have now lasted for so considerable a period. It may be—I express no opinion to the contrary — that, *prima facie*, the father's religion is the religion in which a child should be brought up. But if the guardian of the child, or those who are left to act as such, arrange otherwise, and the interference of the Court is invoked to control their action, it is not, I think, an unsafe rule that that interference must be invoked timeously, and not (unless in exceptional circumstances) after such lapse of time as occurred here. Extreme cases may of course occur, and they must be dealt with when they arise, but the question of creed is never the only question to be considered.

On the whole matter, and laying down no general rule, but having regard to the whole circumstances, and to the welfare of the pupils in the particular case, I am of opinion that the petition should be refused.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioners—J. C. Thomson—W. Campbell. Agent—William B. Glen, S.S.C.

Counsel for the Respondent—H. Johnston—Salvesen. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, March 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ELLIOT *v.* SHEPHERD.

Expenses — Modification — Jury Trial — Reparation — Slander — Conduct of Successful Litigant.

The Court, while bound to accept a jury's finding of fact, and while slow to depart from the general rule that costs follow the event, is entitled in determining the question of expenses to take into consideration the conduct of the successful party either during the litigation or in the matter which gave rise to it.

Where the judge presiding at a jury trial awarded the successful party modified expenses on account of his conduct both before and during the litigation, the Court *adhered*, on the ground of the judge's superior knowledge of the facts of the case.

Circumstances in which *held* by Lord Kyllachy, Ordinary, and *affirmed* by the Inner House for the reason above stated, that the successful defender in an action of damages for slander was entitled only to modified expenses. *Harnett* v. *Vise*, L.R., 5 Ex. D. 307, *approved*.

Adam Shepherd, solicitor, Wick, raised an action of damages for slander against Samuel Elliot, doctor of medicine, Wick.

The pursuer averred that he had been on terms of intimacy and friendship with the defender until recently when the defender conceived an animus against him; that upon one occasion when in company with another person he had met the defender, who, addressing the pursuer's companion, said, "Good morning, I am sorry to see you in such company," meaning thereby that the pursuer was a man of such bad character as not to be fit to associate with respectable persons.

The defender admitted the meeting, but denied having used the words libelled.

The pursuer further condescended on two subsequent occasions, in the Caithness Club and in the defender's house, on which the defender had called the pursuer a "dirty, low, unprincipled fellow," and a "dirty low scum."

The defender denied having used the language attributed to him, and with regard to the first of these occasions explained that the pursuer, not being a member of the club, and having, contrary to the rules of the club, been there as the guest of a member, the defender had called the attention of the pursuer's host to these facts, whereupon an altercation had ensued.

Issues were adjusted appropriate to the pursuer's several averments, and the case went to trial before a jury.

The defender in evidence admitted that on the occasion first complained of he had said "Good morning, I am sorry to see the company you are in," but explained that he did not mean the statement in a slanderous or offensive sense. It further appeared that the pursuer's agents wrote to the defender detailing the alleged slanders and expressing their client's willingness to accept an apology; that this letter was unanswered for a fortnight, and that then the defender's agents wrote a curt note in reply stating that both the slanderous statements attributed to the defender were untrue. The defender also admitted that having gone into the club and found the pursuer and his host there he at once said, "I object to that person's presence in this room;" that he rang the bell and asked the club attendant to "remove this person;" and that he himself had frequently taken the pursuer into the club as his guest before he quarrelled with him.

The jury returned a verdict for the defender.

On 29th January 1896 the Lord Ordinary (KYLLACHY) pronounced an interlocutor applying the verdict, assoilzieing the defender, finding him entitled to expenses subject to modification, and modifying the same to half the taxed amount thereof.

Note.—"The defender has obtained absolvitor and is therefore *prima facie* entitled to expenses. But that question is always in the discretion of the Court both in jury trials and in proofs. In this case I am of opinion that the defender should have expenses, but subject to modification. It appears to me, in the first place, that the defender's pleadings in respect of the first issue were, to say the least, not candid; and I think the same observation applies to

his attitude when an explanation was asked and an apology demanded by the pursuer's agent. I think I am also entitled to take into account that upon his own showing the defender here provoked this action; that he behaved badly throughout; that if he did not slander, he persistently insulted the pursuer, his motive being a private quarrel, and that in the final scene in the club, which was the immediate cause of the action, his insults got the length of, to say the least, conduct unworthy of a person in his position. On the whole matter I think I deal leniently with the defender in restricting the modification to one-half of the expenses."

The defender reclaimed, and argued — There was an absolute rule of practice that where success was all on one side the Court would give expenses to the successful party. The only exceptions were (*a*) cases of divided success, and (*b*) cases where the damages awarded were nominal, and these cases were now provided for by the Court of Session Act 1868, sec. 40. The rule was well exemplified in *Ross* v. *M'Bean*, December 6, 1845, 8 D. 250, which would have been a much stronger case than the present for departing from it. Here the defender had been absolutely successful, yet on account of facts entirely outwith the issue, the Lord Ordinary had deprived him of half his expenses. To sustain such a decision would be to run counter to the public policy of jury trial, and to invite a discussion on expenses in every case.

Argued for the pursuer—There was no hard and fast rule as to expenses in jury trials, but the decision of the matter was left in the hands of the judge, just as it was in cases where the judge sat as a jury or in appeals from the Sheriff Court to the Court of Session—*Ewart* v. *Brown*, November 10, 1882, 10 R. 163. The true principle had been illustrated and laid down in *Dick* v. *Stewart*, February 13, 1836, 14 S. 478; *Mason* v. *Tait*, July 2, 1851, 13 D. 1282, *per* L. J.-C. Hope, p. 1285, *per* Lord Murray, p. 1288; *Rae* v. *M'Lay*, November 20, 1852, 15 D. 30; and *Rogers* v. *Dick*, February 4, 1864, 2 Macph. 591, *per* Lord Deas, p. 593. In the two last cases, moreover, there were expressions of opinion to the effect that the Court would be guided mainly by the opinion of the judge who presided at the trial.

At advising—

LORD PRESIDENT—The principle upon which the Court proceeds in awarding expenses is that the cost of litigation should fall on him who has caused it. The general rule for applying this principle is that costs follow the event, the ratio being that the rights of parties are to be taken to have been all along such as the ultimate decree declares them to be, and that whosoever has resisted the vindication of those rights, whether by action or by defence, is *prima facie* to blame. In some cases, however, the application of the general rule would not carry out the principle, and the Court has always, on cause shewn, considered whether the conduct of the successful party, either during the litigation or in the matters giving rise to the litigation, has not either caused or contributed to bring about the law-suit.

The reclaimer does not question the propositions which I have thus stated, but he has maintained that in actions tried with a jury the Court has no discretion, and the rule is absolute that costs follow the event. His argument was put, as I should think, needlessly high in two respects—first, because in no possible view can the function of the jury conflict with the consideration by the Court of the conduct of the litigation; and, second, because in many causes tried with a jury the conduct of the litigants antecedent to the litigation enters only in the slightest and most incidental manner into the subject of the jury's consideration. In questions of boundary, of right-of-way, of mercantile contract, and in numerous other instances, the conduct of the litigants touches but little, if at all, the trial of the issue.

In the case actually before us, and more or less in all actions for defamation, the conduct of the parties was necessarily and directly considered by the jury. But, then, it was so considered with reference solely to the questions in the issues. The jury had no duty or right to consider the question of expenses. Accordingly, if the reclaimer's argument be sound, the result is that in cases tried with a jury nobody can consider the conduct of the successful litigant as bearing on his right to costs. For the elimination in jury causes of this element, proper to the just determination of the question of expenses in all other cases, no reason can be suggested on the ground of principle. There is no difference in the nature of those cases which are generally tried with a jury which can found such a distinction. Accordingly it was rather argued as if this was, so to speak, a mechanical necessity of the conditions of jury trial. I am quite unable to see it. There is no incompatability between the function of the jury in answering the issue and function of the Court in examining the same material for the decision of the separate question of expenses.

The exercise of this jurisdiction in cases tried by a jury is delicate, but the principles to be followed are clear and are well illustrated in *Harnett* v. *Vise*, 5 Ex. D. 307. The Court, however it may dissent from the verdict, must not take upon itself to overrule the finding of fact. In the present case, accordingly, it is to be assumed that there was no defamation. But well within this admission there may be ample material for cause being shown that the conduct of the successful defender had been such as to conduce to the litigation.

I have only to add that, as far as I have observed, the Court exercises considerable reserve in departing from the general rule that costs follow the event, and where the conduct of the parties has already been considered by a jury, although for a different purpose, probably an additional reason is furnished for caution in entering on doubtful questions. In the present case,

the Lord Ordinary knew much more about the facts than I do, and for this reason more than for any other I am content to abide by his decision. I am therefore for adhering.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent

The Court adhered.

Counsel for the Pursuer—J. C. Thomson — M'Lennan. Agent — Alex. Mustard, S.S.C.

Counsel for the Defender — Jameson — Watt. Agents—A. & S. F. Sutherland, S.S.C.

Wednesday, March 11.

SECOND DIVISION.

[Lord Low, Ordinary.

M'NAB *v.* CAMPBELL'S TRUSTEES.

River — Lease — Water in Ponds and "Streams Leading Thereto"—Diversion of Spring Percolating through Marsh.

The lessee of a distillery had right under his lease to the water in two ponds "and in the streams leading thereto." There was a stream running into the upper pond, and through that pond down to the lower pond. Near the lower pond was a spring, the water from which, at the date when the lease began, percolated through a marshy piece of ground to the lower pond. The landlord collected the water from this spring into a tank, for the purpose of taking water to another tenant whose former supply had been polluted by piggeries erected by the distiller, precautions being taken against waste. In addition a second spring which had previously flowed in another direction, and from which the tenant's former supply had proceeded, was directed into the tank and an overflow pipe supplied to convey the surplus water to the pond. *Held* that the lessee was not entitled to interdict against these operations—by the Lord Justice-Clerk and Lord Trayner, on the ground that the expression, "streams leading thereto" in the lease did not apply to water percolating through the soil from a spring in no defined channel; and by Lord Young, on the ground that in the whole circumstances of the case there had been no prejudicial interference on the part of the landlord with the rights of the tenant.

By lease dated 5th, 9th, and 12th September 1889 the trustees of the late Sir George Campbell of Succoth, Baronet, let to Alexander Ferguson, wine and spirit merchant in Glasgow "all and whole the distillery of Tambowie, as presently occupied by David Chrystal, with the house occupied by the Inland Revenue Officer, and other two cottages adjoining for workpeople, the land extending to about 13½ acres imperial, and forming part of the fields marked Nos. 99 and 142 on the Ordnance Survey map, and with the two ponds marked Nos. 140 and 134 on the said map, all lying in the parish of New Kilpatrick and county of Dumbarton, together with the right to the water in the said ponds and in the streams leading thereto, . . . reserving the right to the first parties to grant liberty to the agricultural tenant of Tambowie farm to use the water-power for thrashing or churning at all reasonable times, and the use of the water for the steading and for agricultural purposes; but declaring that any water returned by the tenant to the said ponds and to the streams leading thereto shall be returned in a pure state." The lease was for the period of 31 years from Whitsunday 1889.

A stream flowed from the hill above into the upper pond, through that pond, and down to the lower pond.

There was a spring which rose about 40 yards to the north of the place where the stream entered the lower pond. At the date when the lease was entered into, the water from this spring formed a marsh in the vicinity. Most of the water percolated through the ground down to the pond. There was also a field drain which came from the top of the field and ran into the pond near the place where the stream entered it.

The farm of Tambowie, which lay about 60 yards to the west of the pond and about 30 yards to the north of the stream, was supplied with water from the stream. After the date when the present lease of the distillery began, the farmer put in a tile drain to catch the spring, and at the end nearer the pond a yard of iron pipe. He opened up the ground from the dam in a small inlet and put a tub to catch the water. This water was used by the farmer to some extent, but he still obtained his principal supply from the stream. Even after the tile and pipe had been put in a considerable quantity of water still found its way into the pond by percolation through the soil. Much the greater part of the water which entered the pond came by the stream, and the proportion which came from the spring was only considerable in very dry weather. In time of flood more water came from the field drain than from the spring.

In 1891, after the farmer had put in the tile and pipe from the spring, the complainer in the present action acquired right to the lease of the distillery, conform to assignation thereof in his favour dated 29th and 30th April 1891. In 1893 he increased the output of the distillery considerably. In order to consume some of the larger quantity of draff and pot-ale thus available, and also partly to obviate the necessity of sending pot-ale down the stream, which had been objected to by the manufacturers lower down, he erected a piggery. In 1894 he built a second piggery. In these piggeries he kept from 250 to 300 pigs. The sewage from the piggeries ran over the neighbour-