheriff-Substitute and of the Sheriff appealed from: *Quoad ultra* affirm the same: Find the pursuer entitled to expenses in this Court," &c.

Counsel for Pursuer (Respondent)—Guthrie Smith—J. Burnet. Agent—J. Smith Clark, S.S.C.

Counsel for Defender William Roy (Appellant)—Ure. Agent—W. T. Sutherland, S.S.C.

Wednesday, November 29.

### FIRST DIVISION.

YOUNG v. THE GLASGOW TRAMWAY AND OMNIBUS COMPANY (LIMITED).

*Process—Jury Trial—Reparation—Excessive Damages—Personal Injury.*

In an action of damages against a tramway company for bodily injury, consisting of a fracture of the thigh, caused by the fault of the defenders, the jury found for the pursuer, and assessed the damages at £800. The Court, while of opinion that the damages were in the circumstances large, held (*diss.* Lord Shand) that the amount awarded was not so excessive as to justify the granting of a new trial on the ground of excess of damages.

Martha Young, grocer at Neilston, Renfrewshire, raised this action against the Glasgow Tramways and Omnibus Company (Limited), concluding for £1000 damages for injuries sustained by her through a fall from one of the defenders' cars on 23d May 1882, which was caused by the fault of the tramway conductor. This cause was tried before Lord M'Laren and a jury on 15th November, when a verdict was returned for the pursuer assessing the damages at £800. The pursuer was about forty-five years of age, and the injury sustained was a fracture of the thigh bone a little below the hip joint.

The defenders obtained a rule on the pursuer to show cause why the verdict should not be set aside on the ground of excessive damages, but were refused a rule for which they moved on the ground that the verdict was against the weight of evidence.

The pursuer now showed cause—There was no case in which a verdict had been set aside on the ground of excessive damages, although the Court had indicated in several cases that unless the pursuer would abate his claim for damages a new trial would be granted. Here the amount was reasonable, and therefore the verdict should stand.

Authorities—*Johnston v. Dilke*, June 16, 1875, 2 R. 836; *Christison v. Lord Kennedy*, July 6, 1818, 1 Mur. 419, and Nov. 27, 1818, 2 Mur. 51; *Holden v. Couper*, December 20, 1871, 44 Jur. 144; *Hallam v. Gye & Company*, December 22, 1835, 14 S. 199, and May 18, 1837, 15 S. 950; *Shields v. The North British Railway Company*, November 24, 1874, 2 R. 126.

At advising—

**LORD M'LAREN**—When this case was originally before your Lordships on a motion for a new trial on the grounds that the verdict was contrary to evidence, and that the damages awarded were excessive—and both questions were fully argued—your Lordships considered that the verdict should not be set aside on the first of these grounds, but granted a rule on the pursuer to show cause why a new trial should not be granted on the ground that the damages awarded were excessive. I need hardly say that in dealing with such a question this Court does not sit as a Court of review; the remedy of setting aside the verdict of a jury was introduced in order to avert a miscarriage of justice, and is only given in cases where the damages are so large that the jury must be held to have taken into account elements which they had no right to consider, or given a large sum without the consideration of the proper elements. The question is, whether the sum of £800 is objectionable on this ground; and if after consideration of the evidence and of the grounds on which the pursuer was entitled to decree, it can be held that the sum of £800 could be arrived at by argument and consideration, then the verdict should stand.

There are three elements to be considered in arriving at the amount of compensation which should be given in a case of this kind—firstly, compensation must be given for the expense the pursuer has been put to for medical attendance and lodging; secondly, compensation for suffering, whether temporary or permanent; and thirdly, compensation for loss of business, so far as this can be proved. I think that £100 is not an unreasonable sum to award as compensation for expenses incurred by the pursuer, looking to the fact that this lady was confined to her room for a period of six months, and was attended by doctors during the whole of that time, and that for half of that time she was lying motionless, requiring almost constant medical attendance. Then as to compensation for suffering, which no doubt was serious and painful—for there was a fracture of the thigh bone immediately below the hip joint, which is a most dangerous injury—we have evidence that for twelve months she suffered very much. There is, moreover, a prospect of permanent lameness, and that she will not be able to walk without the assistance of crutches or a stick. Now, even if the pursuer were independent and possessed of private means apart from her business, she would be entitled to damages for her present and prospective suffering, and in the circumstances of the case I should say £200 or £300

—say £250. Lastly, as compensation for loss of business—the pursuer is the keeper of a retail shop, which it was stated had been carried on for thirty years, so that it was an established business which she might look on as giving her an income for life, and she puts the profits derived from the shop at £100 a-year, or £2 a-week, which could be laid by after deducting expenditure, which consisted in the cost of keeping herself and her mother, and which may be estimated at £1 per week in addition. If three years' profits are allowed for loss of business, which would make this element amount to £450, that would make up the total amount to £800. This is a possible way of assessing the various elements which the jury were bound and entitled to consider, and thus they might arrive at the sum of £800 without looking at anything which they should not have regarded. I do not say that if I had been one of the jury I would have given so much, but I cannot say that, looking to the evidence and the various claims which have been made, the amount is so extravagant as to render it necessary to set aside the verdict. I therefore humbly state it to be my opinion that the motion for a new trial should be refused and the rule discharged.

**LORD MURE**—The damages which have been awarded in this case are certainly high, looking to the facts and to the position of the pursuer; but, as far as I can understand, it is proved by the evidence that the pursuer will be lame for life, and—which is a very strong circumstance in the case—the jury were unanimous in thinking that £800 was a proper sum to give. If I had been one of the jury perhaps I would not have given so much, but having regard to all that Lord M'Laren has said as to the various elements which must be taken into consideration in fixing the amount of damages, I am of opinion that although the damages are high they are not excessive, and therefore I concur in your Lordship's opinion that the verdict should not be altered.

**LORD SHAND**—As your Lordships are agreed that this verdict should not be disturbed, it is perhaps of little consequence what view I take of the subject. However, I must say that I cannot agree with the opinion that the verdict should stand, and that because I think the amount of damages is plainly extravagant and excessive. The pursuer, who is about 45 years of age, is a person of humble circumstances having a small grocer's shop in the village of Neilston which is said to yield about £100 a-year. The injury which she has sustained is a fracture of the right thigh bone. This action was raised six months after the occurrence of the accident, and on the one side it is proved, not only that she has suffered great pain in the meantime, but that there is also undoubtedly a permanent injury to the right leg, which will always be shorter than the other, necessitating some addition to the boot. On the other hand, it is clear that, according to the medical evidence, it is expected that in eighteen months from the time of the accident she will have recovered sufficiently to resume business, and that in two years she will have recovered entirely. Now, while I quite agree that a verdict should not be disturbed unless the excess of damages is of a distinctly marked character—excessive

and extravagant—yet here I do think the verdict is of that character. It has been said by Lord M'Laren that £100 for medical assistance and other expenses resulting from the pursuer's illness is a reasonable sum, and I agree in this, but if there is to be added a further sum of £700, then the total is much larger than can, I think, be justified. The figure of £250 has been mentioned as a sum which might be awarded on account of the pursuer's suffering, which no doubt was considerable. I question whether the pursuer or anyone else would choose to endure such suffering for £250, or even for £1000; but I see no good principle in the method of calculating the total amount of compensation by estimating each item separately as in a stated account. It seems to me most difficult, if indeed possible, to name a sum in such cases as representing compensation for pain endured. The way in which I have always understood that such compensation should be estimated, and in which it has been always estimated in practice, is by the jury taking into their consideration the whole circumstances of the case, and, looking at both the present suffering and permanent injury, without trying to put a money figure on each separately, to fix a sum which will do justice between the parties. If in this case the jury, in addition to the sum of £100 to cover all outlays, had given a sum of £400, which with accruing interest would be £50 per annum for the next nine years, this would in my opinion be clearly fair and full compensation, as such compensation must be estimated in money. It is suggested that an allowance at the rate of £100 a year for three years should be made as compensation for loss which the pursuer has suffered or may suffer in her business. There is no evidence, however, that the pursuer has suffered any loss in her business, except a general statement by the pursuer that since her illness the business had not been quite so good. If the loss had been substantial or appreciable there would have been evidence of that fact. On the whole, I am of opinion that the sum I have suggested, making in all £500, which would give the pursuer £50 a-year over a term of years, would have been amply sufficient. The jury having exceeded that amount by £300, which is a very large excess, being nearly three-fifths of the whole, if I were to decide this question sitting alone, I would put it to the pursuer that unless she was willing to abate her claim by that amount, and accept the verdict as £500, a new trial would be granted.

LORD PRESIDENT—If I were to set myself to assess the damages which should be awarded in this case, I cannot say that I would fix the amount at £300, but looking to the facts of the case, and taking all the elements into consideration I do not think that the sum I would name would be a great deal less. Now, the question here is whether a new trial is to be granted, and before granting that the Court must be satisfied that the sum awarded is altogether extravagant, and such as no other jury would have given. I should say that unless it can be said that the verdict should not have been for more than one-half the sum allowed there would be no room for interference. On the contrary, if this question had come up on appeal from a Sheriff-Substitute, then one might have been disposed to strike off £100 or whatever

sum seemed reasonable, but that fact is not sufficient to justify us in setting aside this verdict.

LORD DEAS was absent.

Rule discharged.

Counsel for Pursuer—R. Johnstone—M'Kechnie. Agent—John Gill, S.S.C.

Counsel for Defenders—Jamieson—Shaw. Agents—Millar, Robson, & Innes, S.S.C.

Thursday, November 30.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.]

INSPECTOR OF POOR OF GOVAN COMBINATION *v.* GLASGOW DISTRICT BOARD OF LUNACY AND GENERAL BOARD OF COMMISSIONERS IN LUNACY.

*Poor—Insanity—Lunacy Act (20 and 21 Vict. c. 71), secs. 57 and 59—Discretion of General Board of Lunacy—Statutory Board.*

Under section 57 of the Lunacy Act 1857 a parish or county which shall have an asylum or other accommodation for pauper lunatics capable of being validly transferred to the district lunacy board, and which shall make such transference to the district board, "shall be entitled to deduction" from assessments to the extent to the value of the accommodation transferred. *Held* that the district board have a discretion to refuse to accept such a transference if not satisfied with the accommodation tendered.

The 59th section of the same statute provides that where there is in any district an asylum "which shall have sufficient accommodation" for the reception of the pauper lunatics of the district, or can easily be rendered adequate for the reception of such pauper lunatics, or any portion of them, the district board of lunacy "shall, before proceeding to assess for or erect any district asylum, contract" with the proprietors or managers of such asylum for the use of such asylum, any difference between them to be settled by the General Board of Lunacy. Where the accommodation in an asylum in a district was not in the opinion of the General Board of Lunacy adequate and suitable for the accommodation of the pauper lunatics of the district, *held* that the Court had no jurisdiction to interfere with their discretion.

Section 57 of the Lunacy Act of 1857 (20 and 21 Vict. c. 71) provides:—"If in any county or counties, or parish or parishes, there shall be any asylum or hospital, or other available accommodation for lunatics, provided for such county or counties, or parish or parishes, or part thereof, the use whereof can be validly transferred or made over, or can be made effectually available, to the district board of any district, for their exclusive use for the reception and confinement