opposing the granting of a supervision order. It was not suggested that the procedure was in any way irregular or incompetent, and in the absence of any such allegation the Court would not refuse the application—*Lawson Seed Company* v. *Lawson & Son*, December 2, 1886, 14 R. 154. It was essential that the proceedings adopted by the respondent should be stayed, and the course proposed by the petitioner was the most effectual for this purpose; without a supervision order the proceedings complained of could not be stayed—*Sdeuard* v. *Gardner*, March 10, 1876, 3 R. 577. The circumstances which induced the Court in the case of *Mitchell* v. *The Rawyards Coal Company*, November 20, 1888, 16 R. 117, to refuse a supervision order were entirely wanting in the present case, and the application should be granted, especially as under it all interests would be fully protected.

Counsel for the debenture-holders stated that it was entirely with their money that the concern was floated, and that the debenture-holders concurred in the application of the liquidator and adopted his arguments.

Argued for respondent—If the petitioner's application was granted, then the respondent's action would be stopped. The action had reached the procedure roll, and the Lord Ordinary was about to determine its relevancy. If it was found irrelevant, then it would be thrown out, and there would be no need of a supervision order; but if it was found relevant, that was the strongest argument in favour of its being allowed to go on; but even if found relevant it could not proceed if the present application was granted. The question of whether such an order should be granted was one for the discretion of the Court, and no sufficient reason had been assigned for its being granted.

At advising—

LORD PRESIDENT—The Solicitor-General is not in a position to challenge the regularity and validity of the initial resolution of the company to go into voluntary liquidation. He says, indeed, that he has an action of reduction which will entirely subvert the present position of the company and give him a dominant influence in it. But the Court must take it that the proceedings of the company stand *ex facie* regular and valid, and the question is now whether the company having resolved on voluntary liquidation, and having resolved to ask for a supervision order, adequate grounds have been stated for refusing the petition; because the cases referred to seem to show that when a resolution of a company so far as the validity is concerned is unimpeached, it requires some strong specific ground to warrant the Court in withholding a supervision order which the company has proceeded to ask.

It has been stated for the petitioners quite plainly that the interest of the company is to stop the action of the respondent Mr Cunningham; but that is perhaps overstating the effect of the proceeding, because under section 87 of the Act the mere effect of the supervision order is to stop proceedings or the commencement of proceedings against the company, "except with the leave of the Court and subject to such terms as the Court may impose." Accordingly if the Court grants the supervision order, the practical effect of it will be that the question whether Mr Cunningham's action should be allowed to proceed becomes matter for judicial consideration, and will be determined on a full consideration of all interests both of Mr Cunningham's and of the company's, and of the debenture holders. If your Lordships are of the same opinion, then I think we ought to grant the order, and leave Mr Cunningham, if so advised, to make application to the Judge before whom his case has already come, whom he may be able to satisfy that he ought to be allowed to proceed with his action.

I am therefore for granting this supervision order, and for remitting the case to Lord Kyllachy, before whom Mr Cunningham's action of reduction has already made some progress.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court granted the prayer of the petition.

Counsel for Petitioners—D.-F. Balfour, Q.C.—Ure.

Counsel for Debenture Holders—Baxter. Agent—J. L. Hill & Company, W.S.

Counsel for Respondents — Sol.-Gen. Graham Murray, Q.C.—Galloway. Agents —Patrick & James, S.S.C.

Tuesday, January 5, 1892.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

M'LAURIN *v.* NORTH BRITISH RAILWAY COMPANY.

Process — Jury Trial — Reparation — New Trial on Ground of Excess of Damage.

A pursuer having obtained a verdict for £1800 in an action of damages for injuries sustained in a railway collision, the defenders applied for a new trial on the ground that the damages awarded were excessive. The evidence showed that the pursuer had received a severe blow on the head, which shattered his nose, and inflicted upon him a serious nervous shock. The shape of his nose was permanently altered, and he was to a certain extent but not greatly disfigured. His health was much broken by the shock he had sustained, and it was a year before he could work a full day at his business, which was that of a yarn and cloth merchant. At the date of the trial, fifteen months after

the accident, he was still suffering from symptoms of nervous shock, and his capacity for business was still much impaired. He had also completely and, in the opinion of the medical experts examined, permanently lost his sense of smell, which was proved to be of special value in his business as a means of detecting certain defects in yarn. With the sense of smell he had also lost the sense of flavour. From the medical evidence it appeared probable that the pursuer's recovery from the shock he had sustained would ultimately be complete, but that it would not be rapid. The outlays which the accident had entailed on the pursuer amounted to £213, 9s. He did not allege any specific loss of business as the result of the accident.

The Court *declined* to grant a new trial, holding that the award of damages was not altogether unreasonable, although higher than the Court, sitting as a jury, would have made.

This was an action of damages brought by John Cockburn M'Laurin against the North British Railway Company on account of injuries sustained by the pursuer when travelling on the defenders' line between Bearsden and Glasgow.

In Cond. 2 the pursuer set forth the various injuries he had sustained in his person. In Cond. 3 he averred—"The pursuer is a partner of the firms of M'Laurin Brothers, yarn and grey cloth merchants, Glasgow, and of A. Y. M'Laurin & Company, muslin manufacturers, Glasgow. He personally undertakes an important department of the business of the first-mentioned firm, and his prolonged absence from business in consequence of the injuries sustained by him in the collision has caused serious loss to that firm."

A minute was subsequently lodged for the pursuer stating that he did not propose at the trial of the cause to prove that he had suffered any specific loss to his business in consequence of the injury sustained by him in the collision, and he craved to be allowed to amend the record by deleting in Cond. 3 the words "And his prolonged absence from business in consequence of the injuries sustained by him in the collision has caused serious loss to that firm."

The case was tried before Lord Wellwood and a jury on 12th and 13th November 1891. The evidence for the pursuer showed that on the morning of 28th August 1890 he was a passenger by the North British Railway from Bearsden to Glasgow. A collision occurred, owing to which the pursuer was thrown violently against the side of the carriage in which he was travelling and received a severe blow on the head, which smashed his nose, shattering the bones of the bridge and breaking and displacing the septum. After the accident he was taken to the house of his mother-in-law in Bearsden. During the greater part of the first day he continued in an unconscious or semi-conscious state, and after that for several days suffered acute pain in his head. His face was so swollen that for three days he was practically blind. For three weeks while his nose was setting he had to lie on his back, and the inability to breathe through his nose, and the production of mucus, caused him great distress. At the date of the trial he still complained of a "crushed, drumly feeling in his forehead."

The pursuer was to a certain extent disfigured by the injuries he had received, but the skill of the doctors who attended him prevented the disfigurement from being very serious. His nose, however, was different in contour from what it had been prior to the accident.

Besides the injuries to the pursuer's face the accident also gave a severe shock to his nervous system. Before the accident he was a strong healthy man, a sound sleeper, and a cool and able man of business. After the accident he suffered from many nervous symptoms. His sleep was much broken. Slight noises startled and annoyed him. He was easily irritated, nervous in travelling by rail, subject to a feeling of weakness when anything occurred to annoy him, and to sensations of giddiness when fatigued. He was also troubled by twitchings and throbbings of the left arm. By the time of the trial most of these symptoms had to some extent abated, but the evidence showed that he was still far from being the same man he had been before the accident, and was still in a nervous and weakened state of health.

In regard to the results of the accident as affecting the pursuer's capacity for business, the evidence showed that it was some time after the accident before he was able to attend to business at all. He made several attempts to do so in the end of October, but found himself quite unfit for work, and had to go away to the country. He returned in the latter part of November, and between that time and March he went almost daily to business, but was only able to do a short day's work. In March he had a short holiday, and after his return he worked fairly steadily at his business until the end of July, but was still unable to do a full day's work. During August, in accordance with medical advice, he took another holiday. According to his own evidence and the evidence of those who were engaged with him in business, he had not at the date of the trial recovered his usual aptitude and capacity for business, his memory, power of application, and ability to stand the fatigues and worries of business being all impaired. It further appeared that the pursuer had completely lost the sense of smell, and with it the sense of flavour, though he still possessed to a certain extent the sense of taste. In consequence of the loss of the sense of smell he had twice since the accident been exposed to an escape of gas without being aware of it. It was also proved that in the pursuer's business the sense of smell had a special value as a means of detecting mildewed yarn, and testing whether woollen yarn was properly scoured and free from oil.

The medical evidence was to the effect

that the pursuer would not regain his sense of smell. With regard to the symptoms of nervous shock from which he was still suffering, the doctors were of opinion that it was probable that in time his recovery would be complete, but they did not expect it to be rapid.

The special outlays entailed on the pursuer in consequence of the accident were stated at £213, 9s.

The defenders examined no witnesses, but merely put in evidence the minute which had, as already stated, been lodged for the pursuer.

The jury found for the pursuer, and assessed the damages at £1800.

The defenders applied for a rule, on the ground that the damages awarded were excessive, and the rule having been granted, the pursuer was called on to show cause why a new trial should not be granted. No suggestion was made at the discussion that the jury in assessing the damages had taken into consideration any element which they were not entitled to consider.

At advising—

LORD PRESIDENT—The subject-matter of this trial is certainly singular, and in my experience almost unique. I am not, accordingly, surprised that different estimates should prevail at the bar as to the proper amount of the damages to which the pursuer is entitled. I may mention some of the elements of the damage suffered, in order to see how far the case has been made out that the jury have gone so far wrong in their assessment of damage as to oblige us to set aside their verdict.

We are first of all on solid ground as regards the £213 expended by the pursuer on actual outlays caused by the accident, and have therefore only to deal with the residue, and to say whether it is an excessive award in the sense in which the term "excessive" is used on such occasions as this. That the pursuer was shockingly injured there is no doubt. His nose was smashed into pulp, and it stands to reason that he must have suffered a deplorable and lamentable amount of pain. The injury he has undergone is of an unusual kind, for though his nose was smashed to pulp, it has been artificially re-formed with such skill as to minimise the damage to his features. He lay, however, for some weeks in a constrained position, suffering agony and distress of mind. When he first returned to business he found that he was unable to attend to the work, and lacked the nerve and power of concentration which had fitted him previously to take a forward and energetic position. He then made various experiments by working short hours and taking frequent holidays, and it was about a year after the accident before he began fully to perform the duties of his business, for, as I collected the statements of counsel, it appears that in March he was doing a half-day's work, and between March and July not a whole day.

Now, what is his state after this long period of gradual convalescence? By the undisputed testimony of his friends and relatives he is a damaged man, his mental activity is impaired, his memory blunted, and his general alertness diminished. As regards the future, the medical men say that such symptoms as the trembling of his hand and his nervous excitability will, they expect, yield to the healing process of time, that no permanent injury has been done to any nerve centre; and I think the Dean of Faculty is justified in saying that that is the final opinion of the experts on what is a matter for the future to decide. On the one hand, therefore, he is not at present the same man he was. On the other hand, we may expect that he will ultimately be restored to health.

But then he has sustained a remarkable special injury of a very unusual kind. He has suffered a complete and permanent loss of his sense of smell, and a corresponding permanent injury to his sense of flavour, though he has not entirely lost his sense of taste.

This raises a difficult question of appraisement of damage. We have an illustration of the extent of such a loss in the experiences of the pursuer himself, who has twice been exposed to an escape of gas without being aware of it, and no doubt it would set the jury thinking what was the result of a loss of smell when they saw that it exposed a man to danger. It is also the case that the sense of smell is useful in the particular business in which the pursuer is engaged. Dealing with this question it is important to determine what is the effect of the minute lodged by the pursuer. It merely says that his business had not suffered. It leaves entirely open any question as to the comfort and ability with which the pursuer will be able to exercise this or any other trade in the future. It was therefore quite competent, in my opinion, for the jury to take into consideration these elements in computing the damage sustained by the pursuer. I make this observation because it appears to me that it would be quite wrong to say that this was a case merely of personal injury and suffering. The jury were entitled to regard his case as that of a person engaged in business, and who might have in the future to depend upon his capacity for business. There are a number of separate elements of damage in the case, each perfectly proper for the jury to consider in estimating the aggregate amount due to the pursuer, and each such as might fairly lead to a difference of opinion. It is not suggested that any foreign or illegal element entered into the consideration of the jury and affected their verdict, and therefore we find ourselves in the position in which the Court stood in the case of *Young* v. *Glasgow Tramways Company*, 10 R. 242, as there described by Lord M'Laren .

Now, looking to the flexible nature of the subject-matter of the damage, and the number of elements that have to be taken into consideration in making a collective award for the whole damage sustained, can we say that the jury has gone so egre-

giously wrong as to entitle us to interfere with their verdict. I may say, that were the amount of damages due to the pursuer now to be decided, I should not myself be inclined to give so large an award as £1800, but at the same time I would probably give a sum over £1000. In the first place, I think that the sum of £213 is a *debitum justitiæ*. In the next place, there is the loss of the sense of smell and flavour, and if we take into account its general consequences to the pursuer of diminished pleasure and safety, and its special consequences in the business in which he is engaged, I should be inclined to allow on this head a large and liberal amount of damage. Then there is the suffering and distress to which the pursuer was subjected, and his nervous state even at the time of the trial, and on this point I must say, that though we may hope and expect that the pursuer's recovery will ultimately be complete, I am not inclined to treat the prediction of the doctors as absolutely certain. Upon that head again I should make a considerable award of damages. I must add also that it would appear to me to be a hard view on the matter of personal injury to hold that a man is to have his face smashed beyond recognition, and yet is not to have considerable compensation for what may indeed, to a certain extent, be looked upon as a loss of his personal identity.

In conclusion, any difference there may be between me and the jury as to the proper estimate of the damages due to the pursuer is only a matter of a few hundred pounds, and I think that their opinion after hearing the trial and the arguments of counsel is probably as good as mine, especially considering the moderation which has distinguished the conduct of the case on both sides, and that there is no suggestion that the jury have fallen into any error as to the principles on which they should frame their award.

I am therefore for discharging the rule.

LORD ADAM—In my opinion we would not be justified in interfering with the verdict of the jury in such a case as this on the ground of excess of damage, unless we were satisfied that some element had entered into the jury's estimate of the damage, which they were not entitled to take into account, or unless their award were so beyond all reason as necessarily to show that they had gone wrong. I would not myself have given the pursuer so much as they have, but I cannot say their award is so excessive or so extravagant as to justify us in setting aside the verdict.

LORD M'LAREN—The ground on which a new trial is asked for here is excess of damage. If my memory does not fail me, that is the expression in the Act which established jury trials in Scotland, and the statement that a new trial may be applied for on the ground of excess of damage would seem to entitle the Court to review the jury's estimate of damage simply on the ground of it exceeding the estimate which the Court would have made, but in practice the provision in the Act has been interpreted to mean that the Court will only give a release from the decision of the jury on similar grounds to those on which release is given in other cases, that is to say, where they think that the award of damages is wholly against the weight of the evidence.

If I had had to decide this case myself, I should perhaps have given less than the jury. It would rather occur to me that a thousand pounds would be fair compensation to the pursuer for the injuries he had sustained, but with the reservation that in assessing the damage at that amount, I might be above or below the ideal sum. The fact that other judges might make a higher award illustrates the difficulty the Court have in altering the jury's assessment of damage in such cases as this.

In attempting to estimate the damages due, the outlay, the pain and suffering, the loss of the sense of smell, and the personal disfigurement, which have resulted from the injury inflicted on the pursuer, are all elements to be taken into consideration, and then, in addition to these, we have a prospective and not improbable loss of income in consequence of weakened health. Now, personal disfigurement is an injury of quite a different character from broken bones in this respect, that the sufferer goes through life sensible of it, and with the knowledge that his friends are sensible of it. Again, although the pursuer lodged a minute stating that he did not allege that his business had in any way suffered from his absence, the jury were, I think, entitled to take into consideration that there might be a loss of business in future.

Taking all these facts into consideration, I am not prepared to hold that the disproportion between the sum granted by the jury and the sum which they ought, in my opinion, to have awarded is such as to entitle us to interfere with their verdict.

LORD KINNEAR—I agree. I think the elements which must enter into the estimate of damages are those which have been pointed out. I do not know how it it is possible to estimate the amount of the injury in a more satisfactory way than has been done. The only rule I know of in law in regard to the assessment of damages is that the proper amount of damages is just that which twelve reasonable men in the jury-box, after being properly instructed by the judge, give, if no element is taken into account which should not have been. I cannot consider that any wrong element was taken into account here, because that is not suggested, and therefore I agree with your Lordships that the rule must be discharged.

LORD WELLWOOD — At the time the verdict was returned it appeared to me that the award was too high, and I still think it too high. I agree that a sum of £1000 would probably have been an ade-

quate and sufficient recompense to the pursuer for what he has endured. But the question whether we should interfere with the verdict of the jury on the ground of excess of damages is of course a very delicate one, and after hearing the opinions of your Lordships I am not prepared to dissent from the judgment of the Court.

The Court discharged the rule.

Counsel for Pursuer—Comrie Thomson—Shaw. Agents—J. & J. W. Mackenzie, W.S.

Counsel for Defenders—D.-F. Balfour, Q.C.—C. S. Dickson. Agents—Millar, Robson, & Company, S.S.C.

Thursday, January 7.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

M'FADYEN *v.* JAMES SPENCER & COMPANY.

Reparation — Slander — Charge of Dishonesty against a Body of Workmen—Malice—Privilege—Relevancy.

A firm of shipowners sent an account and a letter to certain shipwrights demanding payment for six bottles of whisky abstracted by their men while working in the hold of a ship belonging to the firm. Thereafter each of the workmen who had been in the hold—four in number—brought an action of damages for slander against the shipowners, on the ground that he had been represented by them as dishonest and as having stolen six bottles of whisky. There was no averment of malice on the part of the defenders in having written as they had done.

Held (Lord Rutherfurd Clark *dub.*) that no charge of dishonesty had been made against any particular individual, that the defenders were entitled by way of privilege to acquaint the shipwrights with the fact of the whisky having been stolen by their workmen, that no averment of malice had been put upon record, and that accordingly the action fell to be *dismissed* as irrelevant.

Messrs Campbell, M'Donald, & Company, shipwrights, Glasgow, sent certain of their workmen upon Friday 11th September 1891 to erect a bulkhead for gunpowder on board the ship "Firth of Forth," belonging to Messrs James Spencer & Company, shipowners, Glasgow, then lying in Queen's Docks, Glasgow.

Upon 14th September 1891 Messrs James Spencer & Company sent the following account to Messrs Campbell, M'Donald, & Company—"To six bottles whisky, @ 3s. 6d. per bottle, abstracted by your men while putting up the powder bulkhead on board 'Firth of Forth'—£1, 1s." Upon Messrs Campbell, M'Donald, & Company asking an explanation of the rendering of this account, Messrs James Spencer & Company wrote as follows—"In reply to yours of yesterday's date, we know that when your men went down the hold to put up the powder bulkhead the whisky cases were intact, but after they left we found on examination that a case had been tampered with, and six bottles of whisky abstracted. We could come to no other conclusion but that your men had taken it."

Thereafter Hector M'Fadyen, joiner, 85 Shields Road, Glasgow, and three others, each raised a separate action in the Sheriff Court at Paisley against Messrs James Spencer & Company for £500 as damages for slander. In his action M'Fadyen averred that he and other three men were the only workmen employed by Messrs Campbell, M'Donald, & Company on board the said ship on the day in question, that the defenders' account and letter were of and concerning him, as one of the said Campbell, M'Donald, & Company's men therein referred to, and wickedly, falsely, maliciously, calumniously, and without probable cause represented him as being dishonest and as having stolen six bottles of whisky. The averments in the other actions were similar.

The defenders stated that in putting forward a civil claim for the value of the whisky in question they had probable cause for acting as they did, and in sending the account and the letter founded on they were not actuated by malice towards the pursuer or any other person, and the communications in question were in the circumstances privileged.

They pleaded—"(1) The pursuer's averments are irrelevant and insufficient to warrant the prayer of the petition. (2) The defenders having probable cause for sending the account and letter founded on, and these communications being privileged, decree of absolvitor should be granted. (3) The defenders not having slandered the pursuer, and having expressly disclaimed all imputations against the pursuer's character, they should be assoilzied."

Upon 10th November 1891 the Sheriff-Substitute (COWAN) pronounced the following interlocutor:—"For the reasons stated *infra*, repels the first plea-in-law stated in defence: Repels also the second plea-in-law except in mitigation of damages: Finds that the pursuer has stated a relevant claim, and that in making the statements complained of in the account rendered, and the letter addressed to pursuer's employer, the defenders were not privileged to make said statement: Therefore allows parties a proof of their respective averments, and to the pursuer a conjunct probation: Grants diligence against witnesses and havers, but in respect of the necessary absence of the witnesses for the defenders at sea, sists process until their return, and decerns.

"*Note.*—Even if it were true that whisky was abstracted from the hold of the 'Firth of Forth,' the defenders were beyond their legal right in demanding from the pursuer's employer payment for it. The delict of the servant does not constitute a ground of