pursuers' claim of damages rests upon the alleged expense they were put to in removing from the one site to the other, it appears to me to fail, because the interdict which was out against them had no effect whatever upon the first sawmill they had erected, inasmuch as it was erected without leave asked or given by anybody, and, as far as I can judge, without any right whatever. On the short ground, therefore, that the interdict invaded no legal right, and therefore could give rise to no claim for damages, I hold that the averments made in the eighth article of the condescendence are irrelevant. [*His Lordship then dealt with a question with which this report is not concerned.*]

LORDS JOHNSTON and SKERRINGTON concurred.

LORD MACKENZIE was sitting in the Extra Division.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action as irrelevant.

Counsel for Pursuers and Respondents—Macphail, K.C.—G. C. Steuart. Agents—J. C. & A. Steuart, W.S.

Counsel for Defender and Reclaimer—A. O. M. Mackenzie, K.C.—D. P. Fleming. Agents—Dundas & Wilson, C.S.

Friday, July 17.

FIRST DIVISION.

[Lord President and a Jury.

KEENAN *v.* SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LIMITED.

Process—Jury Trial—Verdict Contrary to Evidence—Evidence of Pursuer's Witnesses on Essential Point Controverted by Witnesses for Defenders without Cross-examination for Pursuer—Credibility—Jury Trials (Scotland) Act 1815 (55 *Geo. III, cap.* 42), *sec.* 6.

In an action against a company to recover damages for personal injuries caused through being run down by a closed motor car, the pursuer averred that immediately before and at the time of the accident the driver of the motor car was engaged in conversation with a man who sat beside him in the motor car, and that the driver failed to keep any look-out. At the trial three witnesses for the pursuer spoke in almost identical terms of an old man being seated beside the driver, and of these two men being engaged in conversation at the time of the accident. The cross-examination of these witnesses disclosed that the evidence for defenders was to be that there was no one sitting beside the driver. For the defenders the man alleged to have been beside the driver appeared and stated that he was inside the car, and his cross-examination was directed, not to controvert this, but to show that he was in conversation with the driver. Three witnesses for the defenders also spoke to there being no one sitting beside the driver, and that the only occupant of the car other than the driver was sitting on the seat behind the driver. None of defenders' witnesses were cross-examined by pursuer's counsel on this point. It was impossible that the divergence in evidence was due to defective observation or recollection. *Held* that pursuer had abandoned that part of his case, and new trial *granted* on the ground that the verdict for the pursuer was contrary to evidence. *Held, further*, that pursuer had thereby admitted the incredibility of his witnesses.

Opinion (*per* Lord Skerrington) that the granting of the new trial should proceed on the ground that it was "essential to the justice of the case" under the Jury Trials (Scotland) Act 1815, sec. 6.

The Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), sec. 6, enacts—"It shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial, on the ground of the verdict being contrary to the evidence . . ., or for such other cause as is essential to the justice of the case."

On 11th November 1913 Patrick Keenan, rivetter, Govan, as tutor and administrator-in-law of his pupil daughter Mary Keenan, *pursuer*, brought an action against the Scottish Co-operative Wholesale Society, Limited, *defenders*, to recover £1000 as damages for personal injuries sustained by her through being run down by a motor car driven by the defenders' servant.

The pursuer averred, *inter alia*—"(Cond. 3) The said accident was due to the fault of the defenders' said servant. . . . Immediately before and at the time of said accident he was engaged in conversation with a man who sat beside him in the motor car, and he failed to keep any look-out."

On 6th January 1914 an issue was approved in ordinary form for the trial of the cause, and the trial took place on 23rd and 24th of March 1914 before the Lord President and a jury. The jury found for the pursuer, and assessed the damages at £200.

At the trial three witnesses for the pursuer deponed that they had seen a man seated beside the driver of the car, while for the defenders the man alleged to have been beside the driver, by name Mackintosh, deponed that he was inside the car, and his cross-examination was only directed to showing that he was in conversation with the driver, and three witnesses deponed that there was no one beside the driver. Counsel for the pursuer did not cross-examine these witnesses of the defenders on this point.

On 4th June 1914 the Court granted a rule on the pursuer to show cause why the verdict should not be set aside as being contrary to the evidence, and a new trial granted.

At the hearing on the rule:—Argued for

pursuer—The evidence of the witnesses for the pursuer was sufficient to justify the verdict. It was true there was a conflict of evidence in regard to the question raised in cond. 3 regarding the position in the car of the witness Mackintosh. The question of credibility was a question for the jury and not for the Court. The jury accepted as credible the evidence of the pursuer's witnesses, and disregarded, as they were entitled to, the evidence of the defenders' witnesses on this matter. There was also evidence in the defenders' proof to justify the verdict—*Campbell* v. *Scottish Educational News Company, Limited*, March 15, 1906, 8 F. 691, Lord Kinnear at 698, 43 S.L.R. 487.

Argued for the defenders—The pursuer must, in order to entitle him to a verdict, prove the averment of fault against the defenders contained in cond. 3. The failure of the pursuer's counsel to cross-examine the defenders' witnesses on this point—an essential one in the case—should have led any reasonable jury to hold the contrary proved by admission of the pursuer. Further, there could be no error on this point. The evidence of these witnesses for the pursuer, if proved to be inaccurate, must have been perjured, and their whole testimony was therefore discredited. Even if the evidence of these witnesses on other points could be accepted along with the evidence of the other witnesses, the verdict could not from any reasonable point of view be reconciled with the evidence.

At advising—

Lord Johnston—I fully accept all that was said by the counsel for the pursuer in regard to the function of the Court in dealing with a motion for a new trial. It is the province of the jury to determine the issue of fact, and it is not the function of the Court to review their verdict or to order a new trial merely because on consideration of the evidence the Court disagree with their finding. But it is the duty of the jury to apply their minds to the evidence before them, as reasonable men of ordinary intelligence, and in the term "reasonable" I include fair-minded, and in the term "ordinary intelligence" I include ordinary capacity to appreciate the manner in which cases are presented to a jury. If it can be said that the jury in their verdict have come to a conclusion to which reasonable men of ordinary intelligence would not have come, it is the duty of the Court to quash their verdict.

But it is frequently maintained that a verdict is contrary to or against the weight of the evidence. I consider that to be a misleading expression, as it may mean anything between a case where a jury have merely gone wrong, in a conflict of evidence, in determining which scale tips the beam, and a case where the evidence against the verdict is so preponderating that no reasonable man of ordinary intelligence would have come to their conclusion.

Now the present is an exceptional case. Setting aside the medical evidence, and dealing only with the question of liability, there is about as much evidence in favour of the pursuer's case for liability as for the defenders' case in defence, and if all the jury had to do was to count heads and measure the evidence in matter of quantity merely, it would have been open to them to find either way, and their determination must have stood. But they were bound to regard the evidence with that measure of intelligence and discrimination which I have already indicated. And the first thing it was their duty to keep in view was the case for liability which the pursuer set out to establish. A motor car is alleged to have run over and injured a child; the accident is attributed to the fault of the driver, who is said to have been driving at a dangerous speed and without keeping any lookout. The latter ground of fault is based in fact upon this express and categorical averment, viz., that "immediately before and at the time of the accident he," the driver, "was engaged in conversation with a man who sat beside him in the motor car, and he failed to keep any lookout." Were this proved, the inference of fault and the consequence of liability would be difficult to controvert. But if this were not proved, still more if it were disproved, it would be difficult to reach the pursuer's conclusion. Now what do we find in the evidence—three witnesses for the pursuer speak in the most emphatic way, and almost in identical terms, of an old man being seated beside the chauffeur (the car being a close car of design similar to a taxi-cab), and of these two men having their heads turned to one another and being engaged in conversation at the moment of the accident. This assertion is stoutly maintained in face of a careful and strict cross-examination in such terms as this:—"The driver and an older man were sitting in the front of the motor car together. (Shown Robert Mackintosh)—I recognise this gentleman as the gentleman in question. I solemnly swear that he was sitting beside the driver and speaking to the driver. (Q) You are sure of that as you are sure of anything else you have told us to-day?—(A) Quite certain."

This cross-examination clearly disclosed that the evidence for the defenders was to be that there was no one sitting beside the driver, in which case he could not have been in conversation with anyone. When the defenders' evidence was opened Mr Mackintosh, the manager or secretary, I am not sure which, of the defenders' company, was first called, and he explained—"I got into the car at the gatehouse of the Shieldhall Works; I went into the inside of the car. There was no one beside the driver. I remained inside the car until the accident happened. It is not the case that I was sitting beside the motor-driver and talking to him just before the accident happened. When I got in at Shieldhall I had no communication at all with the driver until we reached Govan Cross. If I had had to communicate with him I believe that in the car there is a speaking-tube, but I did not use the speaking-tube. I had no occasion to do so."

Seeing what Mr Mackintosh was, and his purpose in entering the motor which belonged to his company, and was being used merely to take him from one office of the company to another in the same town, it is not to be wondered at if this evidence somewhat staggered the counsel for the pursuer, who instead of facing the evidence endeavoured to explain it away, and to account for the evidence of his own witnesses by the suggestion that notwithstanding that Mr Mackintosh had been inside the car, he might still have been bending forward and either speaking to or appearing to speak to the driver. Mr Mackintosh is directly corroborated by George Brown, the police-constable on the beat, by Robert Dykes, the chauffeur, and by Mrs Isabella Bunten, and not one of these three was cross-examined on the subject at all. The result was that the jury were bound to note that the pursuers accepted the position that they had failed to prove the cardinal fact in their case, and that this failure not only negatived the case they set out on record, but absolutely discredited the evidence of the three witnesses to whose statements I have adverted in its other details.

I think that this ought also to have drawn their attention to the class of witness with which they were dealing. Two of them at least were street corner men who had been hanging about Govan Cross most of the afternoon ; the third a woman who, though not shopping, was also for no intelligible reason standing at the Cross, and there is such a painful similarity if not identity in their evidence that I regret to say I am satisfied that it was concocted in concert. Besides these three there is only one other witness to fact for the pursuer, Martin O'Connor, whose evidence I am far from characterising in the same way, but which really comes to nothing conclusive. On the other hand, there are at least four witnesses for the defender who speak distinctly in support of the defender's explanation of the accident, viz., that instead of going too fast he had been brought up almost to a standstill by a stopping tramcar just in front of him going in the same direction, and that just as he was starting again the injured girl ran out from behind another tramcar going in the opposite direction, and so close in front of his motor that she was either knocked down or tripped and fell before he could stop again. The nature of the injuries rather indicated the latter. In these circumstances, although there was evidence pretty nearly equal in quantity on either side, I do not think that fair-minded men of ordinary intelligence could have come to the conclusion at which this jury arrived, imputing fault to the driver and imposing liability upon the defenders. Accordingly I think that a new trial must be granted.

Lord Skerrington—I agree with your Lordship, but I think it right to say that I regard the present case as one which is wholly exceptional, and I hope that the circumstances upon which your Lordship has felt constrained to comment are not likely to recur, or at anyrate to recur often in the future.

The case is exceptional in three respects. In the first place, I regard the presence of the second man on the front seat of the motor car as something which was essential to the pursuer's case as presented first of all in his pleadings, and in the second place in his evidence. In the next place, it is quite certain that this essential fact was not proved, or rather was disproved. But the case does not stop there, because the disproof of this fact was in substance admitted by the pursuer's counsel, as appears from the line he took in cross-examining Mr Mackintosh, the second passenger in the motor car. He deponed that he was sitting, not on the front seat, but inside the car, and counsel for the pursuer cross-examined him upon the footing that he was a truthful and honest witness. The third peculiarity in the case is that it is impossible upon any theory of mistake to reconcile the testimony of the three leading witnesses for the pursuer who professed to be eye-witnesses of the accident, and that of the four or five similar witnesses for the defence. It is, I think, clear that the pursuer's three witnesses were telling a story which they had concocted and which was untrue.

There remains another witness for the pursuer, a Mr O'Connor, against whose veracity nothing has been suggested. He says nothing one way or the other about the presence or the absence of a second man on the front seat, but he does say, as I read his evidence, that the tramway car which it is suggested obscured the view of the driver of the motor car had already passed away to the westward, and that therefore there was nothing to prevent the driver of the motor car from seeing the little girl if he had been keeping a proper look-out. I do not think it necessary to consider whether the evidence of Mr O'Connor if it had stood alone was sufficiently corroborated by circumstances to have entitled the jury to have returned a verdict upon it. That is a purely hypothetical question. I do not regard this case as one where a verdict is attacked merely on the ground of defective testimony. It is a case which stands by itself, and the Court as your Lordships know has power to grant a new trial for such other cause — that is, over and above the familiar and enumerated causes—such other cause as is essential to the justice of the case. The Court has always been slow to extend the grounds upon which they would interfere with the verdict of a jury. But if the groundwork of a case is fraudulent, it would not be right for the Court to take the remainder of the evidence and see whether an entirely different case can be built up out of the fragments.

Accordingly I concur with your Lordship in the result which you have reached. While I have thought it right to comment in plain language upon the testimony of these three witnesses, I do not cast the slightest reflection upon any of the parties who had to do with the getting up of this case.

Lord President—I agree in the judgment proposed by Lord Johnston. I am glad, as the Judge who presided at the trial, to know that your Lordships see your

way to reach that conclusion, for I am sure it is a just conclusion.

I, at the time the verdict was returned, considered that it was contrary to evidence in the sense Lord Johnston has explained, and I think so still. I was not asked by counsel for the defenders to withdraw the case from the jury after senior counsel for the pursuer had addressed them. I was not asked to direct the jury in the course of my charge that there was no evidence adequate in law to support a verdict for the pursuer. What course I should have taken had I been so moved I cannot at this moment say, but I did not think it my duty, as I was not moved, to withdraw the case from the jury or to direct them that there was no legal evidence which could support a verdict for the pursuer. But, as your Lordships are well aware, there are many cases in which this Court has set verdicts aside as contrary to evidence where there was legal evidence sufficient to support a verdict for the pursuers, where in other words the Judge was not asked to direct the jury to find a verdict in favour of the defenders.

I pointed out to the jury, however—and I thought it my duty to do so—the prominent place taken in the pursuer's averments by the allegation that there were two persons sitting in front of the motor car and in conversation with one another at the time when the accident took place. I drew their attention very specially to the fact that the pursuer had averred it to be of the essence of his case that before and at the time of the accident the driver of the motor car was engaged in conversation with a man who sat beside him in the motor car, and that he failed to keep any lookout. I pointed out to the jury that the case would scarcely have been a credible one except upon that footing. I reminded them that the junior counsel for the pursuer, in opening the case, had founded upon that statement, and I pointed out that the course which had been taken in the conduct of the case by the pursuer's senior counsel, not only in his cross-examination of Mr Mackintosh, but in his abstention from cross-examination of the other witnesses upon this vital point, led necessarily to the conclusion that those who were responsible for the conduct of the case impliedly admitted that the statement made by these three witnesses was a deliberate invention. For I drew the jury's attention especially to the fact that the discrepancy between the evidence for the pursuer and the evidence for the defenders upon this point could not be accounted for either by inaccuracy of recollection or by inaccuracy of observation. Accordingly if they disbelieved the evidence given for the pursuer, it must be on the ground that it was a deliberate invention. And, of course, if in the view of those responsible for the conduct of this case it appeared that the evidence of three important witnesses upon a vital point was a deliberate invention, it appears to me that their evidence was entirely destroyed.

I did not so direct the jury, and I was not asked so to direct the jury. I did not consider it my duty so to direct the jury. What I did say was that it made a serious inroad not only upon the pursuer's case but upon the credibility of the three witnesses upon whom he must necessarily rely to support his case. And if that conclusion is right, as I think it is, then clearly your Lordships are entitled here to regard this verdict as contrary to evidence, in the sense in which Lord Johnston has explained, and in the sense in which we understand that phrase.

I therefore agree with your Lordships that we should make the rule absolute and grant the motion for a new trial.

LORD MACKENZIE was sitting in the Extra Division.

The Court set aside the verdict and granted a new trial.

Counsel for Pursuer—G. Watt, K.C.—T. G. Robertson. Agent — D. Maclean, Solicitor.

Counsel for Defenders—Constable, K.C.—Lippe. Agents — J. Miller Thomson & Company, W.S.