

it is certainly not usual to have anyone specially appointed to protect people from coming near it. It is necessarily visible both by day and night, and persons using the road are expected to take reasonable care of their own safety when they see a lighted brazier at a place where work is proceeding. If very young children are allowed to wander unattended on the road there is, of course, a risk that they may rashly meddle with such a brazier, but I am unable to hold that the burden is for that reason put upon contractors to incur extra expense in providing special watching to keep children from going near a seen danger such as this, any more than where a long trench is opened in a road they are bound to have it watched throughout its length lest children should get on the excavated pile at the side of it and fall in.

I am unable to hold that any fault has been brought home to the defender, and I would move your Lordships to find in fact and in law in terms of the decision of the Sheriff-Substitute.

LORD YOUNG—I am of a different opinion, but as I am in a hopeless minority I shall not detain your Lordships by elaborating my views. I think that the fault imputed to the defender is distinctly actionable, that fault being that this brazier was left on a public road absolutely unprotected.

LORD TRAYNER—I am prepared to affirm the judgment of the Sheriffs on the grounds stated by them, namely, that the pursuer has failed to prove any fault on the part of the defender subjecting him in liability for damages. If it were necessary to deal with the question of contributory negligence I should take the same view on that question which was taken in the case of *Grant v. Caledonian Railway Company*, December 10, 1870, 9 Macph. 258, 8 S.L.R. 192; and *Fraser v. Edinburgh Tramways Company*, December 2, 1882, 10 R. 264, 20 S.L.R. 192, cited to us in the course of the argument.

LORD MONCREIFF — I agree with the majority of your Lordships in thinking that no negligence on the part of the defender has been proved.

The Court dismissed the appeal, found in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute, and of new assoilzied the defender.

Counsel for the Pursuer and Appellant—W. Thomson. Agent — T. E. Gilbert Taylor, Solicitor.

Counsel for the Defender and Respondent—Campbell, K.C. — Munro. Agent—Jas. Ross Smith, S.S.C.

Friday, January 24.

FIRST DIVISION.

M'QUILKIN v. THE GLASGOW DISTRICT SUBWAY COMPANY.

Process—Jury Trial—New Trial—Verdict Contrary to Evidence—Second Verdict Obtained on Same Evidence—Third Trial Refused.

In an action of damages for personal injuries the pursuer obtained a verdict which was set aside as being contrary to the evidence, and a new trial was granted. At the second trial the evidence led for the pursuer was the same as at the first and the defenders' case was somewhat stronger, but the pursuer again obtained a verdict with increased damages. The case turned upon a pure question of fact as to which the evidence was conflicting. The defenders moved for a rule. The Court refused the motion.

Process—Expenses—Jury Trial—New Trial—Third Trial Refused—Expenses of First Trial.

Where in an action of damages for personal injuries the Court had set aside a verdict for the pursuer and had granted a new trial on the ground that the verdict was contrary to evidence, but had subsequently refused to disturb a second verdict to the same effect returned upon the same evidence, *held (diss. Lord M'Laren)* that the pursuer was entitled to the expenses of both trials.

Mrs Sarah M'Corkindale or M'Quilkin brought an action of damages for personal injuries against the Glasgow District Subway Company. The case was tried before Lord Kinnear and a jury, and on 26th December 1900 the jury returned a verdict in the pursuer's favour. This verdict was set aside as being contrary to the evidence, and a new trial was granted.

At the second trial, which took place before a jury sitting with Lord M'Laren, the pursuer again obtained a verdict with increased damages.

The defenders moved for a rule upon the pursuer to show cause why the second verdict should not be set aside as being contrary to the evidence.

It was admitted that at the second trial the evidence led for the pursuer was the same as at the first, while the defenders' case was somewhat stronger. The case turned upon a pure question of fact with regard to which there was a conflict of evidence.

Argued for the defenders—The first verdict had been set aside as being contrary to the evidence, and no further evidence to support the pursuer's case having been adduced at the second trial the second verdict must also be contrary to the evidence. But further, the defenders' case had been materially strengthened at the second trial, and consequently the second

verdict was worse than the first. They were therefore entitled to a rule.

LORD PRESIDENT—From the statement which we have had from Mr Morison it is clear that the question which the jury had to consider was one depending entirely on evidence. It is not alleged that there was any erroneous direction by the Judge; but that the conclusion which the jury arrived at was against the weight of the evidence. It must be kept in view that the whole occurrence took place within the range of a few seconds, and it would therefore not be surprising that the observation of different persons or the impressions which they formed at the time might be different. Mr Morison has referred to evidence which makes that very clear. Another consideration is that there was additional evidence on this occasion which was not before the jury at the previous trial. And yet the result is that the verdict is again for the pursuer with a considerable increase in the damages. Now, Mr Morison said, I think correctly, that the question is purely one of fact, and if this be so it was eminently for the jury to determine, and the two juries have arrived at the same conclusion. It is said that the evidence was stronger for the defenders on the second occasion and yet the verdict was the same. I see no reason why a third jury might not arrive at the same conclusion upon this pure question of fact. It is very unusual to allow a third trial upon a question of evidence, although there may be cases in which it has been done. But looking to the nature of the question and the circumstances of the case, I cannot say that there is any reason for supposing that another jury might not come to the same conclusion. Therefore I think that we should not grant a rule.

LORD ADAM—In these cases of damages that go to juries the jury are the judges and not the judge on the bench, and therefore whatever our opinion may be we do not pronounce a verdict in the case. In this particular case it is a question for the jury and, as I said before, not for us. No doubt the Court have power in this matter, because if they think that there is no evidence to go before the jury it is possible to withdraw the case from the jury altogether. But if there is, as there is in this case, admittedly evidence, and it comes to be a question of the weight of evidence, then the case must go back to a jury to be decided before them. In this case we in the previous stage of it were of opinion that the weight of evidence was against the verdict, and the case was again submitted to a jury. That was done, and the new jury have taken the same view as the last one. I think in such circumstances we ought not to grant a new trial. The case has been fairly considered by the juries and they have come to the same conclusion. I therefore think with your Lordship that we should not grant a rule.

LORD M'FARREN—I can confirm what Mr Morison has said, that the evidence in the

second trial was substantially the same as that in the first. As to the first trial, we had the judge's notes of evidence read to us at the time we granted the new trial, so that I am in a position to compare the cases. If there were any difference it was that the defenders, as I should have expected in the circumstances, were able to strengthen their case, while certainly the pursuers were not able to strengthen their case in any way. Having been of opinion that the first verdict was contrary to evidence, and not seeing any reason for changing my opinion, I must say that I think the second verdict also is contrary to the weight of the evidence. But then it does not follow that we should allow a new trial. We have the power to grant a rule on the ground that the verdict is contrary to evidence, but I think we ought not to exercise the power unless there is some reasonable prospect that the result of a new trial would be a benefit to the defenders, if not to the cause of justice. Now, in cases where a jury has gone in the face of a judge's direction and returned a verdict which is manifestly contrary to law, I should not hesitate to grant a third trial; but where the question at issue is in the region of credibility of testimony the judge has very little control of the trial, because the question at issue resolves into a matter of fact for the jury, and I should not be disposed to grant a third trial, especially in view of our experience in the present case. I may say that on the evidence as adduced before myself I should have come to a different conclusion from that of the jury, and I am not sure that I was successful in concealing my impression of the facts from the jury. The defenders had the assistance of very experienced counsel—and the pursuer certainly got no help from the judge—yet the verdict given on the first occasion was repeated with additional damages. I therefore agree with your Lordships that in the circumstances we ought not to grant a third trial, which might not improbably end in the same way.

LORD KINNEAR—I concur.

The Court pronounced this interlocutor:—
 “ Refuse the motion for a rule to show cause why the verdict in the case should not be set aside and a new trial granted, and decern.”

The pursuer moved the Court to apply the verdict and to find her entitled to expenses.

The defenders objected to the pursuer being found entitled to all her expenses, and argued—The question of expenses was in the discretion of the Court, and as the verdict here must be taken to have been in the opinion of the Court contrary to the evidence, that discretion should be exercised to the relief of the defenders and a modification of expenses granted. Moreover, this was really a case of divided success, for they had succeeded in setting aside the first verdict. In any event the pursuer was not entitled to the expenses incurred by her at the first trial—*Miller*

v. *Hunter*, November 24, 1865, 4 Macph. 78, 1 S.L.R. 39.

LORD ADAM—I think the pursuer is entitled to the expenses of both trials.

LORD M'LAREN—I am unable to concur in the proposed judgment. If there had been a settled rule as to the awarding of expenses in such cases, as the present I might have considered myself bound to follow it, though I am not prepared to admit that we are bound by precedents in regard to the awarding of expenses. In my experience the cases are rare where a verdict which had been found by the Court to be contrary to evidence and set aside is repeated on a second trial. In my view the cases are not so numerous as to establish an invariable rule, and no authority for the existence of such a rule was quoted to us.

If we are free to consider what is reasonable and just in the matter of expenses, my opinion would be that the pursuer is entitled to the expense of the second trial in which she obtained a verdict which has not been set aside, although we did not agree with it. In regard to the verdict obtained in the first trial, we were all of opinion that it was contrary to evidence and that a new trial should be granted, and I think that neither party should be allowed the expenses of the first trial. If we are to act on the rule proposed in regard to such cases it must proceed on the assumption that if there is a second verdict in favour of the pursuer after a previous verdict in his favour had been set aside as contrary to evidence, the second verdict must have proceeded on different evidence. The assumption would not be in accordance with the facts of the present case; but even if we are to consider it theoretically true, I fail to see why the defender should pay for two trials if the cause of the second trial was the fault of the pursuer in not bringing forward all his evidence at the first trial.

I agree with the opinion of Lord Deas in the case of *Mackintosh v. Moir* (10 Macph. 29), and I observe that the other judges, although agreed as to awarding expenses in the particular case, disclaimed the intention of establishing an invariable rule.

LORD KINNEAR—I agree with Lord Adam. I think we must follow the general rule that a successful litigant is entitled to the expenses of obtaining a judgment in his favour. The pursuer has obtained a verdict which the Court has refused to set aside, and I think we are bound to assume that that verdict is right. The expenses in question were necessarily incurred in obtaining that verdict, and I do not see why the unsuccessful attempt of the defenders to obtain a verdict in their favour on a second trial when a verdict had been given against them on a first should make any difference in the application of the general rule. No doubt the first verdict was set aside. But that only means that there ought to be a second trial; and the party who insists on a second trial takes his risk

of the second verdict being against him, and consequently of its turning out that he has put his opponent to additional expense without altering the result.

LORD PRESIDENT—I agree with Lord Adam.

The Court pronounced this interlocutor:—

“Decern against the defenders for payment to the pursuer of the sum of fifty pounds sterling: Find the pursuer entitled to expenses in the Sheriff Court and in this Court, including the expenses of the first trial and the rule following thereon, and remit,” &c.

Counsel for the Pursuer—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders—T. B. Morrison. Agents—Webster, Will, & Company, S.S.C.

Saturday, January 25.

SECOND DIVISION.

[Lord Kincairney,
Ordinary.]

SCOTT'S TRUSTEES v.

W. M. LOW & COMPANY, LIMITED.

Bankruptcy—Illegal Preference—Act 1696, cap. 5—Indorsation of Bill of Exchange within Sixty Days of Bankruptcy—Reduction—Right of Trustee to Recover Payment from Indorsee—Bill ultimately not Met.

Where a bill of exchange had been indorsed to A by a bankrupt within sixty days of bankruptcy, and this indorsation was admittedly reducible under the Act 1696, cap. 5, but the bill, although paid to the ultimate holders at maturity, was so paid with money supplied for that purpose to the acceptors by a subsequent indorsee, and debited by him in account to A, with the result that A had not obtained any payment or ultimately even any credit in account for the bill; held that the trustee on the bankrupt's sequestrated estates was not entitled to recover payment of the amount contained in the bill from A.

This was an action at the instance of Richard Brown, C.A., trustee upon the sequestrated estates of John Scott & Company, shipbuilders and engineers, Kinghorn, against W. M. Low & Company, Limited, the Burgh Sawmills, Leith, in which the pursuer concluded (1) for reduction of an indorsation to the defenders of a bill drawn by the bankrupts upon and accepted by the Scottish Pulverising Company, on the ground that said indorsation had been granted by the bankrupts within sixty days of bankruptcy in satisfaction or security of a pre-existing debt and was reducible under the Act 1696, cap. 5, and (2) for payment of the sum of £225, 17s., being the sum in the bill referred to in the first conclusion.