found wrong, and therefore expenses must be modified. Expenses modified to three-fourths.

Agents for Pursuer—J. & A. Peddie, W.S.

Agents for Defender—Morton, Whitehead & Greig, W.S.

Friday, February 4.

FIRST DIVISION.

STEWART *v.* CALEDONIAN RAILWAY CO.

(*Ante*, p. 35.)

Jury Trial — Damages — Expenses — Inequality of Platform—Negligence. In an action of damages against a Railway Company, the pursuer alleged that the injury he sustained was due to the height of the carriage above the platform, the badness of the lighting, and an inequality in the platform. The jury found for him with one shilling of damages. This verdict was set aside at his instance as irrational and inconsistent; and in a new trial he obtained £200 of damages. The Court *refused* to disturb this verdict, as the inequality of the platform was sufficient to cause the injury, and there was no proof that the pursuer had contributed to the injury by his negligence. *Held* (diss. Lords Deas and Kinloch), each party must bear his own expenses in first trial.

The pursuer in this action injured his ancle very severely in getting out of one of the defenders' carriages at Broughty Ferry Station in an evening in January. He alleged that the accident was due to one or more of three causes. First, he said the carriage was too high above the platform. The floor of the carriage was 3 ft. 1 in. above the platform; and the iron step was 22 in. above the platform, and 16 in. above the foot-board along the side of the carriage. There were three or four lamps on the platform, the nearest of which was 35 ft. distant from the place where the accident occurred. The pursuer, who is about 43 years of age, sprang from the iron step to the platform, without using the foot-board. On the platform was a depressed portion which at one edge was about 1¼ in. below the adjoining flag. On this the pursuer sprained his ancle very severely. In an action against the Company for damages on account of this injury, the jury awarded the pursuer one shilling. This verdict was set aside as irrational and inconsistent; and in a new trial the pursuer received two hundred pounds. The defenders obtained a rule for the pursuer to shew cause why the verdict should not be set aside, maintaining that the injury was due to the negligence of the pursuer.

Dean of Faculty and Thoms for pursuer.

Lord Advocate and Johnstone in answer.

At advising—

Lord President remarked that there had been two consecutive verdicts for the pursuer, but the force of the first verdict was much taken off by its nature; and he therefore felt disposed to deal with the second verdict as if it had been the only one. The complaint of the pursuer rested on three grounds. First, he said the platform was too low. This must be viewed in reference to the carriages, and they were those in universal use. Various engineers spoke to the lowness of the platform as being the manner in which platforms are usually made; and from the relative distances between the carriage step, footboard and platform, it was plain that no blame was attachable to the defenders on this ground. Then the pursuer attributed his injury to the deficiency of light; but on the whole is seemed that the station was just as well lighted as other stations of the kind. Lastly, he said that his injury was directly due to the inequality of the surface of the platform. Had the depression been of an undulating character the defenders might have been exonerated from liability; but it was irregular in shape and at one edge the dip from the flagstone was 1¼ inches. Such was quite sufficient to cause the injury that occurred, to a person alighting, even from a moderate height, with only part of his foot on the flagstone. It was not said that the Company were unaware of this inequality in their platform, nor that the lighting was such that the hole must have been seen. If it was not sufficient to shew it clearly it was the duty of the Company either to have put a lamp at the place or something to have warned passengers of their danger. The existence of this inequality constituted negligence on the part of the Company and justified the verdict of the jury; and the Company must therefore bear the liability they had incurred unless they could show that the pursuer had contributed to the injury by his own negligence. That negligence was said to have consisted in his not using the foot-board. But neither by what he did, nor by negligence, had the pursuer contributed to the accident. He had simply stepped 22 inches instead of 16 and then 6. But by the very construction of the foot-board people in the prime of life were tempted not to use the footboard but to make one step from the iron step to the platform. On the whole, therefore, his Lordship was of opinion the rule should be discharged.

Lord Deas was absent when the case was argued. Lord Ardmillan and Lord Mure concurred.

Lord Kinloch—I am of opinion that no sufficient ground has been shown for allowing a new trial in this case. I consider the questions involved to have been questions on the evidence for the jury; and I have not had placed before me sufficient reasons for the Court disturbing their verdict.

If the pursuer had rested his case exclusively on the ground that the platform at this particular station was too low, I think he would not have been entitled to succeed. There is sufficient proof to show that the platform was constructed under skilled advice, and of the height considered suitable at the time.

But the case of the pursuer was not rested on the mere lowness of the platform, abstractedly viewed. His allegation was that, considering the lowness of the platform, there was danger to the passengers from the neglect of the Company in two respects. first in having the platform so uneven at that point as to create the risk of what actually happened, the risk, namely, in stepping down from such a height, of twisting and injuring the foot; and secondly, in having the station so imperfectly lighted as to prevent this unevenness from being seen and avoided. On both these points, there was evidence presented, alike by pursuer and defenders. And it was the province of the jury to decide between the conflicting testimonies. I do not feel myself warranted to interfere in this matter with the proper functions of the jury. My impression is in favour of the view

that there was an unevenness in the platform, calculated to create some risk of the kind alleged to persons stepping down at that point, particularly after dark, and which it was negligence in the Company to have left so long unrectified. But of this the jury were to judge.

The most important and difficult question brought before us, was whether there was not sufficient evidence of contributory negligence on the pursuer's part effectual to exclude his claim of damages. The alleged negligence consisted in his not making use of the wooden footboard in stepping down, and so making one step of 22 inches from the iron projection to the platform, in place of two steps of 16 and 6 inches respectively.

This alleged contributory negligence it lay on the defenders to make good. And they were bound to establish two things—(1) that the act of the pursuer contributed to the result complained of; and (2) that the act was such as constituted negligence on his part.

In regard to both these points the question was again one of evidence peculiarly for the consideration of the jury. To take one step of twenty-two inches in place of two of sixteen and six, of which the last lands quietly on the ground, may appear not unlikely to contribute somewhat to a sprained ancle; but even this was matter of opinion with reference to the individual case. The more important question was whether there was negligence in the act on the pursuer's part; in other words, whether he was not bound, as a matter of ordinary prudence, to use the footboard in stepping out. This also was a question whose solution depended on a consideration of the special circumstances. It is impossible to lay down the absolute rule that every one, in all circumstances whatever, who does not use the footboard, is excluded from claiming damages for a sprained ancle or a broken leg. There is some difference of opinion both as to the advantages of the footboard, and as to the facilities of employing it. Its use or its non-use will be regulated to a considerable extent by the specialties of the situation. Very clearly it is not to be used in those cases in which the greater height of the platform throws the footboard beneath the platform, or puts it nearly on a level with it; and we have been given to understand that this greater height of the platform is now the general rule, of which the consequence necessarily will be a much diminished use of the footboard. A great deal will in such a case depend on the view taken by the jury as to the extent of the employment of the footboard by railway passengers generally; for as there exists no law or direct rule on the subject, its general non-employment would go far to exempt any one who did not use it from an imputation of negligence. These, and other similar considerations, were all proper for the jury to take into view. I am not prepared to say that on this particular point they have come to a wrong conclusion. I am clearly of opinion that I am not entitled to interfere with the conclusion formed by them.

Dean of Faculty asked for expenses, including those of the first trial.

Lord-Advocate objected to the expenses of the first trial been given.

After some discussion, the Court desised further argument on the point, and eventually the question was argued before the five Judges.

At advising—

Lord President—In this action the verdict in the first action was nominally for the pursuer. He applied for a rule calling on the defenders to shew cause why this verdict should not be set aside as irrational and inconsistent, or giving too low damages. This rule was made absolute. Substantially, therefore, this was a verdict for the defenders. In the trial that ensued the pursuer got substantial damages; and he now asks for the expenses of the first trial.

He cannot be allowed these expenses that he asks; for I am satisfied that the practice of the Court is against it. The rule was first decisively laid down in the case of *Lindsay* v. *Shield*. But it may be instructive to consider what was the previous practice of the Court. Where a new trial was granted on a bill of exceptions, *i.e.*, where the miscarriage of justice took place through the fault of the Judge, the party ultimately successful was allowed the expenses of the first trial. But according to the earlier practice of this Court, where a rule was granted for a new trial through the fault of the jury, the party asking for a new trial was not listened to except on the condition of paying the whole expenses previously incurred. This was a hard rule. It was found to be so in practice. And it was gradually changed. The question as to what should be the rule had to be considered in the case of *Lindsay* v. *Shield*, (Jan. 31, 1863), and the rule laid down was that neither party was to have the expenses of the first trial.

When the Court laid down this rule they were laying down a general rule for future practice. And the rule so laid down had to be applied in the case of *Barns* v. *Allan* (Dec. 20, 1864). The cases of *Lyell* v. *Gardyne* (Nov. 20, 1867), and *Macbride* v. *Williams* (May 22, 1869), are said to be the other way; and they are so far the other way that there the parties who lost the first trial and gained the second got their expenses. But these exceptions only prove the rule. They were purely exceptional cases. We gave the expenses of the first trial in the case of *Lyell* v. *Gardyne* on the principle that it was exceptional, viz., because the pursuer had acted in bad faith. In *Macbride* v. *Williams* the verdict in the first trial was gained in a manner not very creditable to the successful party and his witnesses; and we gave expenses against him ultimately, because we felt more strongly than we said that we had no doubt their evidence was not true. Therefore I say these were exceptional cases.

Here, I have said, I look on the first verdict as really for the defenders. On whichever side the verdict had been given in the second trial, we would not have disturbed it, it was so nice a point of evidence. But there is nothing in this case to make it an exceptional one. And, therefore, I think we should adhere to the rule, which I consider is plainly laid down, of not giving the expenses of the first trial to either party.

Lord Deas—The jury in the first trial for a severe injury gave the pursuer one shilling. On the motion for a new trial the Court were not only all of opinion it was a wrong verdict,—for that is common enough,—but that it was irrational in only giving the pursuer one shilling. The result of a new trial was that the jury again affirmed the fault of the defenders—that the injury was occasioned by the fault of the defenders. That is now the settled law of the case.

The loss of the first trial was through the misconduct of the jury. And the result of the whole matter, therefore, is to be this, a man is greatly injured, suffers excruciating agony during a long period of time, comes into Court, gains his case, and goes out of it a poorer man than he came into it. This is the result of jury trial.

It is settled law by high authorities that if a party loses his first trial through the fault of the Judge he gets the expense of that first trial. But yet, it is said to be, and it may be, the law that where he has lost the first trial through the gross misconduct of the jury he is not entitled to his expenses. I think the party who should pay the fault of the jury's misconduct is the party who has been in fault throughout. And the pursuer's case, was of course, stronger in the first trial than in the second.

Expenses are a matter of equity. But rules were at first laid down from the admiration for jury trial. But the Court, finding the iniquity of these rules, has been gradually changing them. It is said that the law is laid down and settled by the case of *Lindsay* v. *Shield*, that in the first trial neither party gets expenses. But this was on the ground that the first trial was lost through the fault of the party eventually successful. This was the rule I coincided in, as shewn by my views in subsequent cases. *Lyell's* and *Macbride's* cases go to shew exceptions, it is said. *Lyell's* case may shew that a party may lose a case by maintaining a desperate plea in the law, though the jury affirmed it. In *Macbride's* case the reason why we hesitated about giving expenses to the party who ultimately gained was because, malice not being in the issue, we were not sure whether the rule was settled that the defender was bound to have evidence ready to rebut malice.

There is not a case in our books where the party who gained the second trial did not get the expenses of the first which he had lost through the misconduct of the jury. There is a great difference between the jury going wrong in reading the evidence and going wrong through misconduct, as here. I think the judgment about to be given will be the heaviest blow to jury trial it has ever received; and I do not think it is in such favour that it can well afford to receive such a blow.

Lord Ardmillan—The verdict returned by the jury in the first trial was set aside, not because the damages were too small, but because of its irrationality. If the verdict had been for the defenders we would not have set it aside. But still, as the verdict was, the pursuer was entitled to more damages, if any.

The old rule was that the party who asked for a new trial must pay the whole expenses of the first trial. That rule was modified, and the question of expenses was reserved. Then the question arose—Is the party who loses the first trial and gains the second to get the expenses of both trials? This question came up for decision in the case of *Lindsay* v. *Shield*, and it was settled—and the rule was applied in the case of *Barns* v. *Allan*—that each party was to bear his own expenses in the first trial. In *Lyell's* case there were strongly exceptional grounds for varying from this rule—not grounds in procedure, but in the motives of the party in bringing the action. And in *Macbride's* case the first verdict was gained on false evidence. What is the exception here?—that the pursuer is right. But that is not an exception; for it is common to all cases where the pursuer loses the first trial and gains the second. And practically the pursuer did lose the first trial; for I look upon the verdict in the first trial as a verdict for the defenders. I think, therefore, before the pursuer can get the expenses of the first trial he must show that he lost it through some fault of the defenders.

I have only to add that by the recent Act, the pursuer only getting one shilling of damages in the first trial could not have got his costs if there had been no new trial.

Lord Kinloch—I am of opinion that the pursuer is entitled to the whole expenses of process, including the expenses of the first trial.

Unquestionably there is no rule which prevents us from giving to the pursuer the expenses of the first trial if the special circumstances of the case appear to us to warrant our doing so. In several recent cases a party who was unsuccessful in the first trial, but successful in the second, was found entitled to the expenses of both trials; the specialties of the case seeming to make this the only just course. The point to be decided in the present case is, Whether its circumstances are such as to call on us, in justice to the pursuer, to follow the same course?

I consider the pursuer to have been in substance successful in all the judicial proceedings by which expenses were caused. The only question raised between the parties, and that by the discussion of which all the expenses were occasioned, regarded the liability of the defenders; in other words, whether, on the occasion in question, there was "fault" on the part of the defenders, leading to the injuries complained of. It was to this question that the parties respectively addressed themselves; and made their preparations: and expended their money. There was no ground for disputing that, if there was fault, damages were due, and that these damages must be more than nominal. I do not think the defenders themselves contended that if damages were due, merely nominal damages were sufficient to satisfy the pursuer's demand.

The result of the proceedings has been to shew that on this question of liability the pursuer was from the first right: and we must hold that the defenders should not have litigated the point. The only proper course for them to follow, accordant with the responsibility fixed on them, was not to deny liability, but to make a tender.

But more than this, I think that in all the substance of the case the pursuer was successful on the first trial: and that the verdict was a verdict in his favour on the only real point in dispute. It distinctly affirmed the liability which was the true subject of controversy. It affirmed the whole of the issue. It found that, "on or about the 13th day of January 1869, at or near the defenders' station at Broughty Ferry, the pursuer fell and was injured, through the fault of the defenders, to his loss, injury, and damage," But by some singular and unaccountable perverseness the jury gave only one shilling of damages. In other words, whilst finding the whole case in favour of the pursuer, the jury did not go on so much as to consider the damages. They found in the pursuer's favour: and that he was entitled to damages; and they gave him one shilling,—which was substantially no damages at all. The Court was unanimous in holding that this was a grave miscarriage. The

only mode in which it could be rectified was by giving a new trial. The second jury re-affirmed the liability of the defenders exactly as the first had affirmed it, and gave £200 of damages; and that verdict we refused to disturb.

It would be to little practical effect to speculate on the cause which prompted the first jury to return the verdict they gave. We cannot with certainty know anything about their procedure. But, unquestionably, what they did amounted to something more than error in the ordinary sense of the term. It was an abuse, or a wrongful use, of their functions. Their verdict was a bad one, —not from their misweighing the evidence and drawing from it an erroneous inference:—their inference was exactly the same which was drawn by the second jury. The viciousness of the verdict lay in the jury—from whatever cause—refusing to consider and estimate the pursuer's damages; finding damages due, and giving none.

To this result it cannot be said that the pursuer contributed by anything either done or omitted by him. His case was fully brought before the jury; and with the actual consequence of producing a verdict in his favour on the only real point of dispute. This, I think, creates a marked specialty in the present case. In the ordinary case in which a party loses the first verdict and gains the second, what is generally attributable to the jury is that they have made a mistake in construing and applying the evidence. And it is always open to suppose that this occurred in consequence of the then losing party not sufficiently bringing out or enforcing his case. But all supposition of this sort is absolutely excluded in the present case. The pursuer not only placed his case rightly before the jury, but won from the jury an express affirmance of his issue. The Court, in setting aside the verdict, did not pronounce the verdict wrong so far as it affirmed the issue. They only gave a new trial because that was the only mode in their power of correcting the miscarriage made by the jury in not following out their own verdict to the effect of considering and estimating the actual damages.

I am of opinion that the pursuer should have awarded him the expenses of the first trial, not less than the other expenses in the cause. I come to this conclusion because I think that the pursuer must be held to have been right throughout, and successful throughout; and that even the verdict in the first case must be considered in substance a verdict in his favour, because it affirmed the liability which was the only point of controversy, and only failed of effect from a gross miscarriage in the jury, for which the pursuer can be in no wise held answerable.

I would only, in conclusion, add one or two sentences on the general principle applicable to such a case. The great leading principle on the subject of expenses is, as it appears to me, that the person found in the right should be indemnified for his expenses, except in so far as he may have disentitled himself to claim some part of these by improper or unnecessary litigation. We are not in the practice of denying expenses to the party who obtains our judgment, merely because a different and, as we hold, a wrong judgment was pronounced by the Lord Ordinary or by the Sheriff. This is one of the risks of litigation, which, generally speaking, is not to be taken into account in the ultimate disposal of the expenses in favour of the successful party. I have always felt some difficulty in seeing clearly the principle on which a different result should hold where the erroneous verdict of one jury is corrected by the right verdict of a second. I cannot help tracing any rule laid down to that effect to the importation of an exotic doctrine, doubtfully suited to our Scottish judicial atmosphere. At the same time, I desire not to under-rate the propriety and expediency of adhering to a rule once firmly settled, even although in itself theoretically debateable. Assuming the rule to be that the party ultimately successful is not to obtain the expenses of a first unsuccessful trial, we have certainly gone no farther than to lay down this as the general rule, and have expressly, and as I think wisely, left the door open for the consideration of all special cases, and the exclusion from the operation of the rule of those which cannot fairly and reasonably be brought within its scope. I am of opinion that there are specialties in the present case which render it an exception from the rule, even supposing the rule to be in itself unassailable.

Lord Mure—As I was aware that the Court were to differ in opinion, I have examined the cases which have been supplied to us in argument more minutely in order to see whether there is any rule that the party who is ultimately successful in a jury action shall get the whole expenses incurred. The two most recent cases, those of *Lyell* and *Macbride*, seem at first to favour the supposition that such a rule exists. But on examination I find that there were exceptional circumstances caused by one of the parties. Some years ago the pursuer in this action could not have got a second trial without first paying the expenses of the preceding trial. But that rule was changed. And the question comes to be, Whether there were such exceptional circumstances as to withdraw this case from the general rule? There was no fault with either party. And as regards the first verdict, I may state that I agree with Lord Ardmillan in holding that the first trial was truly a verdict for the defenders. I, therefore, on the whole matter, agree with your Lordship in the chair, that the pursuer should bear his own costs in the first trial.

The Court accordingly found that the pursuer must bear his own expenses in the first trial, and that he was liable to the defenders in the expenses of this discussion; but that he was entitled to his expenses from the date of the application to set aside the first trial.

Agents for Pursuer—Melville & Lindesay, W.S.
Agents for Defenders—Hope & Mackay, W.S.

Friday, February 4.

WALKER AND OTHERS *v.* SHERAR.

Taking Band—Conterminous Feuars—Expenses. Each of two adjoining feuars in Aberdeen had a right to "take band" in his neighbour's wall, and to build on it. By uniform custom it was shewn that in Aberdeen this meant—a party might insert his bandstones to the extent of 9 inches on paving for 4½, and build above the whole 9 inches if he wished to raise his house. *Held*, though one of the feuars had built his gable wall entirely on his own feu, that the other feuar was entitled to the above-mentioned use of it, his author having paid