it would not be justifiable to allow so trifling a difference to form ground for differing from him. I think therefore that no sufficient reason has been made out for disturbing the Lord Ordinary's assessment of the constant rent of the grass and policy parks at £350.

There remains a small matter with regard to the constant rent of the lands under lease which the Lord Ordinary has fixed at £1021, 4s. It appears that by some of the leases the tenants are bound to pay to the proprietor sums amounting in all to £21, 6s. 9d. over and above the rents. These sums represent the cost of the premiums on policies of fire insurance on the farm buildings taken out by the proprietor, who, however, is not taken bound to employ any sums which might become payable under the policies in rebuilding or repairing the buildings damaged by fire. The heritor's contention before us was that these sums are not stipulated for as rent and do not form part of the consideration for the lands. They are, however, payments wholly for the benefit of the proprietor, and if they are not just so much additional rent for the lands leased it is difficult to imagine under what category they can be brought. They constitute consideration other than rent in the sense of the Valuation Acts—*Walker*, (1862) 24 D. 1453. They are unaffected in their character by any counter-obligations by the proprietor other than such as are incumbent on him as landlord—see *Clark* v. *Hume*, (1902) 5 F. 252. It is impossible to refer them to any collateral contract as was done by the majority in the highly special case of *Breadalbane* v. *Robertson*, 1914 S.C. 215. It seems to me therefore that they fall directly within the dicta of the Judges of this Division in *Hamilton's Trustees* v. *Fleming*, (1870) 9 Macph. 329. In short, they form part of the rent payable for the lands. The teindable rental of the lands under lease must therefore be taken at £1042, 10s. 9d. and not £1021, 4s.

The result is to fix the constant yearly value of the lands at the sum of £307, 12s. 4d. instead of the Lord Ordinary's figure of £303, 7s.

LORDS MACKENZIE and SKERRINGTON concurred.

LORD CULLEN did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary, and found and declared the teinds, both parsonage and vicarage, of the lands in question were of the constant yearly value of £307, 12s. 4⅘d., being one-fifth of the constant rent and value of £1538, 1s. 9d., the constant yearly value of the said lands and pertinents in stock and teind jointly.

Counsel for the Reclaimer — Mackay, K.C.—Stevenson. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

Counsel for the Respondent—Chree, K.C. —Aitchison. Agents—Carment, Wedderburn, & Watson, W.S.

Thursday, December 22.

FIRST DIVISION.

[Lord Blackburn and a Jury.

MILLER *v.* MAC FISHERIES, LIMITED.

Process — Jury Trial — Res noviter — New Parole Evidence—New Trial—Jury Trials (Scotland) Act 1815 (55 *Geo. III, cap.* 42), *sec.* 6.

The unsuccessful pursuer in an action before a jury for damages in respect of personal injuries having discovered new additional parole evidence since the date of the trial, applied for a new trial on the ground of *res noviter veniens ad notitiam*. The Court *refused* the application in respect that the testimony of the proposed additional witnesses was merely in further corroboration of evidence already led.

The Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42) enacts—Section 6—"And be it further enacted . . . that in all cases where 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 . . . for a new trial on the ground . . . of *res noviter veniens ad notitiam*. . . ."

Mrs Christina Miller, 4 Clerk Street, Edinburgh, *pursuer*, brought an action for damages against the Mac Fisheries, Limited, *defenders*, in respect of injuries sustained by her through falling over a fish box, which she averred had been left by them or their servants recklessly and negligently on the roadway opposite their shop.

At the trial of the case before a jury the defenders led evidence to show that no fish box was on the roadway at the time of the accident. The only evidence that a fish box was in the position averred by the pursuer was that of the pursuer herself, corroborated by a small boy who was with her. The jury returned a verdict for the defenders. As a result of the reports of the trial in the public press two men gave affidavits that they had seen a fish box standing on the roadway, and that the pursuer fell over it.

The pursuer obtained a rule on the ground of *res noviter veniens ad notitiam* for the defenders to show cause why a new trial should not be granted.

At the hearing of the case on 17th December 1921, argued for defenders—New trials on the ground of the discovery of additional evidence had only been granted when the evidence was documentary, as in *Bannerman* v. *Scott*, 1846, 9 D. 163, and *Coul* v. *Ayr County Council*, 1909 S.C. 422, 46 S.L.R. 338. When new evidence was purely oral applications had been consistently refused—*Paterson* v. *Stow*, 1st February 1817, F.C.; *Patterson's Trustees* v. *Johnston*, 1816, 1 Mur. 71; *Baillie* v. *Bryson*, 1818, 1 Mur. 317; *Bell* v. *Bell*, 1819, 2 Mur. 130; *Longworth* v. *Yelverton*, 1865, 3 Macph. 645; Ersk. Inst. iv, 3, 3; Macfarlane, Practice of Jury Trials, 1837, p. 267.

Argued for pursuer—An application for

new trial on the ground of additional oral evidence having been discovered had never been held incompetent. It was entirely in the discretion of the Court. Here the proposed new witnesses had quite voluntarily communicated with the pursuer upon reading of the trial in the public press. Counsel referred to *Auchmoutie* v. *The Laird of Mayne*, 1609 M. 12,126.

At advising—

LORD PRESIDENT—The pursuer alleges that she fell over a fish box carelessly left by the defenders on the street in front of their fish shop. The jury to whom she presented her case gave a verdict for the defenders, preferring the evidence of the defenders' employees, who one and all denied that any fish box was lying on the street at the time of the pursuer's accident, and contradicted the pursuer's evidence to the effect that they removed it into the shop immediately after the accident had happened. The pursuer's account of her mishap and its cause was corroborated by a small boy who was with her, but although she is proved to have stated to some of the passers-by who collected while she was recovering herself that she had fallen over one of the defenders' fish boxes, no witness (except herself and the small boy) was adduced to say that he saw the fish box either on the street or in course of removal into the defenders' shop. On publication of a report of the trial in a newspaper next day, two men at once communicated with the pursuer saying that it was they who picked her up when she fell, that they saw the fish box lying on the street which caused her fall, and that immediately afterwards two persons who appeared to be employees of the defenders quickly removed it into their premises. The pursuer asks for a new trial on the ground of *res noviter veniens ad notitiam*. She has lodged a minute explaining the circumstances, and has produced affidavits by the two men. Her purpose is to reinforce her own and the small boy's testimony by the additional evidence of these two men as witnesses at a new trial. It is clear that the case is not one of the discovery of a new fact bearing on the ground of action, but only of additional evidence in support of a fact originally averred and supported by testimony in the pursuer's case.

Anything proponed to the Court by a party after the proper time has gone by, which the Court is asked to entertain on the ground that the party did not and could not know of it in time, is *res noviter veniens ad notitiam*. The allowance of *res noviter* is always more or less in the nature of an indulgence. Accordingly it may present to the Court a delicate problem of discretion. But it is an indispensable condition of the allowance that the *res noviter* should be material to the justice of the cause, and it is inconceivable that it should be refused if it is seen to be such that to exclude it from the materials of judgment would prevent justice being done.

The grounds which justify, or fall short of justifying, the allowance of *res noviter* vary somewhat according to the circumstances in which the *res noviter* is proponed. Thus, with regard to reductions of its own decrees by the Court of Session, Erskine (Inst. iv, 3, 3)—glossing Stair (Inst. iv, 1, 44), and Mackenzie (Inst. iv, 3, 1)—says that the Court may proceed "upon the emerging of any new fact or voucher in writing" which was not and could not be known before the decree. Again, in the older forms of Court of Session process, once the record had been closed no new averments of fact could be added except in the case *res noviter veniens* (Shand's Practice, vol. i, 337), and production of any new document after closing of the record was forbidden (as regards documents in the possession or under the control of the party) unless the party could instruct that the document was *res noviter veniens* (Shand's Practice, vol. i, 366). It will be observed that both in the case of the reduction of a Court of Session decree and in the case of these older rules of process in the Court of Session, the allowance of *res noviter* applied not only to new matters of fact but also to what may properly be called new matters of evidence—provided the new evidence was in writing. Moreover, there is no doubt that the Court has power to open up a concluded proof either on a condescendence of *res noviter*, adding new and material facts to those on which the proof was originally allowed, or on a minute disclosing additional and material evidence, written or parole, which has emerged since the proof was closed and could not by reasonable diligence have been obtained before. If the *nova res* is matter of evidence only it does not affect the pleadings as adjusted, and a minute disclosing what it is and how it is proposed to prove it takes the place of a formal condescendence; but it is *res noviter veniens ad notitiam* all the same, and the question of allowing or refusing it has to be determined in the light of the general doctrine applying to all kinds of *res noviter*. The power of the Court in this matter is as wide in its scope as it is delicate in its administration. *Taylor* v. *Provan* ((1864) 2 Macph. 1226) is an example of an application by minute to lead additional parole evidence after a concluded proof. It was refused, but the remarks made by Lord Justice-Clerk Inglis at the commencement of his opinion show how extensive the power of the Court is. There are even special instances in which the Court has ordered the re-examination of a particular witness—*Inglis* v. *Inglis*, (1532) Balfour's Practicks, 374; *Tait* v. *Davie*, 22nd June 1815, F.C.—where there was serious reason to apprehend a miscarriage of justice; but such cases have nothing to do with *res noviter*. In *Longworth* v. *Yelverton* ((1865) 3 Macph. 645)—a case of the tender of additional parole evidence rather than of the submission of new facts, though a condescendence of *res noviter* was put in—the Court while refusing to allow the additional evidence proceeded largely on the fact that the case had already been subject to final judgment in the House of Lords. But the door was not shut against the allowance of

additional parole evidence in any circumstances. And there are several recent instances of additional written evidence coupled with such additional parole testimony as might be necessary to disclose the history of the writing being allowed after a concluded proof—*Reid* v. *Haldane's Trustees*, (1891) 18 R. 744; *Coul* v. *Ayr County Council*, 1909 S.C. 422.

Lastly, *res noviter veniens* appears as one of the statutory grounds upon which in jury practice a new trial may be ordered. It is, I think, an easier matter to allow additional evidence after a concluded proof than to put parties to the trouble and expense of leading the whole case afresh before a new jury. But so far as competency goes the power of the Court to order a new trial on account of emerging matters of fact, or on account of emerging matters of evidence, written or parole, is the same as in the case of allowing additional evidence after a concluded proof. My opinion is that the statutory category of *res noviter* in the Jury Act of 1815 covers both new fact and new evidence. I do not think this has been at any time doubted. In Mr J. P. Grant's book on New Trials, published in Edinburgh very shortly after the date of that Act, I find the following at page 131—"Where evidence has newly come to the knowledge of the party, where there is, as it is termed in the law of Scotland, *res noviter veniens ad notitiam*, with which he neither was nor ought in reasonable diligence to have been acquainted at the time of the trial, but which is material to the justice of the case, then undoubtedly justice requires that a new trial should be granted." And Mr Commissioner Adam in his book on Trial by Jury gives as one of the grounds for granting a new trial "that evidence had been discovered subsequent to the trial which could not have been foreseen or known before the trial" (p. 224). There is one reported case in which a new trial was granted (on the issue of a testator's sanity) upon an application founded on the discovery of a bundle of letters written by the testator which a haver, duly examined before the trial, had by an innocent mistake failed to produce but subsequently disclosed. This circumstance, coupled with the fact that the letters themselves were material to the issue, was held to justify a new trial —*Bannerman* v. *Scott*, (1846) 9 D. 163. In *Byres* v. *Forbes*, (1866) 4 Macph. 388, and in *Fletcher* v. *Wilsons*, (1885) 12 R. 683, a new trial was refused notwithstanding the discovery of additional written evidence, but the grounds were either that the document had been in the possession of the party's agent or that the writing was not material. There are also some reported cases in which a new trial has been applied for on the ground of the discovery of additional parole evidence, *e.g.*, *Patterson's Trustees* v. *Johnston*, (1816) 1 Mur. 71, at p. 78; *Baillie* v. *Bryson*, (1818) 1 Mur. 317; and perhaps also *Bell* v. *Bell*, (1810) 2 Mur. 130, at p. 135. No doubt is thrown in any of these cases on the competency of such an application, but in none of them was the application successful.

Now in the present case I see no reason to doubt that the pursuer's preparations for the trial were made with all reasonable diligence, and I think there is no ground for imputing to any fault either of omission or of commission on her part that she had not at an earlier stage got into contact with the two witnesses she now wishes to adduce. Her application is accordingly not met by such cases as that of *Paterson* v. *Stow*, 1 Feb. 1817, F.C. But the evidence of these witnesses neither imports into the case any new feature nor puts any new complexion upon it. It is confined in its effect to the further corroboration of the account which the pursuer gave of her accident at the trial —an account which was not destitute of corroboration as it was. In short, it does no more than intensify the conflict of testimony which the trial disclosed. The proposed additional evidence is undoubtedly relevant to the pursuer's case. But can it in these circumstances be regarded as material to the justice of the cause? In deciding that question one must keep in mind the necessity of what Lord President M'Neill in *Longworth* v. *Yelverton* (3 Macph. 645, at p. 648) called the conclusiveness of proof. If the accidental turning up of an unexpected witness whose parole evidence promises only to afford additional corroboration of the evidence already given for one party, and to add somewhat to the contradiction of evidence already given for the other, is to be regarded as being of sufficient materiality to justify a new trial there would be no end to the multiplication of trials in which a conflict of testimony occurs. The circumstances of this trial present no specialty; they are not tinged by any element of surprise; and the pursuer had every opportunity of collecting evidence. The pursuer's case was adequately and fairly presented to the jury in the evidence which was actually led. I do not think the testimony of the two additional witnesses was necessary to enable a just decision to be reached, and I think the case is one in which the granting of a new trial cannot be justified.

LORD SKERRINGTON—I agree with your Lordship that the expression *res noviter veniens ad notitiam* as used in the 6th section of the Jury Trials Act 1815 is wide enough to include an application for a new trial made upon the ground of the discovery of new and additional parole evidence since the date of the trial. At the same time it is significant that, although several applications for a new trial on that ground are recorded in the books, it does not appear that any one of them was successful, though in none of them was the competency of such an application objected to. At first sight the case of *Bannerman* v. *Scott's Trustees*, 9 D. 163, 1052, 10 D. 353, appeared favourable to the pursuer's application, if only by way of analogy, because in principle it is difficult to distinguish between the discovery of new witnesses and the discovery of letters or other writings which incidentally throw light upon the issue between the parties, *e.g.*, the sanity of a testator at

a particular date. On closer inspection, however, it appears that the decision proceeded upon the specialty that the writings which formed the ground for the application for a new trial would have been available for use by the applicant at the first trial but for a blunder on the part of his opponent's solicitor who, when examined as a haver, omitted to produce them. In these peculiar circumstances it was impossible for the Court to refuse to grant a new trial unless of course the new evidence had been such as in the words of Lord Jeffrey, 9 D., at p. 167, "by no reasonable possibility could affect the issue of the case. In the case which we have to consider there is no similar specialty. According to the account of the matter which the pursuer gave in the witness-box she was all along aware that there were persons in the crowd which collected immediately after the accident who could confirm her statement that the fish box over which she fell was removed from the street by one of the defenders' shopmen and carried into the shop. Some of these persons, according to the pursuer, abused the shopman for having left a fish box upon the street, and one of them stated to him that an accident had occurred on a previous occasion from the same cause. At the time when she raised her action in May 1921, four months after the accident, it was for the pursuer and her solicitor to consider whether it was better to delay bringing the action in the hope that they might in time be able to get into touch with some of these witnesses or to raise the action in the hope that the other evidence might prove sufficient without their testimony. After compelling the defenders to go to trial at the time and under the conditions most convenient to herself the pursuer cannot reasonably or justly ask that the verdict shall be set aside merely because the evidence upon which she relied proved insufficient to satisfy the jury, whereas it might have been sufficient if it had been corroborated by that of the witnesses whose names and addresses came to her knowledge after the trial. The motion must in my judgment be refused.

LORD CULLEN—I do not doubt that it is within the power of the Court in a proper case to grant a new trial in order to allow of new oral evidence which has been discovered being adduced. No case, however, has been cited to us where the Court has exercised the power—a fact which goes to show that it is one to be sparingly applied. The reason for this I take to be that it is in the general public interest that the door should not be thrown open too widely to the prolongation of litigations by efforts of parties to improve by fresh evidence cases which have already been presented and have failed, "it being the interest of mankind that pleas be not immortal, and that one be not the seed to propagate another like Cadmus's teeth," if I may quote from the case of *Campbell* v. *Farquhar*, 1704, Fountainhall, vol. 2, p. 214. Accordingly I think the power should not be exercised save in very exceptional cases, and where the new evidence not formerly available is in its nature such as materially to change the complexion of the case and to lead to a reasonable presumption that there has been a miscarriage of justice and that the new evidence had it been available at the trial would have led to a different verdict. Such would appear to be the view which is acted on in the English Courts in similar cases (see Taylor on Evidence (11th ed.) p. 1251, sec. 1884 C.). The case of *Bannerman* v. *Scott* (9 D. 163), which related to documents in the hands of a haver which he had omitted to produce under a diligence, must be regarded, I think, as having gone on the special circumstances of the case. I may refer to the opinion of Lord Fullerton. New documentary evidence, moreover, seems to have been always regarded in our law and practice as more nearly akin to newly discovered facts (Stair, iv, 1, 44; Ersk. iv, 3, 3; *Phosphate Sewage Company* v. *Lawson & Sons' Trustee*, 5 R. 1125, *per* Lord Mure at 1145). And there is this difference, that in the case of documents these are tabled for consideration, and the Court is in a better position to form an estimate of their value and effect on the issue than is possible in the case of oral evidence.

In the present case the pursuer chose to go to trial with a body of evidence competent legally to prove an essential fact averred by her if it were believed. The jury apparently did not believe it but preferred the counter-evidence for the defenders. The pursuer now thinks that with the aid of the two additional witnesses she may be more successful before another jury. We have no means of judging of the value of such additional evidence. In any case it amounts in its nature only to corroboration of the pursuer's account of the facts given by her at the trial additional to the corroborative evidence which she then led. This being so I do not think we have here the class of case which falls to be regarded as an exception to the general rule that where a party chooses to go to trial he must stand or fall on the case he presents. If a new trial were granted and the pursuer obtained a verdict, and if the defenders then discovered new evidence corroborative of their case which they could not have discovered formerly, then I suppose a third trial would fall to be granted, and so on indefinitely if new corroborative evidence on one side or the other kept turning up without any failure of due research formerly by the party seeking to use it. I concur with your Lordships in thinking that the rule should be discharged.

The LORD PRESIDENT intimated that LORDS MACKENZIE and BLACKBURN concurred.

The Court discharged the rule.

Counsel for Pursuer — Morton, K.C. — Maclaren. Agent—A. W. Gordon, Solicitor.

Counsel for Defenders—Mackay, K.C.—Dykes. Agents—Guild & Shepherd, W.S.