contention is unfounded, the horse having been kept in the pursuers' stables at the request and for the accommodation of the defender. According to my reading of the proof, there was no limitation of the time during which the horse might be kept; and even though that were more doubtful than it appears to me to be, the pursuers ought to have been made aware that the keeping of the horse beyond a particular period might be made the basis of such a plea as that which is now maintained. No such warning was given, and there being no suggestion that the pursuers acted in bad faith, or that the defender suffered by what was done, the defence which has been set up up must, as well in law as in justice, be overruled.

I have no difficulty in agreeing in the judgment which your Lordship has proposed, that the appeal be dismissed.

Lord Rutherfurd Clark—As far as I am concerned, I wish to abstain from any discussion of the legal principles which were argued, although they are not improbably involved in the decision of the case. I agree, however, that the judgment of the Sheriff should be affirmed. But I do so simply upon the facts of the case as they have been explained to us. It seems to me very clear that the horse was retained in the custody of the pursuers at the request, or at least with the consent, of the defender. That being so, I think it impossible for the defender to maintain that the pursuers were in breach of their agreement in so retaining the custody of the animal. I do not enter further into the facts, because they were fully explained in the very clear and able speech of Mr Mackenzie, with which I entirely concur.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Appellant (Defender)—Mackintosh—Lang. Agent—J. Drummond, W.S.

Counsel for Respondents (Pursuers)—R. Johnstone—C. K. Mackenzie. Agents—Hope, Mann, & Kirk, W.S.

Thursday, November 2.

FIRST DIVISION.

[Lord Adam, Ordinary.

FULLARTON *v.* CALEDONIAN RAILWAY COMPANY.

Process—Expenses—Judicial Tender—Jury Trial—Motion for New Trial on Ground that a New Trial is Essential to the Justice of the Case—Act 55 Geo. III. c. 42, sec. 6—Reparation.

In an action of damages for bodily injury sustained by an accident for which the defenders were admittedly responsible, the verdict was for the pursuer, but the sum awarded by the jury fell considerably below the amount of a judicial tender made by the defenders previously to the trial. The pursuer thereafter moved for a rule on the defenders to show cause why a new trial should not be granted, on the ground that the jury had given their verdict under a mistaken impression that their verdict would necessarily carry expenses in his favour, and he produced an affidavit by the foreman of the jury to the effect that the jury intended that expenses should be carried by the verdict. The Court, on the ground that the question of right to expenses was one outwith the province of the jury in assessing damages, *refused* the rule.

The Act 55 Geo. III. c. 42, by which jury trial in civil cases was introduced in Scotland, enacted by sec. 6—"That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial on the ground of the verdict being contrary to evidence, on the ground of misdirection of the judge, on the ground of undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case: Provided also that such interlocutor granting or refusing a new trial shall not be subject to review by reclaiming petition or by appeal to the House of Lords."

Alexander Chalmers Fullarton, certificated teacher, Greenock, raised an action against the Caledonian Railway Company concluding for £5000 as damages for injuries sustained by him in a collision on the defenders' line of railway at Pennilee, near Paisley, on the 8th September 1880. The case was tried before Lord Adam and a jury on the 12th, 13th, 14th, and 15th of July 1882, when a verdict was returned for the pursuer assessing the damages at £600. Previously to the trial the defenders had made a judicial tender of £750, and in respect of this tender they were according to the ordinary rule of practice entitled to the expenses of the trial.

The pursuer now moved for a rule on the defenders to show cause why the verdict should not be set aside and a new trial granted.

The motion was grounded on the words of the section of 55 Geo. III. c. 42, sec. 6, just cited, "Such other cause as is essential to the justice of the case;" and it was maintained that the verdict as it stood was not the verdict of the jury at all, and that justice had not been done, owing to the deliberation of the jury having proceeded upon a materially erroneous view of the case.

Authorities—*Ewing* v. *Chalmers*, Nov. 26, 1835, 14 S. 69; *Dick* v. *Stewart*, Jan. 16, 1836, 14 S. 218 and 478; *Shields* v. *North British Railway Company*, Nov. 24, 1874, 2 R. 126.

The following affidavit by the foreman of the jury was produced by the pursuer—"I was foreman of the jury who tried this case before the Honourable Lord Adam on the 12th, 13th, 14th, and 15th days of July 1882. That the verdict arrived at in the jury-room by the jury was that the pursuer should get £600, and all expenses to be paid by the defenders, and this was written on a pencil memorandum by me, as foreman, which I afterwards handed to the defenders' agents. That in delivering the verdict in open Court I simply stated £600, having been led to understand that the verdict would carry expenses, and that I did not therefore require to mention the finding as to the expenses. As foreman I affirm that it was the clear and deliberate intention of the jury that the pursuer's expenses

should be paid in addition to the £600, and that they meant this to be a part of their verdict, and a representation to this effect, signed by the jurymen, was, on the 24th day of July 1882, transmitted to the defenders by me, a copy of which is herewith produced—All which is truth," &c.

A representation in substantially the same terms as the affidavit of their foreman was signed by eleven of the jurymen, and forwarded to the directors of the Caledonian Railway, who replied through their secretary declining to interfere with the result of the trial. In this representation it was stated that the jury had understood from the speech of the counsel for the defenders and from the Judge's charge that the expenses of the trial were to be paid by the company since it admitted liability. It was also stated in the representation that had the jury known that there was any chance of the expenses not being paid by the company they certainly "would have added substantially to the sum in their verdict."

Counsel for defenders were not called upon.

At advising—

LORD PRESIDENT — The rule which is well settled in practice, that when a verdict falls below a tender judicially made expenses shall be awarded against the party obtaining the verdict, is an extremely wholesome rule, and calculated to prevent improper and vexatious litigation. It appears to me that if we listened to the motion now made to us we should destroy altogether the utility of that rule, because wherever it could be shown that the jury were not aware that such tender has been made as should carry expenses against the pursuers in the event of the sum given by the verdict being less than the amount tendered, a new trial would be granted so as to enable them to take that into account. Mr Pearson very ingeniously endeavoured to disguise that proposition in a number of ways, but he found it impossible. That is the plain ground upon which this application is made. What the jury did in the present case was to assess the damages at £600, and it is not said that this is so unreasonably small a sum as to entitle the pursuer to a new trial upon that ground. We must assume therefore that the verdict for £600 is a reasonable verdict in itself. The jury tell us, in the form in which this matter is brought before us, that if they had known that that verdict did not carry expenses they would have given more. Now, I think if upon that ground they had given more they would have done quite wrong, and that if that had been clearly demonstrated to us we should have granted a new trial upon the application of the defenders, for this plain reason, that the jury have nothing to do with the question of expenses. Their duty is to assess the damages according to the evidence, and they are quite entitled to assume, and should assume, that a verdict for the pursuer carries expenses. That is the general rule, and the only reason why in a case like this it does not carry expenses, but, on the contrary, leads to the pursuer being subjected in expenses, is on account of the pursuer's own conduct. The matter is not before the jury, or within their province at all. I am therefore for refusing this rule.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. The question of expenses in a cause depends upon the conduct of the parties in the litigation. If either of the litigants acts unreasonably, the Court in the exercise of its discretion will take the unreasonableness into consideration in dealing with the expenses, and it is one of the settled rules of Court founded upon, that if after a tender has been made and rejected the party goes on to litigate and gets less than the tender he shall bear the expenses which obviously he has caused by his unreasonable conduct in declining to accept the amount in the tender. The elements for judging of the question of expenses are not before the jury; they are expressly withheld. In this case the jury had no means of judging how the question of expenses should be determined, and properly so, because the question of expenses is not one for the jury, but for the Court, and would only be a misleading element if the jury were to take it up at all. In this case it appears to me that the jury have assessed the damages on the general view which all juries may go upon, that wherever fault is admitted the pursuer is entitled to his expenses. But if in the conduct of the litigation the party has forfeited his right to expenses, that is plainly a matter for the Court. I do not think Mr Pearson has succeeded in his argument in showing that the jury have assessed their damages on any other footing than that of giving the pursuer the full amount of compensation to which they thought him entitled in respect of the injury, and I am of opinion that the verdict should stand.

LORD ADAM—I concur. I do not know whether it would be a satisfaction to the pursuer to know or not, but I can only say that I quite approve of the verdict, and thought the damages were reasonable and sufficient.

The Court refused motion for a rule.

Counsel for Pursuer — Pearson. Agents — Smith & Mason, S.S.C.

Counsel for Defenders—D.-F. Macdonald, Q.C. —R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Thursday, November 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ROSS *v.* THOMSON & COMPANY.

Reparation—Negligence—Unfenced Machinery—Liability of Master to Fence Machinery in a Workshop in which Young Children are Employed.

A boy of ten years of age was employed at a piece of unfenced machinery in a ropework, and was injured by the fingers of one of his hands being caught in the machinery. There was no statutory liability to fence their machinery. In an action for damages on the ground that the machine ought, having regard to the youth of the persons who were