Upon the whole therefore—upon the grounds I have stated and your Lordship has stated—in concurrence with the Lord Ordinary, I have come to the conclusion that the keels were laid with a camber upon the instructions of Mr Stewart, and that the pursuer Mr George Burrell knew and approved of its being done, and that the pursuers accepted the ships in full knowledge that they had been built in this way.

The Court adhered.

Counsel for the Pursuers—Sol. Gen. Dickson, Q.C.—Salvesen. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders—Ure, Q.C.—Younger. Agents—J & J Ross, W.S.

Thursday, December 22.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MACDONALD *v.* ANDREW WYLLIE & SON.

Reparation—Master and Servant—Defective Plant—Liability of Master for Defect in Plant Supplied by Competent Independent Contractor.

A firm of builders and contractors having a contract to take down certain high walls, contracted with a firm of competent joiners for the erection of a scaffolding. The scaffold so erected, after it had been taken over by the builders, collapsed owing to a defect which might have been discovered by a skilled person inspecting it. A workman who was injured by the fall of the scaffold brought an action of damages for the injuries sustained by him against the builders, his employers. At the trial of the cause by jury the Lord Justice-Clerk directed the jury as follows:—"That if the jury are satisfied that the defender, not having the knowledge and skill to erect the scaffolding in question, selected a tradesman having skill and experience of such work, and contracted with him to provide such a scaffold, he would not be liable as for fault if the scaffolding fell in consequence of its being erected in an unskilful manner through the fault of the skilled person who contracted to erect it." *Held*, upon a bill of exceptions, *inter alia*, to this direction, that it was erroneous in law. Exception *allowed* and new trial *granted*.

Expenses—Jury Trial—Bill of Exceptions—New Trial—Expenses of First Trial and of Bill of Exceptions.

Held (*diss.* Lord Young) that the general rule now established, to the effect that when a new trial is granted, apart from special circumstances, the expenses of the former trial should be reserved, applies to cases upon bills of exceptions as well as to cases upon motion for a new trial.

Gibson v. *Nimmo & Company*, March 15, 1895, 22 R. 491, *distinguished* and *commented on*.

This was an action brought in the Sheriff Court at Ayr by John Macdonald, a labourer, against Andrew Wyllie & Son, builders and contractors in Ayr, and George Wyllie, the only known partner of that firm, in which the pursuer claimed damages, alternatively at common law or under the Employers Liability Act 1880, for personal injuries sustained by him while working in the defenders' employment, through the collapse of a scaffold.

In the month of December 1897 the defenders had the contract for taking down the walls of Ayr Town Hall, which had been destroyed by fire. The walls were in some places 60 feet high, and scaffolding had to be erected to the wall head to enable the walls to be taken down.

The defenders maintained that even if the scaffold was in fact defective they were not responsible for it. They averred that the erection of it was proper joiners' work, and not such work as is usually executed by builders; that they had accordingly employed a firm of joiners in good repute, who had had large experience in the erection of high scaffolds, and that they had entrusted the erection of the scaffold required for the performance of this contion entirely to this firm of joiners, who had duly erected it, and had represented to them that it was safe and sufficient.

This scaffold so erected gave way while the pursuer was working upon it in obedience to the defenders' orders as one of their workmen, and he sustained certain injuries in consequence of its collapse.

The defenders originally denied that the scaffold was defective.

A proof was allowed, and the pursuer appealed for jury trial. The following issue was adjusted and approved for the trial of the cause:—"Whether, on or about the 14th day of December 1897, and at or near the Town Hall in Ayr, the pursuer, while in the employment of the defenders, was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer.

"Damages laid at £1000, or alternatively, under the Employers Liability Act, at £195."

It was ultimately admitted that the scaffold was defective and dangerous, and that the defects were not latent, but would have been apparent to the inspection of any skilled person.

The case was tried before the Lord Justice-Clerk and a jury on 17th October 1898. In his charge the presiding Judge directed the jury as follows:—"That if the jury are satisfied that the defender, not having the knowledge and skill to erect the scaffolding in question, selected a tradesman having skill and experience of such work, and contracted with him to provide such a scaffold, he would not be liable as for fault if the scaffolding fell in consequence of its being erected in an unskilful

manner through the fault of the skilled person who contracted to erect it."

Counsel for the pursuer excepted to this ruling, and asked the Lord Justice-Clerk to give the following directions to the jury:—"(1) That the defenders are liable for the scaffolding used by their employees unless it was reasonably sufficient for the purpose for which it was being used, and that employment of competent joiners to erect such scaffolding does not free them from responsibility to their workmen if the scaffold fell in consequence of its being erected in an unskilful manner. (2) That the defenders are liable if they took over the scaffolding under circumstances indicating that Messrs Ferguson had not inspected the scaffolding." (Messrs Ferguson being the joiners employed by the defenders.)

The Lord Justice-Clerk refused to give these directions to the jury, whereupon counsel for the pursuer excepted to the ruling and refusal.

The jury returned an unanimous verdict for the defenders.

The pursuer brought a bill of exceptions, and argued—The direction given by the presiding Judge at the trial was erroneous in law, and it was calculated to and did in fact mislead the jury. The defenders were bound to provide their workmen with a safe scaffold to work upon if such a scaffold was necessary, as here, for the performance of the work undertaken. If the scaffold provided by them was defective and injury resulted to a workman in consequence they were liable, for they were bound to procure proper appliances for the use of their workmen, and if the appliances procured and taken over by them for the use of their workmen were defective, they were responsible. Although they might delegate their duty of providing safe plant to another, they did not get rid of their responsibility to their workmen by doing so—*Baird* v. *Addie*, Feb. 8, 1854, 16 D. 490, *per* Lord Anderson (Ordinary), *affd.* at p. 493, and Lord Rutherfurd at p. 495; *Wilson* v. *Merry & Cuninghame*, May 31, 1867, 5 Macph. 807, *per* Lord President Inglis at p. 811; *Weems* v. *Mathieson*, May 31, 1861, 4 Macq. 215; *M'Killop* v. *North British Railway Co.*, May 29, 1896, 23 R. 768; *M'Nulty* v. *Primrose*, Jan. 28, 1897, 24 R. 442. No doubt fault upon the part of the employers must be established. The fault of which they were guilty here was that they neglected the duty incumbent upon them of providing safe and sufficient scaffolding. It might be that they would not have been liable for a latent defect, but the defect here was not latent, and the direction given proceeded upon the assumption that it was not. Where a person owed a duty to anyone, and in the performance of it, or with a view to the performance of it, contracted to have something done by a third party, who in the performance of what was incumbent upon the person owing the duty acted negligently, the person owing the duty was responsible to the person to whom he owed it, and could not excuse himself by throwing the blame upon the contractor. He was not liable for the casual or collateral negligence of the contractor, but he was responsible for any negligence on the part of the contractor involving the imperfect performance of the work which he had contracted to do, and which the person owing the duty was bound to do or get done—*Hole* v. *Sittingbourne and Sheerness Railway Co.* (1861), 6 H. & N. 488; *Pickard* v. *Smith* (1861), 10 C.B. (N.S.) 470; *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; *Bower* v. *Peate* (1876), 1 Q.B.D. 321; *Randleson* v. *Murray* (1838), 3 N. & P. 239; *Black* v. *Christchurch Finance Co.* [1894], A.C. 48; *Dalton* v. *Angus* (1881), 6 App. Cas. 740; *Hardaker* v. *Idle District Council* [1896], 1 Q.B. 335; *Penny* v. *Wimbledon Urban Council* [1898], 2 Q.B. 212. As to the authorities referred to for the defenders—*Cleghorn* v. *Taylor*, Feb. 21, 1856, 18 D. 664, and *Campbell* v. *Kennedy*, Nov. 25, 1864, 3 Macph. 121, so far as in point, were in the pursuer's favour. *Kettlewell* v. *Paterson & Co.*, Nov. 25, 1886, 24 S.L.R. 95, the case apparently most nearly in point of those quoted for the defenders, was not really so, as the defective plant was not the plant of the master, and the master had provided sufficient plant, but the foreman directed the workman to use another person's plant. That case was therefore distinguished from the present. The same observation applied to *Robinson* v. *John Watson, Limited*, Nov. 30, 1892, 20 R. 144, for there the ground of judgment was that the plant was not the master's, or used as such. In *Stephen* v. *Thurso Police Commissioners*, March 3, 1876, 3 R. 535; and *M'Lean* v. *Russell, Macnee, & Co.*, March 9, 1850, 12 D. 887, the negligence of the sub-contractor was collateral, as in *Reedie* v. *London and North-Western Railway Co.*, 4 Ex. 244. No question as to the doctrine of collaborateur could now arise in such cases as the present—*Johnson* v. *Lindsay & Co.* [1891], A.C. 371; *Cameron* v. *Mystrom* [1893], A.C. 308. (2) The rulings asked by the pursuer, and which the Judge refused to give, were correct. (3) If the employers were excused on the ground that they had employed competent joiners, then the workman had no remedy, for he had no right of action against the joiners—*Campbell* v. *A. & D. Morrison*, Dec. 10, 1891, 19 R. 282; *M'Gill* v. *Bowman & Co.*, Dec. 9, 1890, 18 R. 206. The workman had no contract with the joiners, and they had performed their contract to the satisfaction of the person with whom alone they had contracted—that is to say, the defenders, who had accepted the scaffold as duly constructed. *Heaven* v. *Pender* (1883), 11 Q.B.D. 503, was explained and distinguished in *Caledonian Railway Co.* v. *Mulholland* [1898], A.C. 216. In *Heaven* v. *Pender* the appliances were provided for the persons using the docks. That was not a case of appliances made for and finally taken over by an employer. It had consequently no bearing upon the present question. But even if the pursuer had a good right of action against the joiners, his more proper course was to go against his own employer, leaving the latter to seek relief from the former.

Argued for the defenders—The direction given was right. It was not a correct statement of the law to say that the master was bound to provide safe appliances. He was not an insurer, nor did he warrant his plant. All that he was bound to do was to take every reasonable precaution to secure the safety and sufficiency of the appliances provided by him for his workmen's use. To make the employer liable it must be proved that he neglected some such reasonable precaution—*Gavin* v. *Rogers*, November 30, 1889, 17 R. 206, which really overruled *Fraser* v. *Fraser*, June 6, 1882, 9 R. 896, and *Walker* v. *Olsen*, June 15, 1882, 9 R. 946; *Cleghorn* v. *Taylor*, February 27, 1856, 18 D. 664, as corrected and modified by *Campbell* v. *Kennedy*, November 25, 1864, 3 Macph. 121. That this statement of the law was correct appeared from the fact that admittedly the employer was not liable if the injury resulted from a latent defect, for if the employer was bound absolutely to provide safe plant, he could not excuse himself on the ground that the defect was latent. The rule that the employer was not responsible for a latent defect was merely an illustration of the general principle that he was only liable for neglecting some reasonable precaution, a latent defect being something not discoverable by the exercise of ordinary care. Here no question could arise under the Employers Liability Act for the employer was his own superintendent. At common law the employer was only liable for his own personal negligence. He was not liable for the fault of anyone else as fault imputed by law to him. It was not fault on the part of the defenders to assume without examination that the scaffold was safe. The employer did all he was bound to do if he saw that the appliances which he required to provide were made by competent tradesmen, and when so made he was entitled to assume that they were sufficient. He was not bound to have them inspected by some expert before allowing his workmen to use them—*Kettlewell* v. *Paterson & Company*, November 25, 1886, 24 S.L.R. 95; *Robinson* v. *John Watson, Limited*, November 30, 1892, 20 R. 144; *Paterson* v. *Kidd's Trustees*, November 5, 1896, 24 R. 99, where *Dolan* v. *Burnet*, March 4, 1896, 23 R. 550, was considered and distinguished. It might be that in some cases there was a duty of inspection, but no inspection by an unskilled person would have discovered the defect here, and it could not be maintained that a builder, who *ex hypothesi* had no special knowledge of joiners' work, was bound to have a scaffold, erected for him by one competent joiner, inspected by another competent joiner before he allowed his men to use it. The only precaution which a builder could take if he required a scaffold was to employ a competent person to erect it, and if he did so he was not liable for its insufficiency. If the effect of the decisions in *M'Killop*, *cit.*, and *M'Nulty*, *cit.*, was as maintained for the pursuer, then these decisions were inconsistent with *Paterson* v. *Kidd's Trustees*, *cit.*, but these cases did not support the pursuer's contention. In *M'Killop* all that was decided was that a railway company might be liable at common law for the fault of a skilled official, and *M'Nulty* was in the defenders' favour, for there the employer was held to be not responsible for a defect in a stair necessarily used by his workmen. The fact that the stair in that case was not the property of the employer made no difference. The English cases quoted for the pursuer were not in point. They were decisions, not on the law of master and servant, but of agent and principal. In all of them there was some statutory duty or some other obligation upon the defenders to secure or warrant something, and this fact formed the ground of judgment. See *Hardacre*, *cit.*, *per* Lindley, L.J., pp. 341 and 342, and *per* Smith, L.J., p. 345. Where the sub-contractor was completely independent he alone was liable—*Stephen* v. *Thurso Police Commissioners*, March 3, 1876, 3 R. 535, *per* L.J.C. Moncreiff, p. 540; *M'Lean* v. *Russell, Macnee & Company*, March 20, 1850, 12 D. 887. (2) The argument based upon *Campbell* v. *A. & D. Morrison*, *cit.*, was irrelevant, but apart from that it was not well founded. That case was isolated and special. It was not a decision upon the general question. There the gangway provided was merely certain loose planks. The rules of law relating to this matter where it was submitted as follows:—If the employer contracted with (*e.g.*) a joiner to construct a gangway, and directed him to make it in a certain way which was defective, then the workman would have no action against the joiner who had fulfilled his contract, but he would have an action against his own employer for ordering a defective gangway. On the other hand, if the employer ordered the joiner to make a gangway for the purpose of being used by his workmen, and sufficient for that purpose, then the workman had no action against his employer, but under *Heaven* v. *Pender*, *cit.*, he had an action against the joiner, because he had a *jus quæsitum tertio* in the contract between his employer and the joiner which was made for his benefit and behoof. There was nothing to the contrary of this in *Campbell* v. *A. & D. Morrison*. The present pursuer therefore would have a good right of action against the joiners here.—See also *Gardiner* v. *Main*, November 29, 1894, 22 R. 100, when *Heaven* v. *Pender* was approved by Lord M'Laren, p. 104; and *George* v. *Skivington* (1869), L.R., 5 Ex. 1. (3) The first direction proposed for the pursuer was too broad, and the second was ambiguous. The Judge was right in refusing to give these directions.

At advising—

Lord Young—The facts of this case so far as necessary to be taken account of in disposing of this bill of exceptions are few. The pursuer is a mason's labourer. Recently he met with very severe injuries on account of the fall of a scaffolding on which he was working, and has been rendered a cripple for life. This action is

raised at his instance against his employers on the ground that the scaffolding was defective and dangerous, and that his employers are responsible. The defences are various. In the first place, it is said that the scaffolding was not defective, and that the accident must have happened through the fault of the pursuer and his fellow labourers. In the second place, it is said that if it was defective and dangerous, that was not due to any fault of the defenders, who are masons by trade not acquainted with joiner work, in respect that they employed a joiner who was reputed fit to do the work, and quite capable of erecting such a scaffolding, and that in consequence they, the defenders, are not responsible. They say that the joiner should have been called as a defender. Their first plea is "All parties not called." The case went to trial on the general issue whether the pursuer was injured through the fault of the defenders. This bill of exceptions comes before us on the footing that the scaffold was defective and dangerous. It is admitted that for the purposes of this discussion that must be conceded, and it is stated by the learned Judge who tried the case that it was upon that supposition that the ruling now in question was given by him, and also that it was given upon the further supposition that the defect was not a latent defect, but one which could have been discovered by a proper inspection by a reasonably skilled person. Therefore the question of latent defect does not arise here. The ruling was asked and given on the footing that the scaffolding was defective and dangerous, and that the defect was not latent. Accordingly the learned Judge who tried the case, in accordance with the defence put forward by the defenders, gave this direction—[*His Lordship read the Lord Justice-Clerk's direction to the jury quoted above*]. This ruling was given on the assumption that the joiner employed by the defenders was a properly skilled person. The direction given practically amounts to this, that the defenders discharged their whole duty to the pursuer by entrusting the erection of the scaffolding to a properly skilled joiner, and that, however unskilfully that joiner might erect the scaffolding, the defenders would not be liable in consequence to the pursuers. We have now to determine whether this ruling is in accordance with the law of Scotland. I am of opinion that it is not.

The basis of this action is that the defender was responsible to the pursuer for the scaffolding being in a safe condition, of course excluding the case of some latent defect not discoverable by reasonable care, and that the workman is not concerned with who is employed by the master to discharge his duty of making the scaffolding safe. Whether the person so employed by the master is liable to the workman who is injured by the defective condition of the scaffold is another question, and depends upon what is the contract between the master and the person so employed by him, with which the workman has nothing to do. The basis of the workman's claim against his master is that there is a responsibility on the part of his employer for the scaffolding being in a reasonably safe condition to enable the workman to perform the work which he has been engaged to do. It is no answer to him for the master to say "I am not a joiner and I employed a skilled joiner to do the work for me." It is no more an answer for him to say so to his workman, than it would be an answer for a person who had erected a scaffolding for people to see a procession, to one of the persons who had engaged a seat upon it, and who had been injured through a defect in it, to say to that person that he himself was not a competent joiner, that he had employed a fit joiner to erect the scaffolding, and that he was not responsible for that joiner's fault. No doubt, there, there is a contract, but so there is here. According to the law of Scotland in the contract of master and servant, apart from special stipulation to the contrary, it is implied that the employer is responsible to his workmen for the condition of the scaffolding which he has provided for them to work upon, and that without any reference to the mode employed by him to erect it. This scaffolding was necessary to enable the defenders to perform the contract into which they had entered for the taking down of these walls, and it was incumbent upon them to provide it. No moral blame may attach to them if they employed a fit joiner to erect it, but the fact that they did so does not discharge their liability to their own workman for its being in a good and safe condition. I cannot say whether the joiner is liable to them for the consequences of this accident. That depends upon the contract between them, and the pursuer has no concern with that contract. Whether or not it is so is a matter altogether apart from the question raised by the present bill of exceptions.

On the whole matter my opinion is that the first direction asked by the counsel for the pursuer was right, that the ruling given by the learned Judge who tried the case was erroneous, and that the bill of exceptions ought to be allowed.

Lord Trayner—The direction given to the jury, which forms the subject of the first exception, involves or assumes three things—first, that the defenders were bound to supply their workmen (including the pursuer) with good and sufficient scaffolding; 2nd, that the scaffolding in question was insufficient; and 3rd, that the defenders would be liable for the consequence of its insufficiency if it had been erected by themselves. But the jury were directed that no liability would attach to the defenders for the consequences of the insufficiency of the scaffolding, if, not having themselves the skill necessary to enable them to erect it, they employed a person having such skill to do so, through whose fault the scaffolding proved insufficient. I am of opinion that the direction so given to the jury was unsound in law.

The scaffolding was necessary to enable the pursuer to perform the work for which the defenders engaged him. It was a necessary appliance which the defenders had to supply, and they supplied it. In any question between the pursuer and defenders, the scaffolding can only be regarded as the defenders'. As to who erected the scaffolding, or on what instructions or in what manner it was erected, the pursuer has no concern. He only knows that an appliance necessary for the execution of his master's work has been given to him by his master, who is charged with the duty of seeing that it is sufficient and suitable for the purpose to which it is to be put. That the appliance was scaffolding is not material. The master's duty is the same whatever the appliance may be. If a master buys a machine, let us say, necessary for the execution of his work, and gives it to his workman, it is the master's machine, not the workman's or manufacturer's. If the machine turns out to be faulty, defective, or otherwise indifferent, the master must answer for it. He may have his relief against the maker or manufacturer, but the injured workman has no claim against the maker of the machine; there was no contractual or other relation between them; the maker of the machine had no duty towards the workman. When the scaffolding or the machine passes out of the hands of the man who erected or made it, it becomes the scaffolding or the machine of the man who ordered it and gave it to his workman. It is the master's scaffolding or machine, although erected or made *per alium*, and he is directly responsible for its insufficiency.

The rule that a person is not responsible for damage done through the neglect or fault of an independent contractor, does not apply to a case like this. It applies in cases where there is no relation between the person injured and the person who employs or engages with the contractor. But "the case is wholly different where a distinct duty is imposed upon the person sued towards the person injured, and where the duty has not been performed" (*per* Lord Justice-Clerk Moncreiff in *Stephen's* case). That correctly represents the case now before us.

It was argued by the defenders that they were not responsible for defects in their appliances which were latent, and that their duty was limited to supplying the workman with appliances which were reasonably sufficient. I am not prepared to admit the soundness of this argument to the extent to which it was carried by the defenders. But it is not a point raised for decision by the exception before us. The charge excepted to is absolute, and neither states nor suggests any limitation in the direction to which the defenders' argument points. I therefore give no opinion upon the question so raised.

We had a copious citation of authorities from both sides of the bar, but I do not think it necessary to notice them in detail, or mark their bearing upon the question before us. There were, however, two cases cited for the defenders on which I should like to make a single observation. The first of these cases is *Heaven* v. *Pender*, L.R., 11 Q.B.D. 503, in which a dock-owner was held liable in damage occasioned to a workman, not his servant, through the insufficiency of staging supplied by the dock owner under a contract with the master of the man who was injured. There was a very noticeable difference of judicial opinion in this case; the unanimous judgment of the Queen's Bench Division was that the dock-owner was not liable on grounds which to my mind were satisfactory and convincing, but in the Court of Appeal the learned Judges, while reversing the judgment of the Court below, differed as to the grounds on which it should be reversed. The ground on which the ultimate judgment proceeded appears to have been that the dockmaster was under an obligation to the injured man to take reasonable care that the staging was in a fit state to be used, and that for the neglect of such duty the defender was liable. Taking the case as decided upon that ground, it is plainly consistent with principle and authority, and supports the law for which the pursuer here contends. The difficulty which may be experienced with reference to this case is only in connection with the fact whether the dockmaster underlay the obligation or duty towards the injured man which the Court of Appeal affirmed.

The other case to which I referred above is that of *Kettlewell*, in reference to which I desire to say that the ground on which the Court decided the case was undoubtedly sufficient, for it was held that the pursuer had failed to prove "that there was any negligence on the part of the defenders or their foreman." But I take leave to say with all deference that if there was nothing in the case other or different from that which appears in the report, I should have had great difficulty in reaching that conclusion in fact. As decided, however, the case is not adverse to the pursuer here.

I am of opinion that the first exception stated for the pursuer should be allowed, and consider it unnecessary to say anything with regard to the other.

Lord Moncreiff—This is not a special verdict, and we do not know precisely what facts the jury held proved. We must, therefore, consider the direction of the presiding Judge as given with reference to evidence on which the jury had not yet deliberated. So viewed, I am of opinion that the direction is not exhaustive, and that therefore it is defective. As it stands the jury may have supposed that the defenders sufficiently discharged their duty to their servants by entrusting the construction of the scaffold to a competent joiner. In order to make the direction complete I think his Lordship should have added the words "unless by the exercise of reasonable care the defenders could have discovered the insufficiency of the scaffold," or words to that effect.

A master is bound to supply safe and sufficient plant for the use of his workmen, but he is not bound to warrant the suffi-

ciency of the plant. He is not personally bound to make it or to keep it in repair. He is only bound in a question with his servant to take reasonable care that it is sufficient; and in order to render him liable there must be proof of fault or negligence on his part or those for whom he is responsible.

In judging whether an employer has or has not used reasonable care regard must be had to the whole circumstances of each case. The fact that he has entrusted the manufacture or construction of the plant to a skilled tradesman under an independent contract will go far to establish that he has taken reasonable care. But of itself it is not necessarily sufficient, because if he could on inspection have discovered the defect he will not be freed from liability. It is for the jury to decide in each case what is reasonable care and what defects are to be considered latent in a question with the employer.

Lord Justice-Clerk — It is to be regretted that in this case there has been a miscarriage of justice, as I must admit there has been in view of your Lordships' opinions. When the case was tried I had not the benefit of such a full debate and citation of authorities as we have now heard. I had to decide upon the spur of the moment a question which is not clear upon the authorities. But having now heard a full debate and citation of authorities upon the point I have come to be of opinion that the direction which I gave to the jury was erroneous in respect that it was incomplete. I think it was right as far as it went, but that I should have added some words to the same effect as the addition suggested by Lord Moncreiff in his opinion.

In this connection, questions of latent defect often present considerable difficulty. A defect might be latent to one person and not latent to another who was highly skilled.

I agree with your Lordships that the first exception should be allowed and a new trial granted.

Counsel for the pursuer moved for a new trial, and also for the expenses of the first trial and of the discussion on the bill of exceptions. He referred to *Gibson* v. *Nimmo & Company*, March 15, 1895, 22 R. 491.

Counsel for the defenders maintained that expenses should be reserved.

The case was continued for further argument and citation of authorities on the question of expenses.

Argued for the defenders—The old rule was that a new trial was generally only granted upon payment of the expenses of the former trial. But the practice had been altered, and it was now the general rule that the expenses should be reserved. The history of the change would appear from an examination of the following cases —*Morrison* v. *Maclean's Trustees*, February 27, 1862, 24 D. 625, p. 648, where the Court refused to recognise any general rule, but gave the expenses of the first trial; *Bell* v. *Reid*, February 28, 1862, 24 D. 648, where expenses were reserved; *Barns* v. *Allan & Company*, June 1, 1864, 2 Macph. 1119, where again expenses were reserved—see page 1119—the Court in these two last cases proceeding to some extent upon the special circumstances; and *Frasers* v. *Edinburgh Street Tramway Company*, December 2, 1882, 10 R. 264, p. 270, where the new rule was recognised as settled. It made no difference whether the new trial was granted upon a bill of exceptions or upon a motion for a new trial. Since *Frasers*, *cit.*, the new rule there stated had been invariably followed except in the case of *Gibson* v. *Nimmo & Company*, March 15, 1895, 22 R. 491, p. 505. That was no doubt formally a case of a new trial being granted upon a bill of exceptions, but it was not the ordinary case of that kind. The judge had directed a verdict for the defenders on the ground that there was no evidence sufficient in law to support the pursuer's case. Expenses were there expressly only asked for and given owing to the exceptional circumstances of the case, and it was admitted and recognised that the general rule was to reserve the expenses, and that this rule generally applied to cases upon a bill of exceptions. There was no reported case of a new trial granted upon a bill of exceptions in which the question of expenses had been formally decided. The expenses of the bill of exceptions itself were in the same position as the expenses of the first trial. In the cases of *Muir* v. *Muir*, February 11, 1837, 15 S. 540; and *Henderson* v. *Russell*, October 22, 1895, 23 R. 25, at p. 32, there were neither discussions nor opinions upon the question of expenses. If *Henderson* v. *Russell* was to be regarded as an authority for giving the successful party in the discussion on the bill of exceptions the expenses of it, then it was also an authority for reserving the expenses of the first trial. Upon principle apart from authority it would be very hard that a person against whom what might ultimately prove to be an unfounded action had been brought, should be ordered to pay the expenses of a jury trial because the presiding judge had given an erroneous direction. By granting a new trial the Court did not finally decide upon any question in the action, and in this respect decisions like the present differed from decisions on appeals or reclaiming-notes.

[Lord Moncreiff—The pursuer's case in *Gibson* v. *Nimmo & Company* was ultimately proved to be unfounded.]

Argued for the pursuer—(1) The pursuer was at least entitled to the expenses of the bill of exceptions, and the discussion thereon—*Muir* v. *Muir*, *cit.*; *Henderson* v. *Russell*, *cit.*; *Gibson* v. *Nimmo & Company*, *cit.* (2) There was no analogy between the case of a new trial granted upon a bill of exceptions and the case of a new trial granted upon motion for a new trial. The "old rule" as to expenses never applied to cases of the former kind—Macfarlane on Practice in Jury Causes, pp.

283, 284. Since the "new rule" had been introduced, it might be that as a general rule the expenses of the former trial were reserved, but from the decision in *Gibson* v. *Nimmo & Company*, *cit.*, it appeared that there was a distinction between cases in which the question of law, which formed the subject of the bill of exceptions, went to the root of the case as it did in that case and in this, and where it did not, as in *Henderson* v. *Russell*, *cit.*, the expenses of the first trial being given in the first class of cases, but not in the second, and the ground of the distinction being that in the first class of cases a whole trial had been rendered nugatory by an erroneous contention in law put forward by the party who was successful at the first trial, and whose success was due to his erroneous contention being erroneously approved by the presiding judge. It would be very hard that the pursuer, whose contention upon the main point hitherto in dispute had been sustained by the Court, should be put in such a position that through poverty he might not be able to go on with his case.

At advising—

LORD JUSTICE-CLERK — The question which was left over for consideration after the exception in this case was sustained was whether the expenses of the bill of exceptions and trial should be now awarded or reserved. I am of opinion that they should be reserved. The practice of reserving the question of expenses when motion for a new trial is successfully made is now, as I think, well established, setting aside the former rule under which a litigant successfully applying for a new trial was made to pay the expenses of the previous one. In cases in which a new trial has been granted on the ground of misdirection, the practice has, so far as I know, been the same. I may refer to the case of *Wilson* v. *Merry & Cuninghame*, which was a leading case in the law of master and servant, and where exception was taken to the Judge's directions in law and refusal to give a direction asked, which the Courts held should have been given. I am not aware of any case to an opposite effect in the case of a bill of exceptions, unless it be the case of *Henderson*, in which the expenses of the discussion were allowed but the other expenses reserved. The only other case quoted which has occurred since *Wilson's* case is that of *Gibson* v. *Nimmo*. That case was not one of a bill of exceptions to directions given or refused. It was an exceptional case, having been one in which the Judge took the case from the jury, and directed a formal verdict for the defenders before the case had been fully concluded by evidence. There was thus no truly concluded trial, in consequence of a motion made to have it stopped, which the Judge accepted. It was expressly on the ground that the case was entirely exceptional that a motion for expenses was made, and this illustrates the fixity of the practice in ordinary cases, which was indeed admitted by counsel in the case. I am of opinion that in this case the same course should be taken as was taken in the case of *Wilson* v. *Merry & Cuninghame*, and that these expenses should be reserved, to be dealt with at the conclusion of the cause.

LORD YOUNG—This is an ordinary motion for expenses made by the successful party, and I regard the case as of importance with regard to the general question as to how expenses ought to be be dealt with in cases of this kind. This is not a motion for a new trial, the granting of which is in the discretion of the Court. Nor is it a motion by the losing party on a motion for a new trial for the expenses of the first trial as a condition of a new trial being granted. There is nothing of that kind here, nor could there be, for the judgment which we are about to pronounce is a statutory judgment which in the circumstances we are bound to pronounce, not a judgment which we pronounce in the exercise of any discretion which we have. We have no discretion in the matter, the Act of Parliament providing that in the case of a bill of exceptions, if the Court sustains the exceptions, or any of them, then the Court *shall* set aside the verdict and order a new trial. That is the course which is always followed, because it is statutory. In the case of a motion for a new trial, the question whether a new trial is to be granted is in the discretion of the Court. And the Court has frequently refused to grant a new trial even when there had been a misdirection by the presiding judge, or when the verdict was against the evidence, and if the Court in its discretion grants a new trial, it may do so on such terms as it may think just, in the exercise of its judicial discretion. It is not so in the case of a bill of exceptions, where, if we sustain the bill of exceptions—and we must sustain it if we think the ruling excepted to was wrong—if we sustain the bill of exceptions we must grant a new trial.

Now, here we were of opinion, including the Judge who tried the case, that the direction excepted to was erroneous and calculated to mislead, and so probably did mislead the jury, and that therefore we must grant a new trial. In fact we quashed the first trial. What we have here, therefore, is a motion made by the successful party for the expenses to which he has been put by the erroneous contentions of his adversary.

I think the case is of importance because it is attempted—as I think erroneously—to introduce a rule, established in the case of motions for a new trial, where the granting of the motion, and the terms as to expenses or otherwise on which it is to be granted, are entirely in the discretion of the Court, and where the Court used to give the expenses of the first trial as a condition of granting the new trial—that is to say, they gave expenses to the unsuccessful party on the motion for a new trial as a condition of the successful party on the motion getting the benefit of the decision of the Court on the motion—this is an

attempt to introduce that rule into a question as to expenses in a case where we are granting a new trial which we are bound to grant as the result of sustaining a bill of exceptions. In such a case the ordinary rule as to expenses should apply, and not any exceptional rule which has been established in the case of motions for a new trial.

Now, is there any doubt about the practice of the Court in regard to giving expenses, or as to the expediency of that practice. I think I shall have the assent of all your Lordships, and the assent of the profession generally, when I say that the general practice of the Court is to give expenses to the successful party, that is, according to the result. No doubt the question of expenses is always in the discretion of the Court, and it may in any case reserve the question of expenses, but it must deal with them. When I say that expenses are habitually given according to the result, the word "result" does not mean the final result of the case. It has been said long ago, although I do not think it has been said recently, that expenses should not be given till the end of the case, and that if, for example, there is an objection to the relevancy of the pursuer's averments or of the defender's defences, the expenses of the discussion should not be given to the successful party in the discussion, because it may ultimately turn out that the action or the defence is utterly unfounded, and that the action ought never to have been brought, or ought never to have been defended. I think it has been a long time since it has been so contended. It is the same with regard to discussions on other preliminary pleas, such as "no title to sue" or "all parties not called." We constantly give expenses to the party who has been successful in the preliminary discussion immediately after the decision following upon the discussion without waiting for the final result of the case. We do so every day. We did so yesterday, and we did so the day before. It may turn out that the action was unfounded and ought never to have been brought, but nevertheless we give the expenses to the successful party in the discussion on the preliminary plea.

Another contention which has not been heard for a long time is that the Court ought not to give expenses against the party who is defending a judgment which he holds, the judgment of a sheriff or a Lord Ordinary. That contention cannot now be maintained, and it is not maintained here.

But if neither of these contentions is put forward now, is there any reason which can be stated for treating a discussion on a bill of exceptions differently from any other discussion which takes place before us. I asked if there was any such reason. None was suggested. I venture to say none can be.

If that be so, is there any special ground for treating this particular case as an exception to the general rule? The defender puts forward as a defence—I rather think it is his only defence—but at least he puts forward prominently as a defence, a statement to the effect that the erection of the scaffolding required for the performance of their contract was proper joiners' work, and not such work as is usually executed by builders, that they entrusted the erection of the scaffolding to joiners in good repute, and who had large experience in the erection of high scaffolds, and that the joiners erected the scaffold, and represented the same to be safe and sufficient for the work. Now, the point at the trial was whether that defence was a good defence. If it was a good defence, then the bill of exceptions was not justified. The defence was that the defenders were not responsible for the scaffold. Evidence was led to raise that point, and then the question was raised at the trial whether it was a good defence. The Judge was asked to give a decision on the point, and he gave the ruling which has been excepted to. That ruling gave effect to the defenders' contention in point of law. The question might have been raised as matter of relevancy. I think it was better raised as it was. But this was the question discussed on the bill of exceptions. We were of opinion that the pursuer was right, and that the defender was wrong. Who then caused the discussion? Not the pursuer. Was the pursuer in fault? No. Then the pursuer should have the expenses to which he has been put. And what are the expenses to which he has been put? Not merely the expenses of discussion on the bill of exceptions, but also the expenses of the trial, which has been rendered nugatory by the erroneous contention of the defenders. I assume that he was right. I asked, if he was right why should the pursuer not have his expenses? What made me think this question of importance was the answer I received. The only reason suggested for his not receiving expenses was the general rule as to expenses upon a motion for a new trial, as it is stated in Mr Mackay's book at p. 647, and in the case of *Frasers* v. *Edinburgh Street Tramways Co.*, December 2, 1882, 10 R. 264, there cited. That is a statement of the rule to be observed when a new trial is granted upon a motion for a new trial. I should have thought the rule was stated in rather too general terms. No doubt it is generally better to reserve the question of expenses, but I do not think it is at all invariably so. As this question has been raised, it is perhaps better that I should say something with regard to it too. There are a good many cases in which the expenses incurred are granted as a condition of a trial being allowed to go on. Illustrations are endless, but, for instance, there is the case of a motion to postpone the trial. The trial is put off. The Court think it reasonable that it should be put off, but on condition of paying the expenses caused by the postponement. All that is in the discretion of the Court. The case of a motion for a new trial is precisely the same. The Court may think it reasonable or not according to circumstances that the party who is allowed a new trial should be bound to pay the

expenses of the first trial as a condition of proceeding with a second. I should rather have thought the rule was the other way from what is stated in *Fraser's* case. As I have said, the granting of a new trial upon motion for a new trial is entirely in the discretion of the Court, and the conditions upon which it is to be granted are entirely in their discretion. Lord Chief Commissioner Adam, in his book upon Trial by Jury, at p. 187 says—"In the case of *Macrow* v. *Hall*, 1 Burrow 11, in which a new trial was moved for on the ground of the verdict being against evidence, Mr Justice Foster (who tried the cause) reported it to be an action of trespass, *extremely frivolous*, but sufficiently proved." He said "That the defence was a very strong one indeed in mitigation of damages, but yet was not a sufficient denial of the trespass," so that in strictness the verdict was undoubtedly against evidence. However, he thought the action so *trifling, frivolous, and vexatious* that he should have thought sixpence damages to have been enough, whereupon the Court held, that notwithstanding its being a verdict against evidence (which in general is a good reason for setting aside a verdict and granting a new trial), yet the action appearing in the case to be frivolous, trifling, and vexatious, and the real damages little or none, they ought to refuse, and accordingly did refuse, to set aside the verdict; and Lord Mansfield added that it would even be a cruelty to the plaintiff to grant his motion, as he must pay the costs of the former trial, even should he prevail in the motion; and yet could only hope for such very small damages upon a new trial." I read this to show that upon a motion for a new trial the granting of the motion is entirely within the discretion of the Court. Lord Chief Commissioner Adam goes on upon page 188—"The case of *Farewell* v. *Chaffey*, 1 Burrow, 53, was tried upon the Western Circuit before Mr Sergeant Willes, who certified 'that the weight of the evidence was against the verdict.' But a new trial was denied, upon the nature of the action, the value of the matter in dispute, and other circumstances of the case. Lord Mansfield said a new trial ought to be granted to attain real justice, but not to gratify litigious passions upon every point of *summonis jus*."

At page 229 of Lord Chief Commissioner Adam's book I find the following quotation, "The case of *De Roufigny* v. *Peale*, 3 Taunton, 483, had stood first in the cause-paper for trial at a sittings in term. When the cause was called on, the defendant's attorney had delivered no brief to his counsel, although he had had a consultation with him the preceding night; and the cause being thus undefended, a verdict passed for the plaintiff. Soon after the verdict had been recorded, the defendant's attorney came into court with a brief to instruct his counsel to defend the cause. The Court was moved to set aside the verdict, and have a new trial on the payment of costs. The Court held that it would be only encouraging the negligence of attorneys to grant such an indulgence in the ordinary way at the client's expense. Attorneys ought to know that they are amenable to their clients for the consequences of such neglect. Neither would it be putting the plaintiff in the same situation if they were to grant the rule on payment of costs between party and party—they therefore granted a rule *nisi*, which on a subsequent day was made absolute for a new trial, upon payment by the defendant's attorney out of his own pocket of all costs as between attorney and client." I have read these extracts for the purpose of questioning its being the general rule that when an motion for a new trial is granted no expenses are given till the end of the case. Is it to be said that in such a case as the last to which I have referred, the Court would set aside a verdict except upon payment of the expenses of the first trial, whatever may be said about the general rule, and the change of practice. I quite admit that it is a question of discretion, and that the Court must consider in each case whether it is equitable that the payment of the expenses of the first trial should be made a condition of proceeding to a second.

But in the case of a motion for a new trial the Court is not bound to grant a new trial even when the verdict is against the weight of the evidence or when improper evidence has been admitted or even where there has been misdirection by the judge. It is different in the case of a bill of exceptions. In what was once a very well-known case—the hot-blast case—*The Househill Coal and Iron Company* v. *Neilson*, March 6, 1843, 2 Bell's Appeals 1, the Lord Chancellor, Lord Lyndhurst, at page 17, says—"Now if this were a motion for a new trial, having read the evidence, and having attended to the record, I really for one should feel strongly of opinion that we ought not to have disturbed the verdict, for I think the verdict is supported by the evidence. But when we come to consider a bill of exceptions we are bound to take a different view of the subject, and if we are of opinion that the law has been laid down incorrectly, and if we are of opinion that the jury may have been misled, we have no discretion to exercise, we are bound to say under such circumstances that the exception must be allowed." That is a strong case to show that the Court is not bound to grant a new trial upon motion for a new trial even when there has been misdirection by the judge, which might have misled the jury, and also that the case of a bill of exceptions is altogether different. In that case no costs were given to either party. They gave no expenses but they did not reserve them. They gave none. I am not surprised. There were thirteen exceptions and only one was sustained.

Your Lordship referred to the case of *Wilson* v. *Merry & Cuninghame*, May 31, 1867, 5 Macph. 807. That was a case of a bill of exceptions. The judgment was as follows:—"Allow the second of the exceptions: Set aside the verdict in this cause,

and grant a new trial, reserving all questions as to expenses until the final issue of the cause." I do not know the ground upon which the Court reserved expenses. It is not stated in the report. It is the fact, however, that there was more than one exception, and that there had also been a motion for a new trial. When the Court discharged the rule and sustained only one exception, they might in their discretion reserve the question of expenses. That case has no bearing on the present, where the question is as to the general rule, and no question arises upon the special circumstances of the case. I quite admit that if there were any special circumstances here, the Court might reserve the question of expenses. In the case of *Merry & Cuninghame* the House of Lords when they affirmed gave expenses, and did not reserve them, as appears from the report in 6 Macph. (H.L.) at p. 96.

But we have a case exactly in point—I refer to the case of *Gibson*. Your Lordship has distinguished that case from the present, on the ground that it was not the ordinary case of a bill of exceptions being sustained and a new trial consequently granted, but a case where there had been no concluded trial at all. But where is the difference? In that case we were unanimously of opinion that the direction given was erroneous, and we therefore allowed the exceptions and granted a new trial as we were bound to do. In that case we gave the pursuer expenses, including the expenses of the first trial, on the ground that the first trial had been rendered nugatory by the erroneous contention of the defenders given effect to by the erroneous ruling of the Judge. And so here the first trial has been rendered nugatory by an erroneous contention and an erroneous ruling. How could a case be more in point? Why is it not in point? The only reason suggested is that the case was exceptional, and that the general rule is to reserve expenses—that is to say, there is no reason why we should not follow the case of *Gibson* except the rule which is said to be established in the case of motions for a new trial—a rule which is altogether inapplicable to a case of a bill of exceptions. I am therefore of opinion that we should follow the case of *Gibson*, and that the pursuer should have his expenses, including the expenses of the first trial.

I have said that I consider this case of importance, and I do so because we are asked to proceed upon a different rule in the case of bills of exceptions to that which we follow in other cases, and because I think the rule founded upon has no application to cases like the present.

Lord Trayner—In the recent trial of this case the jury returned a verdict for the defenders. On an exception taken by the pursuer to a direction given by the presiding Judge, which has been allowed, the verdict has been set aside and a new trial ordered. The pursuer now moves that he shall be found entitled to the expenses of the first trial, or at all events to the expenses of the bill of exceptions and the discussion thereon. According to the older practice of our Court—that is, the practice prior to about the year 1860—a new trial was usually only granted on condition of the party obtaining the new trial paying to his adversary the expenses of the first trial, or so much thereof as would not be available for the second trial. There were exceptional cases where the expenses were not so disposed of, but reserved, and of these may be taken as examples the cases of *Stewart*, March 7, 1856, 18 D. 786, and *Magistrates of Elgin*, January 17, 1862, 24 D. 301. In this latter case there appears to have been a serious debate on the question with citation of authorities, with the result that the expenses were reserved. In the case of *Bell* v. *Reid*, Feb. 28, 1862, 24 D. 648, the same course was adopted. The rule or practice thus commenced has since been followed, so far as my experience has gone, without any variation or change; and in the case of *Fraser*, Dec. 2, 1882, 10 R. 264, was recognised as a general rule, well established, and was there followed. The rule is stated by Mr Mackay in his work on the Practice of the Court of Session (ii. 550), to which the Lord President referred with approval in the case of *Fraser* as follows:—"When a new trial is granted, the expenses already incurred are now almost universally reserved until the result of the second trial, but the Court sometimes makes their payment a condition of allowing a second trial."

I understand the rule as thus stated is not disputed by the pursuer, but he maintains that it is confined to cases where the new trial is granted on account of the verdict being contrary to evidence, and does not apply to cases where the new trial is granted on account of a misdirection by the judge. Well, in the first place, it may be observed that no such distinction is stated by Mr Mackay nor by the learned judge I have referred to who approved of Mr Mackay's statement of the rule. In the second place, I think there is no room for such a distinction. A new trial is allowed or ordered because the first trial has proved abortive, and it is of no consequence, so far as the expense incurred by the first trial is concerned, whether that has been brought about by the error of the jury or the error of the judge. A new trial is necessary in either case—equally in either case—and is therefore ordered or allowed. In the third place, the supposed distinction is not supported by any authority — indeed, any authority there is on the subject (with the exception of one case to which I shall afterwards advert) is against it. In the case of *Wilson* v. *Merry and Cuninghame*, May 31 1867, 5 Macph. 807, decided soon after the new (that is, the existing) rule was introduced, a verdict was set aside on the ground of misdirection, and the interlocutor of the Court was as follows: "Allow the second of the exceptions; set aside the verdict in the cause, and grant a new trial, reserving all questions as to expenses until the final issue of the cause." That is the only case I

can find after a careful search of the reports, bearing upon the question I am now dealing with, from the year 1860 until the year 1895, and it is an authority directly against the pursuer's argument. In 1895, however, there is the case of *Gibson*, March 15, 1895, 22 R. 491, decided in this Division of the Court. In that case the jury returned a verdict for the defenders, but an exception was taken to a direction given by the Judge, and that (after a discussion on a bill of exceptions) having been allowed and a new trial ordered, the Court found the pursuer entitled "to the expenses of the first trial, in so far as not available for the second, and *quoad ultra* all his expenses from the date of said first trial till this date." I cannot remember that the question of expenses was discussed at all, and while the report of the case shows that something was addressed to the Court by the parties on the subject, there does not appear to have been any serious discussion, or any citation of authorities. Indeed, it appears from the report that the pursuer's counsel in moving for expenses admitted the general rule and asked for expenses only on the ground of the exceptional nature of the direction which had been successfully excepted to. For the interlocutor in *Gibson's* case I am quite unable to account. The finding of expenses in that case is opposed to the opinion I now hold, and have held from a period long antecedent to 1895. It is opposed to the authority of *Wilson's* case, and to the well established and recognised practice of the Court. But further, it is the only case in the books, so far as I know, in which the party asking and obtaining a new trial has been found *entitled* to expenses. According to the older practice, the pursuer in *Gibson's* case would have been found *liable* in expenses as the condition of a new trial being granted, but that is the practice which has been abandoned for what I regard as the fairer and better rule which now prevails. I cannot regard the decision in *Gibson's* case as any authority for departing from a settled rule of practice; and indeed it does not appear to have been considered (even in this Division where it was decided) as of much authority, for in the very next case it appears to have been disregarded. In the case of *Henderson* (Oct. 22 1895, 23 R. 25) a new trial was allowed to the defender on the ground of misdirection. The defender was allowed the expense of the bill of exceptions and the discussion thereon, but *quoad ultra* expenses were reserved—that is, the expenses of the first trial were reserved. So far as the report of this case shews, nothing was said from the bar on the question of expenses.

I think it must now be considered as settled that where a new trial is allowed, the expenses of the first trial are to be reserved until the final issue of the cause, and that equally where the new trial is allowed on the ground that the first verdict was contrary to evidence, or is allowed on the ground of misdirection by the Judge.

A good deal more might be said in favour of the view that the expenses of a discussion on a rule, or on a bill of exceptions should be allowed to the party who is successful in that discussion. But so far as the authorities or existing practice goes, no distinction appears to have been taken between the expenses of such a discussion and the expenses of the first trial, both being reserved. I am for adhering to the existing practice, and therefore think the pursuer's motion should be refused. I do not think it necessary to say anything in vindication of a rule which has been so long established, although its vindication would not be difficult.

Lord Moncreiff—The case with which we have to deal is the ordinary case of a verdict set aside on the ground of misdirection. The evidence is not before us. We do not know whether the jury would have returned the same verdict if a full and proper direction had been given; hence the necessity for a new trial, But there is nothing exceptional in this case to take it out of the settled rule that where a new trial is granted the expenses of the first trial should be reserved. No doubt the question of expenses is in the discretion of the Court; but where the Court has adopted and acted upon a general practice as to awarding, withholding, or reserving expenses in particular cases or at particular stages of a process, such practice must be followed, unless exceptional circumstances exist to take the case out of the rule. Therefore what we have to consider is, what is the practice in jury cases?—the practice in other cases is comparatively immaterial.

It was at one time the rule, borrowed from English practice, to make payment of the expenses of the first trial by the party who lost the verdict, but succeeded in getting it set aside, a condition of a second trial being allowed. It appears from Mr Macfarlane's work (published 1837), and the decisions which he cites, that an exception to this rule was recognised where the verdict was set aside on the ground of misdirection by the judge; but the exception was limited to this—that expenses were not awarded against the party who lost the verdict; expenses were reserved. The reason stated by the author, p. 285, is that neither party is supposed to be responsible for the judge's errors.

The practice was subsequently further modified, but only to this extent, that in all cases in which a new trial was granted on whatever ground (unless in exceptional circumstances) expenses were reserved and not awarded against the party who obtained a new trial. In *Frasers* v. *The Edinburgh Street Tramway Company*, 10 R. 270, this is stated by Lord President Inglis as having been long settled.

There may have been exceptional cases in which this practice was departed from; but with the solitary exception of the case of *Gibson* it was, as far as I know, in the direction of the earlier practice, namely, of making the party who lost the first trial pay his opponent's expenses in that trial as a condition of a second trial being granted.

It is said that there is a distinction between a case in which a verdict is set aside as against evidence, and one in which a new trial is granted on the ground of misdirection. Although I do not perceive the distinction in a question of expenses, there is some warrant for saying that it has been recognised to certain limited effects. It is stated, as I have mentioned, by Mr Macfarlane as a recognised ground for reserving expenses instead of awarding them against the party who lost the first trial, that the first trial was lost through misdirection; and it is also indicated in some of the decisions (for instance in *Stewart* v. *Caledonian Railway Company*, 8 Macph. 486) that in the same case a party who has lost the first trial through misdirection may ultimately obtain the expenses of it if he proves successful in the second trial. But this distinction has never been acted on as a reason for awarding expenses to the party who was unsuccessful in the first trial before it has been ascertained by the result of the second trial that his case was from the first well founded. On the contrary, the practice has been to reserve expenses in such cases just as in cases in which the verdict has been set aside as against evidence. I may refer as a notable example to the well-known case of *Wilson* v. *Merry & Cuninghame*, 5 Macph. 807, affirmed in the House of Lords, 6 Macph. (H. of L.) 84.

This being the settled practice in jury causes, it is not necessary to justify it, and the practice as to awarding expenses in other cases cannot affect it. The leading object of the practice probably was to make it as difficult as possible to interfere with the verdict of a jury. There is this further consideration to support it, that though a party to a suit gets a verdict set aside on the ground of misdirection, it may quite well be that on a second trial (as happened in the second trial in *Gibson's* case) the second jury will come to the same result as the first, and the Court may in the end be satisfied that the case from the first was frivolous and unfounded.

As to the case of *Gibson*, I would only observe that if, as might be gathered from the note appended to the report, expenses were there awarded to the pursuers because in the opinion of some of the Court (from which I entirely dissented) the course adopted of withdrawing the case from the jury was incompetent, the case is not in point, because in this case there was nothing exceptional in the course followed.

If this is not the true explanation, I am humbly of opinion that the decision was inconsistent with the settled practice, and should not be followed.

The general question was certainly not argued, and there was no citation of authority.

I therefore have no hesitation in holding that the expenses should be reserved.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the bill of exceptions, Allow the first exception in said bill: Set aside the verdict and grant a new trial, reserving the question of expenses."

Counsel for the Pursuer — Hunter — Grainger - Stewart. Agent — William Green, S.S.C.

Counsel for the Defenders—Salvesen—A. S. D. Thomson. Agent — Alexander Wylie, S.S.C.

Friday, December 23.

SECOND DIVISION.

GRAHAM'S TRUSTEES *v.* GRAHAM'S TRUSTEES.

Marriage - Contract — Implement of Provision of Annuity to Wife—Purchase of Government Annuity.

A testator left his whole means and estate to trustees, *inter alia*, for implement of the provisions contained in his marriage-contract. By his marriage-contract he had bound himself and his representatives to pay to his widow a free alimentary annuity of £100, and he conveyed two properties in security of these provisions to his marriage - contract trustees, binding himself and his representatives, in the event of the subjects conveyed proving insufficient as a security for the annuity, to provide such further security as would with the foresaid subjects or the free proceeds thereof produce a sum equal to the value of an annuity of £100. The marriage-contract provided that the marriage-contract trustees should have power to discharge the security and to accept in lieu thereof such other security or securities as they might see fit, and change the same from time to time. The testator was survived by his wife. The properties ultimately conveyed in security of the annuity were sold and did not realise enough to secure the payment of the annuity. *Held* that the testamentary trustees would sufficiently implement the obligations in the deceased's marriage - contract by purchasing a Government annuity in name of the marriage - contract trustees, and that these trustees would be in safety in accepting such annuity.

Trust—Termination of Trust — Purchase of Annuity out of Residue to Enable Trust to be Wound up.

Held (*diss.* Lord Young) that testamentary trustees were not entitled, without the consent of all the beneficiaries, with a view to winding up the trust, to purchase an annuity out of the capital of the trust estate, in implement of an obligation undertaken in the testator's marriage - contract, and imposed upon his trustees, to provide an annuity to his widow (instead of paying the annuity out of the income of the trust), such application of capital not being an act of ordinary trust administration.