if the proper amount of information had been laid before the Lord Ordinary, I am by no means certain that he would have pronounced the interlocutor he has pronounced.

I agree with your Lordship, that in deciding the question whether or not we shall allow the note to pass on juratory caution, we must regard the *prima facie* aspects of the case, and I agree that *prima facie* the complainer is tenant under a lease.

With regard to the question raised under the Agricultual Holdings Act, it is provided by section 35 of that Act that "nothing in the Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden." It does not of course follow that the fact of there being a house on the subjects alters the character of the holding, because the house may be a mere adjunct to the land, but in this case can we say that the subjects are either wholly agricultural or wholly pastoral? If I were to express an opinion, I should say that the subjects consisted partly of land and partly of houses, the houses being the major part of the holding, and it appears to me that there is no *prima facie* case made out that they are a holding under the Agricultural Holdings Act.

On the whole matter, therefore, I concur with your Lordship.

LORD M'LAREN—I concur. I am always unwilling to interfere with an interlocutor pronounced by a judge in the exercise of his discretion. I adhere to the opinion I formerly expressed on this point in the case of *Livingstone* v. *Beattie*, and it is only on a strong legal ground that I would interfere with an interlocutor of that kind. I find such a ground here, and I think the interlocutor cannot stand, as the Act of Sederunt has not been complied with. The interlocutor once disposed of, the question of what caution should be found is open for our consideration, and I agree in the views of your Lordships.

LORD KINNEAR—I agree that no sufficient reason has been shown for displacing the ordinary rule applicable to proceedings of this kind.

The Court recalled the Lord Ordinary's interlocutor, and required the complainers to find caution in ordinary form as a condition of the note being passed.

Counsel for Complainers—Dewar. Agent—Thomas M'Naught, S.S.C.

Counsel for Respondents — Jamieson — Salvesen. Agent—F. J. Martin, W.S.

Saturday, November 5.

FIRST DIVISION.

BURNS *v.* ALLAN & SONS.

Reparation—Personal Injury—Master and Servant—Jury Trial—Excess of Damage—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42).

In an action of damages by a workman against his employers under the Employers Liability Act, the jury awarded the pursuer a sum equal to three years' wages, being the full amount recoverable under the Act. The injuries which the pursuer had sustained were a broken thigh, a broken and disfigured nose, and displacement of the breast-bone. The medical evidence was to the effect that he would probably be able to resume his work in a year from the date of the accident.

Held that, in addition to the actual loss sustained, the jury were entitled to take into account the pain suffered and the chance of the medical opinion not being realised, and that there was no such excess in the award of the jury as to entitle the defenders to a rule on the ground of excess of damage.

Francis Burns brought an action of damages under the Employers Liability Act 1880 against J. & A. Allan & Sons for payment of three years' wages (£234) in respect of injuries sustained in their service.

The case was tried before the Lord President and a jury, and the result of the evidence was to show that the pursuer's injuries were very severe. His thigh was broken, his nose was broken in a way that caused considerable disfigurement, and his breast-bone was displaced. The only medical man examined (a witness for the pursuer) gave it as his opinion that the pursuer would probably be able to resume his ordinary work as a quay labourer in about a year from the date of the accident.

The jury found for the pursuer, and assessed the damage at the full amount claimed.

The defenders applied for a rule, on the ground of excess of damage, and argued—A sum equal to three years' wages was the maximum of damages recoverable under the Employers Liability Act, and that being so, it was evidently excessive for a jury to award such a sum where the injuries sustained only disabled the workman from pursuing his ordinary employment for a single year.

At advising—

LORD PRESIDENT—I see no ground whatever for granting a rule. The pursuer's injuries were very serious. His breast-bone was stoved in, his thigh smashed, and his nose broken so as to be altered almost beyond recognition. At the trial—six months after the accident—the pursuer went on crutches, and was a perfect wreck. The jury, I imagine, in estimating the

damages due, would first take the loss of wages which it was not disputed the pursuer had sustained. To that I think they were entitled to add something on account of the uncertainty of the doctor's opinion as to the date of his recovery being realised. They were also entitled to give him something additional for the suffering he had endured. On the whole, it appears to me that there is no excess in the award made, or at least that if there is any, it is of so microscopic a character as not to entitle us to interfere.

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

The Court refused a rule.

Counsel for the Pursuer—Comrie Thomson—Orr. Agent—W. A. Hyslop, W.S.

Counsel for the Defenders—Jameson—Fleming. Agents—Drummond & Reid, W.S.

Tuesday, November 8.

FIRST DIVISION.

[Lord Low, Ordinary.

DALGLEISH *v.* THE FIFE COAL COMPANY, LIMITED.

Contract—Construction of Agreement—Output of Coal.

In an agreement between the owner and the lessees of a coalfield it was stipulated that when "the annual output of coal and dross from the said mineral field" exceeded so many tons a certain proportion of the selling price should be paid as a royalty on "the total quantity of coal and dross put out and removed from the said lands." *Held* that, no limitations being expressed, "annual output" must be taken, for the purpose of fixing the rate of royalty, as the whole mineral brought to the surface, although the royalty was payable only on the portion thereof removed from the lands.

Laurence Dalgleish of Dalbeath, Fife, leased certain coalfields to the Fife Coal Company, Limited, under a tack dated December 1876, and in December 1889 an agreement was entered into between the same parties which provided, *inter alia*—"Third. In lieu of the royalties for coal fixed and stipulated by said tack, the royalties payable and exigible (in the option of the said first party) for coals and dross put out by the second parties from said mineral field, and removed from the lands in each year, from said term of Whitsunday 1889 to the end of said tack, as now extended, shall be as follows, *videlicit*— . . . (3) When the annual output exceeds 70,000 tons, but does not exceed 100,000 tons, one-twelfth of the selling price, as aforesaid, on the total quantity of coals and dross put out and removed from said lands. (4) When the annual output exceeds 100,000, but does not exceed 130,000 tons, one-thirteenth of the selling price, as aforesaid, on the total quantity of coals and dross put out and removed from said lands." The conditions of the original lease were declared to be binding upon the parties so far as not altered by the agreement.

In 1892 Mr Dalgleish brought an action against the Fife Coal Company, Limited, for payment of his royalty, on the footing that the annual output from Whitsunday 1890 to Whitsunday 1891 had not exceeded 100,000 tons, the defenders contending that it had. The question turned upon the meaning to be attached to the word "output" as used in the agreement.

The Lord Ordinary (Low), upon 2nd August 1862, pronounced the following interlocutor:—"Finds that the total output of coal and dross from the collieries let by the pursuer to the defenders for the year from Whitsunday 1890 to Whitsunday 1891 exceeded 100,000 tons, but did not exceed 130,000 tons, and that therefore upon a sound construction of the minute of agreement of 9th, 10th, and 11th December 1889, the royalties payable to the pursuer amount to one-thirteenth of the selling price of the coals and dross sold in the said year: With that finding appoints the cause to be enrolled for further procedure.

"*Opinion.*—The main question in this case depends upon the construction of the third article of the minute of agreement of December 1889.

"The article makes provision for the royalties which are to be payable for coals and dross 'put out' of the mineral field let to the defenders 'and removed from the lands in each year,' in lieu of the royalties stipulated in the lease of 1876.

"The principle upon which the royalties are fixed is that according as the 'annual output' is under or over a certain amount, the royalty shall be a larger or smaller percentage upon the selling price of the total quantity of coal and dross 'put out and removed from the lands.'

"I do not think that it can be disputed that, according to the ordinary and natural meaning of the words 'annual output,' something different is meant from coal 'put out and removed from the lands.'

"The defenders say that the 'annual output' means the whole coal and dross taken out of the pit, whether it is disposed of or not, and that the coal and dross 'put out and removed from the lands' means the coal and dross sold. I am of opinion that *prima facie* the defenders are right.

"The pursuer, on the other hand, contends that the agreement must be interpreted in view of the lease, which, except in so far as superseded, remained in force, and that so interpreted, the phrase 'annual output' and the phrase 'put out and removed from the lands' refer to the same thing, viz., the coal and dross sold. . . .

"In my judgment the contention of the pursuer is not well founded. I am of opinion that by the third article of the agreement the royalty clause in the lease is entirely superseded and cancelled, and that the clause at the end of the third