"The 11th item of the claim, which was reserved, is for relief from all claims of damages and expenses at the instance of the relatives of the workman killed. If the action of damages had resulted in a judgment against the defender, the arbiter would have been entitled to deal with his claim to be relieved from the consequences of the decree, both as to damages and expenses. It would have been a different question whether, in that state of the case, the expenses incurred by the defender to his own agent in defending the action, might not have been held to be imported into the reference, as a necessary incident of the action raised against him? On that point the Lord Ordinary expresses no opinion, except that it appears to him to be in principle very different from the question on which the parties are now at issue,—as to the defender's claim to be relieved of his expenses in successfully resisting the claim for damages made against him, for which he has got decree against the pursuer of the unsuccessful action.

"If the defender had been found liable in damages, he would have been in a position to contend that the successful claims at the instance of the representatives of the workman, for the consequences of an accident, caused, as he alleges, by the fault of the pursuer, had involved him in liability for the damages found due, and the expenses of the action on both sides; and that, on a fair construction of the 11th item of his claim in the submission, these must all be held to be included within it, and therefore imported into the reference. It is unnecessary to consider whether such a contention could have been successfully maintained. The claim for relief now insisted in is necessarily of quite a different description. It does not proceed on the footing of any claim at the instance of the relatives of the workman having been sustained, or having legally existed against the defender. They are very different questions,—whether, on the one hand, the pursuer is bound to relieve the defender of any claim of damages which might be sustained against him, with all its incidents? and, on the other hand, whether he is bound to relieve him from the consequences of an unfounded claim, viz., the expenses incurred in defending the action, and his inability to recover them from the opposite party? It is quite conceivable that the pursuer might have been willing to leave the former question to be decided by the arbiter, while he would have declined to make him judge in the latter, which involves legal considerations of a very different kind, quite independent of the construction or due execution of the contract. The Lord Ordinary sees no reason to think that any such question was in the contemplation of the parties, and he cannot hold it to have been imported by implication into the reference, to the proper subject matter of which it is entirely foreign."

The defender reclaimed.

A. MONCRIEFF and LANCASTER for them.

MACKENZIE and STRACHAN, in answer.

The Court adhered.

Agents for Pursuer—J. S. Mack, S.S.C.

Agents for Defenders—Wilson, Burn & Gloag, W.S.

Wednesday, October 27.

FIRST DIVISION.

STEWART *v.* CALEDONIAN RAILWAY CO.

Verdict — Damages — Inconsistency—Injury—Railway. A party getting out of a railway carriage at Broughty-Ferry Station, in an evening in January, sprained his ancle badly. He suffered much pain, and considerably in his business, and alleged the accident was due to the height of the carriage above the platform, the darkness of the station, and an inequality in the platform. The jury found for him unanimously with one shilling damages. Verdict *set aside* on ground of inconsistency.

This case arose from an action tried before Lord Mure and a jury last July, in which the pursuer sought to recover damages from the defenders on account of an accident he met with, owing, as he alleged, to their fault. He is senior partner of the firm of John Stewart & Sons, carrying on a lucrative trade as nurserymen and seedsmen in Dundee and in Dorsetshire. Much of their business is due to his activity in obtaining orders on the journeys which he makes for the firm during two or three months of the year. On 13th January last he returned, as was his custom, from Dundee to Broughty-Ferry, where he lived, by the 8·35 P.M. train. There were three gentlemen in the carriage with him. All of them got out before him. He had a small parcel in his hand, and on getting out, though with the aid of the handle of the carriage, doubled his right foot under him. He fell, and became unconscious from pain for a moment or two. On recovering, and being assisted up, he pointed out to the guard and porter an inequality in the pavement, which had, he said, caused the accident. He suffered severely from the injury, was confined to bed for four days, and for about ten days longer to the house. He gradually became able to resume business, but far from as actively as before; and, in consequence of this inability for active exertion, he had been deprived, since the 13th of April, of the salary of £32 a month allowed to him in addition to his share of the profits. His outlay for medical attendance, &c, exclusive of fees to Edinburgh doctors, amounted to about £50. The testimony of various eminent medical gentlemen who had attended him, was to the effect that the sprain was of a very severe character, so severe as to be worse ultimately than a broken leg.

The height of the carriage above the platform was about 3 feet 1 inch; and the depression in the platform was about 3 feet long, 14 inches wide, and variously represented as from 1¼ to 1¾ inches deep. There were three or four lamps on the platform, the nearest of which was 35 feet distant; and the evidence on the subject of the amount of light was exceedingly discrepant. The officials at the station alleged it was sufficient, and that no complaints of want of it had been made; and one or two witnesses for the company spoke to the station being well lighted. While, on the other hand, several witnesses had complained of its darkness; and one of the gentlemen who assisted the pursuer to rise said it was so dark at the time that they could not see the hole till the guard's lamp was brought. There was a like difference of opinion as to the excellence of the light on the opposite side of the platform. Several railway officials and engineers from various

parts of the county eulogising it; and one or more remarking that there were greater inequalities on the pavements in Edinburgh. Some witnesses spoke to complaints of the height of the carriages above the platform; while some professional witnesses considered such height advantageous and usual.

When the evidence had been led, the defenders' counsel moved the judge to withdraw the case from the jury, on the ground of want of evidence; but he declined to do so, and the jury found unanimously for the pursuer, with one shilling of damages.

The pursuer moved for a new trial; and the defenders tendered a bill of exceptions, in which, however, they ultimately did not insist.

LORD-ADVOCATE and JOHNSTON, for the defenders, argued—The verdict is a logical inconsistency. If the company are to blame, the damages show they are not. This verdict must be tested as if it was for the defenders. Authorities—*Mostyn* v. *Coles*, 7 Hur. and Nor. 872; *Morisett* v. *Brecknock*, 2 Doug., 508; *Rendall* v. *Hayward*, 5 Bing., N. C. 424; *Siner* v. *G. N. Rail. Co.*, 4 L. R. (Exch.), 117; *Howard* v. *Barton*, 11 L. R. (C. B.), 653.

DEAN OF FACULTY and THOMS, for the pursuer, replied—Two questions went to the jury, (1) was the plaintiff injured through the fault of the defenders? and (2) what was the amount of the damages due to him? The jury were unanimous that it was not the pursuer's fault. Verdict is, no doubt, illogical as regards the amount of damages. The case of *Mostyn* is not well decided. Authorities—*Black* v. *Croall*, 16 D., 431; *Foy*, 18 Scott (C. B.), 225.

The Court held the verdict was irrational and inconsistent, as it implied the railway company was in fault, yet only gave one shilling of damages, a sum wholly incommensurate with the pursuer's loss pecuniarily and otherwise. There was nothing to justify the case being withdrawn from the jury, though the evidence was narrow; but if the defenders were in fault more than nominal damages were due.

LORD KINLOCH—If I was satisfied on the evidence, clearly and conclusively, that the defenders were entitled to a verdict, I might concur in adopting the practice said to be followed in England in such a case, of refusing a new trial; on the ground simply that by this course no injustice was committed, on the contrary substantial justice done. But I do not feel entitled to pronounce so on the evidence, or indeed to pronounce on it to any absolute effect. I think the case was one fitted for a jury, and which was properly left to the jury by the presiding Judge. I must hold the verdict to have meant what its terms import, that the pursuer had succeeded in establishing both the fault and injury in issue. To find him in such a case entitled to no damages at all (which is practically the result of the verdict), appears to me a plain miscarriage on the part of the jury, to whatever cause it is to be ascribed. And I think the pursuer is entitled to have his case tried again (with whatever result), as a step indispensably necessary to the justice of the case.

Order for new trial granted.

Agents for Pursuer — Lindsay & Paterson, W.S.

Agents for Defenders—Hope & Mackay, W.S.

Wednesday, October 27.

WYLIE & LOCHEAD *v.* NEWTON, WILSON, & CO.

Breach of Contract—Agency—Damages—Sale. B. & C. ordered from D. & Co. certain goods, on condition that they were to have the exclusive sale of them in Glasgow, and a certain per centage on the sale. Alleging the delivery had been delayed beyond the stipulated time, and breach of the exclusive agency, they cancelled their order, and refused to take delivery of the goods. *Held* this was a mixed contract of sale and agency, and that it was implied B. & C. were to push the sale of the goods in the market; and as their allegations were not proved, and D. & Co. had suffered injury by the loss of the expected custom,, damages were awarded.

This was an appeal from a judgment of the Sheriff-substitute (DICKSON) at Glasgow, affirmed by the Sheriff (BELL), finding the appellants liable in payment of a certain sum to the respondents.

Newton, Wilson, & Co., are manufacturers of sewing machines in London, and on 5th September 1866, through Mr Wilson, one of the partners, entered into an agreement to supply 100 sewing machines to Messrs Wylie & Lochead, warehousemen in Glasgow. The order, as engrossed in the books of the appellants, was in the following terms:—

"Newton, Wilson, & Co., 144 High Holborn, London.

Sept. 5.	30°/o	50 'Queen Mab' Machines		3	3	0
	33⅓	50 Sets Tools for do. .		0	5	0
	33⅓	50 'Cleopatra' Machines		4	4	0
	,,	50 Sets Tools for do. .		0	5	0
	,,	2 Walnut Boxes .	@	1	1	0
	,,	1 ,, ,, .	@	2	2	0

Within 14 days from date of invoice. } Agency to be exclusive in Glasgow. Cases to be returned, carriage free. Carriage to be paid to Glasgow.
30°/o of all extra apparatus.
Two complete sets of extras @ £2 12 6.
NEWTON, WILSON, & Co."

The machines not having been delivered, the appellants wrote to the respondents on 1st October, alleging delivery had been promised within eight days, and that they were to have an exclusive agency in Glasgow, and complaining of the delay and that the respondents had been offering for sale in Glasgow machines of the kind of which they were to have the exclusive sale. And on these grounds they cancelled their order. The respondents, in their reply, denied the truth of these assertions, and some correspondence followed between the parties; but as the matter could not be settled, the respondents brought an action in the Sheriff Court, claiming £273, 15s. 10d. for the price of the goods ordered, £75 for damages sustained by the delay of the appellants in taking delivery, and £200 in the event of their persisting in their refusal to take delivery. And to this last claim alone they ultimately adhered.

A proof was led; and, on 16th March 1869, the Sheriff-substitute gave decree for £62, 10s. against the appellants. On the 26th April this judgment was affirmed by the Sheriff, but he restricted the damages to £25.

Appeal was taken on the 3d June.

Solicitor-General CLARK and LANCASTER, for the