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 There was nothing to justify the case being withdrawn from the jury, though the evidence was narrow; but if the defenders were in fault more than nominal damages were due.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%	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% 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

appellants, argued—This is a contract of sale. The appellants were justified in not taking delivery of the goods, as the respondents broke the contract; at least, no damages are due, or only nominal damages.

Authorities—*Watt* v. *Mitchell*, 1 D. 1157; Addison on Contracts, 1373; Sedgwick on Damages, 318, 319; *Watson* v. *Abergele Railway Co.*, 15 English Jurist, 448.

CAMPBELL (with him WATSON, who was not called on), being told to speak only to the question of damages, replied—The question is, are the damages to be nominal or such as the Sheriff contemplates? The contract is the measure of the damages.

Authorities—*Corrie* v. *Thames Iron Co.*, 3 Law Reports, Q.B., 181; *Inchbald* v. *Western Neilgherry Railway Co.*, 17 Law Reports, C.B., 733.

At advising—

LORD PRESIDENT—This is not a contract of sale, but a contract of a composite character. It is a mixture of sale and agency. The parties to it had each an object in view. The respondents selected the appellants, as an old-established firm in Glasgow, to sell for them. The appellants, on the other hand, as godfathers to the machines, stipulated—"If we are to have the sale, we must have the character of being the only firm selling them." It is not therefore, a contract of sale. The appellants were to have 33 per cent. on the sale, which is almost a contract of agency. But then, it differs from it in this respect, that they were to take the risk of the sale. It is said that after the hundred machines were sold, the contract was to cease. But whether or no this be true, makes little difference—the contract is still the same. So long as the hundred machines were with them, they alone were to be able to sell. But, on the other hand, might they lock them up? Surely not. Of course this, like many other things, is not expressed in the memorandum. But I think they were bound to push the sale. Mr Wilson says—"The inducement held out by the defenders to us, to give them the sole agency in Glasgow, was that they promised to put the machines into the hands of their travellers, advertise them largely, and make them a prominent article for sale. In consequence of this we abstained from advertising, or in any other way pushing the sale of the machines in any part of this country." There was no stipulated time when the machines were to be delivered, but there was an interest on both sides that delivery should be made as early as possible. Mr Wilson, it is alleged, was four weeks in Glasgow, and yet made no delivery of the machines. Of this the appellants justly complain. But then, they unjustifiably say—"You are breaking the contract; you are selling to all and sundry." This assertion was unfounded. Several witnesses expressly state that when they called at the Glasgow agency of the respondents to get machines, they were directed to apply to the appellants, who alone had right to sell them; and that the machines exhibited in the window were there only as samples, and for sale to country purchasers.

Yet the appellants broke up the contract and refused to accept delivery of the goods. If this had been a contract of sale, all the respondents had to do would have been to sell the machines at once and claim the difference from the appellants. But, as I have said, this is not a contract of sale. The claim is of the loss arising to the respondents from the appellants, as parties to this contract, not getting the machines pushed in the Glasgow market. It was, we are informed by witnesses, a good opportunity for their sale; and the only machines that were sold were well thought of by the purchasers.

In consequence of the appellants' action in this matter the respondents lost the Glasgow custom they thought they had secured under the contract. There was no loss on the hundred machines. They were actually sold for a higher sum than the appellants were to have paid for them. But Mr Wilson tells us, in consequence of the loss of the Glasgow market, they were left at Christmas with an extra supply of machines in hand, to the extent of 200; and that in consequence, they, in December, reduced their production of machines by 10 per week.

The only question, then, I think, is what is the amount of damages to be paid. The Sheriff assesses it at £25. Had this been a jury case, and I been requested to withdraw the case from the jury, I should not have done so. They might quite probably have given £25; and if they had, I do not think your Lordships would have been for setting aside their verdict. I am, therefore, for adhering to the Sheriff's interlocutor.

The other Judges concurred.

Agents for Appellants—J. & R. D. Ross, W.S.

Agents for Respondents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, October 27.

SECOND DIVISION.

GRANTS *v.* BAILLIE & OTHERS.

Trust—Unauthorised Investment of Funds—Disposal of Profits accruing thereon. Trustees under a marriage contract having invested trust-funds in bank shares, which was not authorised by the trust-deed, they were ordained, in an action by the trusters, to sell the shares and invest the money in terms of the deed. Profits having accrued on the unauthorised investment, *held* that these must be applied in the same way as the trust-funds themselves; but circumstances in which *held* that a portion of the sum which had been invested was not trust-money but the property of one of the spouses, and that she was entitled to payment of that portion, and the proportion of the profits corresponding thereto.

The pursuers, Mr Patrick Grant and his wife, executed, in the year 1838, an antenuptial contract of marriage, by which the defenders were appointed trustees for the purposes therein expressed. By the said contract, *inter alia*, Mrs Grant conveyed to the trustees a sum of £4000, part of the fortune which she was entitled to under her father's testamentary settlements. The trustees were directed to invest this sum *in heritable or personal security*, and to pay the *interest or yearly profits thereof* to Mrs Grant during her lifetime, exclusive of the *jus mariti* of her husband. In the event of Mrs Grant surviving her husband, £3000 of the said sum were to be paid to her for her own right and use, and subject to her own absolute and uncontrolled disposal, and the remaining £1000, along with certain policies of insurance, were to be paid to the children of the marriage after her death. In the event of the husband's survivance, the interest or yearly profits were to