much as to say that either party may decline to go on with a contract and then say it is at an end, and that seems to me a monstrous contention. The second contention was that the tenant was entitled to bring the lease to an end because there was a breach of the conditions of the lease on the part of the landlord. Now, some conditions are essential, others are not. In this case the landlord came under an obligation to put the fences into tenantable condition, and the position the landlord took up was, as I understand, that the fences were in tenantable condition. The tenant maintained that they were not, and was awarded £35 for the damage he had sustained. That no doubt was an award for a breach of a minor condition on the part of the landlord. But I never heard that a tenant, because the fences were in a bad condition, was to be allowed to walk away.

I agree with your Lordship that there is no doubt whatever that we must answer this question in the negative; and I go further—I think that the tenant had the matter in his own hands, and might have put the fences into proper condition himself and retained the expense he was put to off the rent.

LORD M'LAREN—I agree that we must answer the question in this case in the negative. There has been no determination of the tenancy in the sense of the statute, because there is a current lease, and in my opinion no such state of facts exists as would entitle one of the parties to rescind the contract without the consent of the other party. I do not wish to be understood as suggesting that the tenant is the only party to blame for this dispute. The lease contains a clause of obligation on the part of the landlord to put the fences into tenantable order and condition. One would expect from a reasonable landlord that he should be willing to expend a part of his first year's rent in repairing the fences according to the contract, and when the Sheriff found him in the wrong for not doing so, that he would have been prepared to carry out the obligation. Instead of this his agents wrote two days after the Sheriff's judgment to the agent for the defender — "We assume your client has now ceded possession of the arable lands, and we propose to advertise for a new tenant."

But we are not called on to decide any other question than that put to us, whether there has been a termination of the lease which will enable an arbiter to proceed under the Act to consider the claim. The parties will no doubt be able to determine their respective claims in some other form.

LORD KINNEAR concurred.

The Court answered the question in the special case in the negative.

Counsel for the Appellant—Dundas, K.C. — Hunter. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Respondents — Salvesen, K.C.—T. B. Morison. Agents — Macpherson & Mackay, W.S.

Friday, January 17.

SECOND DIVISION.

[Sheriff-Substitute at Dumfries.

BELL *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Negligence — Railway — Level-Crossing—Injury to Horse through Foot being caught between Rail and Chair in consequence of Wedge not being driven in—Inspection.

In an action of damages, brought by the owner of a horse for injuries sustained by it at a level-crossing maintained by a railway company, it was proved that the accident was caused by the horse's foot being caught in a space between the rail and the chair on which it rests, owing to the wedge which keeps the rail in position not being fully driven in. It was further proved that the rails at the level-crossing were regularly inspected twice a-day for the purpose of seeing that the wedges, which are liable to be displaced by passing trains, were properly driven in, and that the level-crossing had been inspected within an hour before the accident occurred. *Held* that the railway company had not been guilty of negligence, and that they were not liable in damages for the accident to the pursuer's horse.

This was an action raised in the Sheriff Court at Dumfries by Joseph Bell, farmer, Dinwoodie Mains, Lockerbie, against the Caledonian Railway Company, in which the pursuer concluded for £65 in name of damages on account of injuries sustained by a horse belonging to him, which he alleged were caused by the negligence of the defenders.

The circumstances under which the horse met with the injuries complained of are set forth in the following findings in fact, which were made by the Sheriff-Substitute (CAMPION) in his interlocutor, and were ultimately adopted in the interlocutor pronounced by the Court of Session on appeal:—"Finds (1) that the pursuer is tenant of the farm of Dinwoodie Mains, which lies partly on one side and partly on the other side of the defenders' main line of railway between Glasgow and Carlisle; (2) that at Dinwoodie Station, where the said line crosses the public carriage road, there is a level-crossing which was constructed by the defenders under the authority contained in their special Act of Parliament; (3) that on 8th February 1901 John Watson, one of the pursuer's servants, was engaged carting on said farm and had occasion to cross the said level-crossing; and (4) that as he was leading his horse across the line the toe of the shoe on the horse's near forefoot was caught between the rail and the chair on which it rests and became fixed, so that the horse was thrown to the ground and was unable to extricate its foot until forcibly relieved, when it was

found to be seriously and permanently damaged."

The pursuer averred — "(Cond. 5) The pursuer avers that the accident was caused through the fault, negligence, or carelessness of the defenders or their servants, and for which they are responsible in that the wedge or key used for the purpose of keeping the rail in position where the accident happened had not been driven sufficiently in between the chair and the rail, whereby an open space or crevice was left between the chair and rail in which the horse's foot was caught. (Cond. 6) The defenders are bound to uphold and maintain the roadway at the said level-crossing in a proper condition for traffic and the safe use thereof by the public, and in particular they were bound to see that the said wedge or key was in proper position and that there was no opening or other defect in the roadway at the level-crossing in question."

The defenders in answer averred that the level-crossing was maintained in the usual condition, and that it had on the date in question been examined by their servants about an hour before the accident and found to be in good order.

The pnrsuer pleaded—"(1) The defenders being bound to maintain the roadway at the said level-crossing in a proper condition for the safe use of the public, and having failed to do so, are responsible to the pursuer for the damages sustained by his horse in consequence of the defects therein. (2) The pursuer having suffered damages through the negligence of the defenders or their servants is entitled to reparation from the defenders therefor."

The defenders pleaded—"(1) The averments of the pursuer, so far as material, being unfounded in fact, the defenders ought to be assoilzied. (2) The accident to the pursuer's horse not having been caused by the negligence of the defenders or their servants the defenders ought to be assoilzied."

Proof was allowed and led.

The pursuer deponed — "About eight o'clock on that morning (viz., 8th February 1901) an accident happened to one of the horses. . . . I went across to see what was the matter. I found the horse's toe of the near forefoot caught between the rail and the chair. Between the rail and the chair there is a space which ought to be filled up with a wooden key or wedge. There was a key there but it was not driven home. It was not half-way in. *Cross.*—I have seen keys come out in very dry weather, but this was a moist season. This key had never been driven fully in. It was firmly wedged in the hold which it had; it was frozen in. It could not have been through all the way that morning. A man tried to push it out with his foot and could not move it."

David Johnstone, station-master, Dinwoodie, examined for the pursuer, deponed — "There must have been some space between the chair and the rail to allow it to get in. I noticed the position of the key after the horse had been relieved—it had not been fully driven home; an opening of about an inch, off and on, was left. *Cross.*—At some seasons of the year the keys come out easily, and platelayers are employed to see that they are kept in position. I have seen them out of position. Trains are liable to shake them out, and in dry weather they may shrink and fall out. A platelayer goes over the line twice a-day. I am certain that he goes over the Dinwoodie length twice a-day. I do not remember seeing him on the morning on which the accident occurred. There is no other precaution we could take to keep the keys in than by sending the platelayer along to inspect them. Between seven and nine o'clock that morning two trains had passed on the up line on which this accident had occurred and one on the down line. *Re-examined.*—Both of these trains passed after the platelayer had been over the line, between seven and nine o'clock. They both passed before the accident. I am quite clear about that."

George Brown, permanent-way inspector of the defenders, examined for the defenders, deponed—"The keys get loosened by the traffic and fall out occasionally. It is the duty of the platelayer to replace them. The fact that a key is out for a little bit does not endanger traffic. There are four men employed at Dinwoodie to look after two miles of double line. Their duty is to look the road twice a-day and keep the permanent way in repair. That is the only precaution which the Company can take to keep the keys in their place."

James Johnstone, platelayer, examined for the defenders, deponed—"On the morning of the accident I passed the crossing about five minutes before eight o'clock. I looked at it particularly. This key could not have been anything like half-way out without me seeing it. There were trains passed between the time I looked at the crossing and the occurrence of the accident. I came back between nine and ten o'clock, after the accident, and trains had passed in the interval. I examined the crossing in the afternoon. I saw then that the key was shifted a little out of its place. As nearly as I could judge it was about an inch out. It is quite possible that the shaking of a train would shift the key a little. In either frosty or warm weather the keys shift easily. It is my duty to look at these things particularly and see that they are always put into their place. We frequently find keys out altogether, and we pay particular attention to them for that reason. . . . We pay more attention to the keys on the level-crossing than on other parts of the railway because you cannot see them so easily and have to be more particular. There are no special instructions with regard to them. Keys are not liable to come fairly out on a crossing, but they will shift a little with the traffic. On a frosty morning and with the key dried up it might quite easily shift with two trains passing over it. There is more dampness about a crossing than the rest of the line if you go back from the edge of the rail."

On 7th August 1901 the Sheriff-Substitute (CAMPION) pronounced an inter-

locutor whereby, after pronouncing the findings in fact 1, 2, 3, and 4, which are quoted *supra*, he found further as follows:—"Finds that said accident was caused through the neglect of defenders or their servants to see that the wedge or key used for the purpose of keeping the rail in position where the accident happened had not been driven sufficiently in between the chair and the rail, whereby an open space or crevice was left between the chair and the rail in which the horse's foot was caught: Finds further, that said accident occurred in consequence of defenders' failure to maintain, as they were bound to maintain, the roadway at the said level-crossing in a proper and safe condition for public traffic, and that they are liable to pursuer for the loss and damage sustained by him by the injury thus occasioned to his horse."

He assessed the damages due to the pursuer at £65.

The defenders appealed to the Court of Session, and argued—The defenders could not be held liable unless they had failed to take reasonable precautions to keep the level-crossing safe—*Port-Glasgow and Newark Sailcloth Company* v. *Caledonian Railway Company*, February 21, 1893, 20 R. (H.L.) 35, *per* Lord Chancellor, at p. 36, 30 S.L.R. 587. The evidence showed that there was a system of constant and regular inspection, and no more could be required of the defenders.

Argued for the pursuer and respondent—The Sheriff-Substitute had rightly held the defenders liable. The platelayers' duty was to see that every key was firmly driven in; but it was clear from the evidence of the pursuer, who saw the key in question at the time of the accident, that it had not been driven in on that morning.

LORD JUSTICE-CLERK—This is an extraordinary case. I never heard of such a thing happening before, and it seems very unlikely ever to happen again, but the question to be decided is whether the pursuer has succeeded in proving that there was negligence on the part of the Railway Company. Now I am satisfied that he has failed to prove that. The evidence in the case, which does not seem to be open to any exception in regard to candour or truthfulness (and in regard to the railway witnesses I may say that none of them expressed themselves so as to appear to be biassed at all in giving their evidence), goes to this, that it was part of the regular arrangements of the line that these wedges or pins for fastening up the rails into the chairs should be regularly inspected. I think the evidence is that they were regularly inspected, and that if any wedge happened to be out of its place to any extent that was to be attributed to the traffic which necessarily produces that result more or less according to the state of the weather, and according also probably to the condition of the wood that happens to be used at the time. It was the duty of certain platelayers to go along that line, and there was an inspector to control and oversee them, and it was their duty to do that twice a-day for the purpose of driving up those wedges which were not in their proper place either from having fallen out altogether or being loose while they still remained between the chair and the rail. The evidence is that that had been done that morning, and that after that certain trains, I think two, had passed along the line before the time had come for another inspection. I see nothing in the evidence to show that the duty of so keeping these wedges firm by reasonable inspection according to reasonable and universal practice had been neglected. If so, I think there is failure on the part of the pursuer to prove that there was negligence on the part of the defenders, and therefore that the pursuer is not entitled to succeed in this action, and that the Sheriff-Substitute's interlocutor ought to be recalled, and that we should so find and assoilzie the defenders, with expenses.

LORD YOUNG—I am of the same opinion, and I do not think I have anything to add. I have probably sufficiently indicated the impression, which has now hardened into a conviction, in the course of the argument, when I put it to Mr King whether the case he made came to this, that the Railway Company had done all they should be required to do, indeed all that it was possible to do, in order to see that such keys were kept in proper condition against their liability to be displaced from the constant passage of trains over the line, and that their servants employed by them to carry out their system with a view to the public safety, not only of traffic on the line but to people crossing at that level-crossing or any other crossing, had fully fulfilled their duty. My own opinion is, attending to the evidence and to the argument on both sides, that the Railway Company have fulfilled their duty in this matter, and that their servants have fulfilled theirs, and that the accident therefore is not attributable to anything blameworthy for which the Railway Company are responsible either in their system or in the execution of it. That is sufficient for the decision of the case.

LORD TRAYNER—I concur.

LORD MONCREIFF—I am of the same opinion. The Sheriff apparently proceeds on the footing that the pursuer succeeded in proving that there was no inspection that morning—that in point of fact the wedge had not been put in properly between the chair and the rail. If that had been clear the pursuer would have been right. But I think that has not been established, for James Johnstone, who gave his evidence very clearly, says that he examined this crossing immediately before the accident occurred and that there was nothing wrong at that time, that the key could not have been half-way out without him seeing it, and that immediately after that two trains passed which might have displaced it.

The Court pronounced this interlocutor:—

"Sustain the appeal and recal the said interlocutor appealed against: Find in fact in terms of the first, second, third, and fourth findings in the said interlocutor appealed against: Find further in fact (5) that it is not proved that the defenders failed to maintain the roadway at the level-crossing where the accident in question occurred in a proper and safe condition, and (6) that the accident in question was not occasioned by any fault or neglect of duty on the part of the defenders: Find in law that the defenders are not liable to the pursuer for the claim now made: Therefore assoilzie the defenders from the conclusions of the action, and decern," &c.

Counsel for the Pursuer and Respondent—A. S. D. Thomson—Scott Brown. Agents—Pairman, Easson, & Millar, S.S.C.

Counsel for the Defenders and Appellants—Guthrie, K.C.—King. Agents — Hope, Todd, & Kirk, W.S.

Saturday, January 18.

FIRST DIVISION.

REID *v.* MORTON.

Process — Jury Trial — Motion for New Trial — Insufficiency of Damages — Reparation.

In an action of damages for personal injuries a dock labourer obtained a verdict for £20. Before the accident by which he was injured he was regularly employed, and was earning £2 a-week, and in the fourteen weeks succeeding the accident he only earned £2 altogether. The pursuer moved for a new trial on the ground of the insufficiency of the damages, and maintained that he had lost £26 in wages, and was entitled in addition to damages for the pain he had suffered, the expense he had been put to, and the injury to his future prospects through impaired health.

Held that insufficiency of damages was a competent ground for granting a new trial, but that the insufficiency must be such as to be unreasonable or perverse, and to amount to a miscarriage of justice; and that in this case although the Court sitting as a jury might have assessed the damages at a larger sum, there was not sufficient cause for setting aside the verdict, the jury being entitled to take into consideration the uncertainty attending the chances of regular employment in the pursuer's trade.

James Reid, Rutland House, Mair Street, Govan, raised an action of damages for personal injuries against Robert Morton, builder and contractor, Weir Street, Paisley. The damages were laid at £100.

The case was tried before a jury.

From the evidence led for the pursuer it appeared that he was a dock labourer, and that prior to the accident whereby he sustained injuries he was regularly employed and was earning £2 a-week; that during the fourteen weeks immediately succeeding the accident, for the first eight of which he was completely disabled, he only earned £2 altogether; that to some extent he was not fit for work after that period of fourteen weeks, and that at the time of the trial, eight months after the accident, symptoms resulting from his injuries were still present.

The defender led no evidence.

The jury returned a verdict for the pursuer and assessed the damages at £20.

The pursuer obtained a rule on the ground of insufficiency of damages.

Argued for the defender—There were only two cases in which a new trial had been granted on the ground of insufficiency of damages—*Leven* v. *Young & Co.*, May 14, 1818, 1 Murray, at p. 373; *Black* v. *Croall*, January 31, 1854, 16 D. 431. In both these cases it was clear that the jury had proceeded on a wrong basis. Here the jury were justified in their estimate. Looking to the whole circumstances of the case the sum awarded was one at which the jury were entitled to arrive—*M'Laurin* v. *North British Railway Co.*, January 5, 1892, 19 R. 346, 29 S.L.R. 291. Though the Court should be of opinion that a larger sum might have been awarded, that was no reason for setting aside the verdict—*Young* v. *Glasgow Tramway and Omnibus Co.*, November 29, 1882, 10 R. 242, 20 S.L.R. 169. The defender was entitled to call upon the pursuer to show that the verdict was unreasonable. Insufficiency of damages was not one of the statutory grounds for granting a new trial—55 Geo. III. c. 42, sec. 6.

Argued for the pursuer — It was sufficient cause for setting aside the verdict that the damages were unreasonable, whether unreasonably large or unreasonably small—*Black* v. *Croall*, *cit. sup.* There was no evidence to contradict the evidence for the pursuer, according to which he had lost £26 in wages during the fourteen weeks succeeding the accident, during which he only earned £2, and continued to be unfit for his ordinary work beyond that period. Therefore, however small a figure was put upon his loss in wages, £20 was inadequate. Besides loss in wages the pursuer was entitled to damages for the pain he had suffered and the expense he had been put to, and for the damage to his future prospects through impaired health. No reasonable view could reconcile the verdict with the evidence; accordingly the verdict could not stand.

LORD PRESIDENT — This is a somewhat singular case, the pursuer's allegation being that the amount of damages awarded is insufficient. It is certainly not common for juries to give too small an amount of damages, and where it is alleged that this has been done it would require strong reasons to induce us to interfere. Unless we were