so. The pursuers themselves seem to have led in reducing the prices, and I think they did so, not because of the defenders' competition, but because there was a very large competition with a great many other nails, particulars of which are given by the witnesses, and so I am of opinion with the Lord Ordinary and Lord Adam that in this part of the case the pursuers also fail.

Lord Adam has proposed that we should nevertheless allow a sum of £50 to the pursuers as damages or compensation, and I quite concur with his Lordship that that may be done. The ground upon which I do that is this, that in any view there has been an infringement of these patents. I do not think that as the case was presented the pursuers have made out damage which they could recover in either of the views they put, but taking their case as one in which they might have said—although they have not so said, —"Well, at all events we must have the profit made by your using these two parts of our patent," I think we must take it that although the profit that would be made must be of very trifling amount, there must be some profit made, because the former case sustained the patents upon the footing that there must be some profit made. But looking to the evidence as a whole, I cannot see (assuming that I must take it that these were beneficial parts of the patent which the defenders used) that it has been made out that a profit beyond the sum of £50 at the utmost could have been made by their infringement of these heads of the patent, and taking it at that, I concur with what has been proposed by Lord Adam, and have only to repeat that I concur entirely in his Lordship's views, and have only ventured to add what I have done because of the novelty and importance of the question which it raises.

Lord President—I entirely concur in the opinion of Lord Adam. The result will be to reduce the damages found by the Lord Ordinary from £530 to £50.

The Court recalled the interlocutor of the Lord Ordinary, and decerned for £50 instead of £530.

Counsel for Pursuers and Reclaimers—Guthrie Smith—Shaw. Agents—Gill & Pringle, W.S.

Counsel for Defenders and Respondents—Asher, Q.C.—Ure. Agents—Maconochie & Hare, W.S.

Friday, December 17.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

ROSS *v.* M'KITTRICK.

(See *ante, Ross* v. *Johnston* (*P.-F. of Burgh of Edinburgh*), vol. xxiii. p. 695, June 8, 1886).

Reparation—Slander—Verdict—New Trial.

A tradesman raised an action of damages for slander contained in a newspaper article charging him with dishonesty in his business. No justification was pleaded, an apology was made, and the defender admitted in evidence that the article implied a charge of dishonesty. The verdict was for the defender. *Held* that the pursuer's character having been calumniated by a false charge, he was entitled to a verdict, and that the verdict must be set aside as against evidence.

Lord M'Laren *dissented*, holding that there was no substantial difference in such a case between a verdict for the defender and a verdict for the pursuer with nominal damages.

In May 1886 Alexander M'Kenzie Ross, refreshment-room keeper at the International Exhibition held that year in Edinburgh, was charged before the Burgh Court of Edinburgh with having been guilty of an offence against The Weights and Measures Act 1878, actor or act and part, "in so far as on 8th May, in his premises at the Exhibition, he used or had in his possession for use for trade 28 measures of capacity which had not the denomination thereof stamped on the outside thereof in legible figures or letters, were not of the denomination of some Board of Trade standard, and were false or unjust."

The Magistrate (Bailie Turnbull) convicted him of the offence charged, "except in so far as it is charged in the complaint that the measures in question were false or unjust," and fined him £2.

The facts proved, as stated in the report of the Justiciary Case referred to *infra*, were, that he used, when a glass of whisky was ordered, vessels for measuring it off and giving it to the customer, which contained about a third of a gill. They were not of the denomination of a Board of Trade measure, and were not stamped. Each bar was, however, supplied with an imperial half-gill measure duly stamped, which was used when half-a-gill was asked for.

Ross took a Case, and the High Court of Justiciary (*diss.* Lord Justice-Clerk and Lord Craighill), as previously reported June 8, 1886, 23 S.L.R. 695, quashed the conviction on the ground that the sale of a "glass of whisky" is not a sale by measure in the sense of the Weights and Measures Act said to have been contravened.

Before this appeal, however, was heard, the defender of this action, William Lethan M'Kittrick, printer and publisher of the *National Guardian*, a journal connected with the licensed victualling trade, and published in Glasgow, had on 26th May 1886 published in that paper an article commenting upon the case in the Burgh Court. The article, which was written by a regular contributor to the paper, and was headed "Illegal Measures," stated that false weights and measures were always in existence, and remarked that "small and deceiving measures" would not be appreciated unless when compared with something bigger and more just to the purchaser. "Anyway, the false measure has not been acknowledged to be in strict accordance with the provisions set down in the decalogue. Hard names have been applied to it by inspired writers, and its use has been universally condemned as unfair and dishonest. Seeing that the use of a false measure violates one of the Ten Commandments, it follows naturally enough that a portion of the moral law is thereby broken. Nothing is more certain than that an infraction of the plain injunction 'Thou shalt not steal' must then ensue. It is not possible to regard the position in any other light."

The article went on to regret that the Exhibition had been marred at the opening by the unseemly discovery that "visitors were being supplied with liquor in measures that were unjust or false in respect of their capacity," and that the case against Ross was not very creditable to him; that the illegal measures were confiscated, "so that visitors will know in future that they are being supplied with the quantity of liquor for which they pay. The attempt to prove that this was the case already was not very happy. The mere circumstance that the false measures were there unstamped, in constant use, and purporting to be what they really were not, was quite sufficient to secure a conviction." The article then went on to say that it was undoubtedly very kind of the Procurator-Fiscal to say that he made no reflection on Ross from a moral point of view, but not so clear that he was strictly accurate. "If Mr Ross was not guilty of an offence against the moral law, as laid down in the authorised authorities on that delicate subject, then why should he have been dragged into Court and fined £2, with the alternative of imprisonment?" The article closed with an expression of regret that the opening of the Exhibition "should have been disfigured by such an unfortunate occurrence, but in all probability it was better that the discovery should have been made early in order to give the public the full benefit of a more equitable traffic."

Ross brought this action on 3d June 1886 for damages laid at £1000 for slander contained in this article, complaining that it was libellous, and that he had been deeply injured in his feelings and in his business by its publication.

The defender stated that he had no personal knowledge of what took place at the trial, and had derived his information as to it from a report in the *Scotsman* of 20th May 1886.

This report, which was produced with the defences, and was thus before the Court on the motion for a new trial now reported, showed that the Procurator-Fiscal in asking a conviction had stated that he made no reflection on Ross from a moral point of view. It showed also that the Magistrate in deciding the case said he was "satisfied that these measures complained of were not in accordance with the Weights and Measures Act, and not stamped as required by sec. 29 thereof. He found him guilty of that." It could thus be inferred from the report that the part which charged Ross with the use of false and unjust measures was not proved, but that was not stated in terms therein, the precise judgment not being reported.

The defender denied that the article complained of was libellous, and pleaded that it did not go beyond fair and legitimate criticism on the reports of the pursuer's trial in the Burgh Court. He also stated that he, whenever he became aware that the report he relied on was erroneous, offered a retractation and apology, and in the first number of his paper —viz., that which appeared on 9th June—inserted in a prominent place an explanation and apology. This apology he offered on record to repeat, and to pay £10 nominal damages. The apology was—"We find that we were misled by the incomplete reports which appeared in the newspapers, and the article would not have been written had we been aware that the Magistrate had excluded the 'false or unjust' portion of the charge from the conviction. We are sincerely sorry that we have done an injustice to Mr Ross. The proceedings did not imply any defection in Mr Ross from a moral point of view, and any suggestion to the contrary effect implied in the article is unreservedly withdrawn."

The case went to trial on these issues, viz.—"It being admitted that the article printed in the schedule appended hereto [above quoted] appeared in the '*National Guardian*, the representative journal of the licensed trade of Scotland,' published by defender on or about 26th May 1886—(1) Whether the article was of and concerning the pursuer? (2) Whether the said article falsely and calumniously represents the pursuer as having been guilty of dishonest conduct in his business of purveyor to the International Exhibition, to the loss, injury, and damage of the pursuer?"

At the trial the defender admitted in his evidence that the article charged the pursuer with dishonesty. Lord M'Laren told the jury that he had no direction in law to give; that the question for them was, whether the article was a representation that the pursuer was guilty of dishonesty? that they were sole judges whether the words of the article were capable of that meaning, and comprised an untrue, and therefore calumnious, charge of dishonesty; that if they thought defender had done all in his power to redress the injury, that would go to mitigate damages.

The jury returned a verdict for the defender.

The pursuer moved for a new trial on the ground that the verdict was contrary to the evidence.

A rule was granted.

The defender showed cause against the rule. The verdict might mean (1) that the article did not impute dishonesty; (2) that it did, but not to the pursuer's damage; or (3) that it neither imputed dishonesty nor caused the pursuer damage. The jury being of opinion that there was no damage proved, and that an ample apology was given, the question was, whether the jury were bound to give nominal damages? There was no authority for that.

The pursuer argued — The defender having himself admitted that the article imputed dishonesty, and no attempt being made to justify that charge, it was clear that the verdict was against evidence. He said also it was written hastily and on imperfect information, but that did not excuse him, and even the *Scotsman* report he had consulted might have shown him that the case was not viewed as one of dishonesty by the prosecutor or magistrate. Yet the article implied that, and was not a mere comment on the use of measures not stamped with a Board of Trade denomination. Even defender's counsel had not asked a verdict for him, but only a verdict for nominal damages. The pursuer did not seek special damages, but only to vindicate his character. A calumnious charge was presumed to be false and malicious. The difference between a verdict for the pursuer with nominal damages and a verdict for the defender was that the former verdict cleared the pursuer's character—*Faulks* v. *Park*, 17 D. 247. In the case of *Smith* v. *Gentle*, January 31, 1844, a case of slander, where a jury found for the defender, the Court was of opinion that the verdict was against evidence, though the case

was not one for heavy damages, and the verdict was set aside and a new trial allowed. The fact that the pursuer's character was here calumniated being clear, he was entitled to a verdict which would clear it, even if nominal damages only were given.

At the debate reference was also made to *Paul* v. *Jackson*, January 23, 1884, 11 R. 460; *Craig* v. *Jex Blake*, July 7, 1871, 9 Macph. 973; *Smith* v. *Gentle*, 6 D. 565 *(supra)*; 6 and 7 Vict. c. 96, Lord Campbell's Libel Act (which does not apply to Scotland).

At advising—

Lord Mure—This is a motion for a new trial on the ground that the verdict of the jury was contrary to the evidence. Now, in his evidence the defender admitted that the newspaper article in question charged the pursuer with dishonesty. The issue put to the jury was, "whether the article falsely and calumniously represented the pursuer as having been guilty of dishonest conduct?" Now, looking to the admission of the defender and to the article itself, there seems no room for doubt that a verdict for the defender was contrary to the evidence. The pursuer comes into Court to have his character cleared. The article charged dishonesty, and therefore the natural verdict was one for the pursuer, but granting only nominal damages if it should seem to the jury that he had in reality suffered no injury. The apology made by the defender was made after the summons was served, and I asked counsel whether there was any case where, on the ground that an apology had been made, a jury had found for the defender and the verdict had been sustained. But no such case was cited. Therefore I can come to no other conclusion but that there must be a new trial.

Lord Shand—A new trial seems inevitable. The article appeared after the pursuer had been tried upon a charge by the Procurator-Fiscal, which in substance can be divided under two heads—1st, That of having used measures which were unstamped, and not of a standard sanctioned by the Board of Trade; 2d, that these measures were false and unjust. The pursuer was convicted before the Magistrate under the first head, and not under the second, and so no moral stigma attached to him. Then came this article charging him with dishonesty. The question before the jury was whether what was charged by the article was more than the pursuer had been convicted of. It was more. The defender admits that it charged dishonesty. Therefore pursuer was entitled to a verdict in his favour.

By the verdict either the jury say there was no dishonesty charged, and that is contrary to the evidence, or, on the other hand, the jury did consider that dishonesty was charged, and yet did not return the verdict for the pursuer with at least nominal damages. This was equally wrong. Now, is the article a fair comment on the trial? I disagree entirely with the view that it was so. For the Magistrate declined to convict of dishonesty, and the article charges it. It can of necessity have been no fair comment, because the writer thought that those charges which contained a moral imputation had been followed by a conviction.

The defender has no doubt made an apology, and I hope in the circumstances that parties will arrange to settle the matter, and so avoid a new trial.

Lord Adam—The verdict means that the defender did not represent that the pursuer was guilty of dishonesty. In this the jury have gone wrong, for all the evidence shows that the defender did charge dishonesty. He represented that the pursuer had measures which were both illegal and false and unjust. A jury is not infallible in a libel case any more than in other cases, and when they go wrong they must be corrected. I think the verdict is against evidence, and that a new trial must be granted. No doubt the writer of the article was under a mistake as to the conviction in the Burgh Court when he wrote the article, but this mistake does not excuse the defender. The pursuer is entitled to a verdict clearing his character. Though it is only a case for nominal damages, yet there must be a new trial if the parties are unable to settle the matter.

Lord M'Laren—I believe that I stand alone in the opinion I have formed regarding this motion, but in the view I take the question is one of considerable importance. So far as I know, there is no precedent since the institution of jury trial in Scotland for interfering with the verdict of a jury in a case of libel where the question is between a verdict for the defender and a verdict for the pursuer with nominal damages. I may say I should have been perfectly satisfied if the verdict of the jury had been one for the pursuer accompanied with nominal damages, and that I understand to be in accordance with the view expressed by my colleagues who have already spoken, but I am also quite satisfied with the verdict that was returned. There is a distinction, no doubt, between the two forms of verdict, but I think it is a distinction without a difference. I cannot see that either as regards the matter of real injury or as regards the vindication of the character of the pursuer with the public it was of the slightest consequence whether he obtained a verdict with a farthing damages or whether the verdict is recorded against him. I understand that the English judges will not set aside a verdict for the defendant merely because they think the plaintiff entitled to nominal damages. I am further of opinion that the verdict that has been returned is not against the weight of evidence, but is one which a jury was fairly entitled to find having regard to the evidence laid before them.

It is to be observed, in the first place, that the pursuer was undoubtedly convicted before the Burgh Court of Edinburgh of a contravention of the Weights and Measures Act. He was charged under two sections, one of which applies to unjust measures—measures which professed to be legal—and the other of which applies to the using measures that are not legal, and not duly stamped. He was convicted under the latter section, and nothing was said about the other section, which amounts in substance to an acquittal of the charge of using unjust measures. Nevertheless it is a fact that he was convicted of an offence under the statute, and an offence punishable by fine, and therefore falling within the

scope of the criminal law of the country. The conviction was eventually set aside by the Court of Justiciary upon a Case in which the Judges were equally divided in opinion. But I cannot for a moment suppose that the fact of the conviction being eventually set aside ought to weigh against the writer of a newspaper article commenting, as he was entitled to do, upon a conviction which had taken place before a competent Court. I think it must be assumed in favour of the defender that he was professing to criticise the conduct of the pursuer as disclosed in a case in which a conviction followed.

The next point in the order of the events is that it has not been shown—at least not to my satisfaction—that the article in question contained any misstatement of fact whatsoever. It was not a report of the case; it did not profess to set forth a full narrative of the circumstances; it was what is called a "leading article." But in the course of the article I think the circumstances of the case were fairly brought out, and also the views that had been expressed in the Burgh Court, whether for or against the accused. There was an omission in the article; it was not stated that the pursuer had been absolved from the charge of using unjust measures, but neither was it stated that he had been convicted of that particular charge. The charge was treated generally as illustrative of the subject of the article.

Next, in considering the import of the article, I conceive that the defender is entitled to have it read just as if the words contained in the innuendo in the issue had been used in the article itself, because the defender in his examination admitted that his article, when fairly read, meant to characterise the conduct of the pursuer as dishonest. Upon that matter I would remark, in passing, that this is not the case of a general accusation of dishonesty—a charge which I should take to mean something much more serious than what we are here considering. The issue puts the question, whether the article falsely and calumniously represents the pursuer as having been guilty of dishonest conduct in his business as purveyor to the Exhibition, and I think the article must be construed as if it had said in so many words that the person who was convicted of this offence had been guilty of a dishonest contravention of the Weights and Measures Act. In my view there were two questions which the jury had to consider—1st, The meaning of the article; and 2d, whether with that meaning it was a fair comment on the conduct of the pursuer as disclosed at the trial.

Upon the first point there could be no doubt, because the meaning of the article was admitted by the defender himself. But then the jury had to consider (as I directed them it was their duty to do) whether the imputation of dishonesty (not dishonesty in the abstract, but dishonesty as applied to the actual facts of the case) was or was not within the bounds of fair criticism on the facts upon which the conviction had followed. It was argued to the jury that if the meaning attributed to the article were proved damages must follow. I expressly told the jury that that was not so; that they must consider, even if the meaning were proved, whether the article was false and calumnious. No exception was taken to that direction, and I do not understand that any of your Lordships differ with me in that direction. Then I take it that by their verdict the jury in effect found that the article was not false and calumnious. The only alternative is, I think, that they thought that it did not exceed the bounds of fair criticism having in view all the circumstances of the case. Now, I think that, whether the words constituting the alleged libel be actionable in themselves, or whether they are only actionable after the innuendo is proved, the question whether the article is or is not a defamatory libel is a question which the practice of this country—I might almost say the constitution of this country—leaves entirely to the discretion of the jury. It is not a question of fact; it is a question for the judgment of the jury whether the facts set forth justify the opinion expressed by the writer upon them. I do not know how I can arrive at the conclusion that the judgment which the jury formed as to this matter is or is not against the weight of the evidence. I might think for myself that to call a contravention of the Weights and Measures Acts dishonest was using language too strong for the occasion. Another man might approve of the language; that is entirely a matter of opinion. But if the facts are fairly stated, an expression of opinion, whether strong or weak, can do no harm. Whoever reads the article may read the facts upon which the writer has founded his animadversions, and may make the necessary correction for himself. I take it that this is what the jury meant to affirm when they brought in a verdict for the defender; that the article was a fair criticism upon the evidence which had been adduced in a court of justice. And without saying whether I entirely agree with the jury or not, I think that the language of the article was such as the jury might reasonably take to be not beyond the bounds of fair criticism. Further, I think that the judgment proposed really amounts to this, that the judge, or rather the court, is to take upon itself the function which has hitherto been exercised by juries, of construing the libel and determining whether the words used are or are not defamatory. Now, I think that was the very thing which the judges of England in the last century attempted to do in the famous prosecution in which Lord Erskine was counsel, and in which he successfully asserted the right of juries to give a general verdict, and to determine whether the matter on therecord was or was not libellous. The jury found the defendant 'guilty of publishing only,' and it was held that on such a verdict a conviction could not follow. To remove doubts an Act of Parliament was passed, known as Mr Fox's Libel Act (32 Geo. III. cap. 60). It applies only to criminal prosecutions, and therefore I do not quote it as an authority. But it is at least an indication of what the Legislature considered to be the proper functions of a jury in actions founded on libellous publications, because I cannot conceive that the functions of a jury are different in the civil action from what they would be in the case of a prosecution founded on the same facts.

It seems to me that if your Lordships take the course proposed, of sending this case to a new trial, you are practically assuming that upon proof of the words used, and proof of the sense attributed to them, the jury must, in accordance with the direction of the judge, find a verdict for the pursuer, which is the very thing the statute says

they are not required to do. I should be strongly opposed to making a precedent which would take from juries the discretion which I think, on the whole, they have fairly and advantageously exercised of distinguishing between cases in which substantial injury has been suffered and cases such as this, where the whole thing proceeded upon a mistake, where an apology was offered, and where no real damage was done.

Lord President—The article in question was of and concerning the pursuer, and the question for the consideration of the jury was, whether the article falsely and calumniously represented the pursuer as having been guilty of dishonest conduct in his business of purveyor at the Exhibition? Now, what was the meaning of a verdict for the defender upon such an issue? It could mean nothing but this, that the article did not falsely and calumniously represent that the pursuer had been guilty of dishonest conduct.

Lord M'Laren thinks that the difference between a verdict such as this and a verdict for the pursuer with only nominal damages is immaterial, or, in other words, is a distinction without a difference.

To this I cannot assent. To say that a man has been calumniated and to say that he has not seems to me to be a very substantial distinction and a very great difference. And further, a verdict for the defender means, in a case of libel, either that there has been no attack upon a man's character at all or that he came into Court under such circumstances that the jury do not think his character ought to be vindicated. Now, if a man has been calumniated—if he has been falsely charged with dishonest conduct in the prosecution of his business—it seems to me that it is his right to have a verdict of a jury affirming that he has been falsely and calumniously attacked, and that he should receive reparation in some form or other. That the charge of dishonesty was false was necessarily assumed in this case, because there was no justification, and where there is no issue in justification the jury are bound to assume falsehood. The next question which the jury had to consider was whether this article was calumnious, or, in other words, whether it was a libel. I am quite prepared to concur in the general proposition that the question of libel or no libel is one for the jury. But still, when they go flagrantly wrong they must be set right, and that is done in the form of a motion for a new trial. The article distinctly set out that it was very unfortunate for the International Exhibition that their visitors were being supplied with liquor in measures that were false and unjust, and then represented that the pursuer used false and unjust measures. That was inconsistent with the fact, and the whole comments which followed proceeded upon the assumption that that was the nature of the conviction. That being so, and considering that the defender himself, when examined as a witness in the case, admitted distinctly that the article means a charge against the pursuer of dishonesty, I do not see how it is possible to say with Lord M'Laren that the jury were right in finding there was no libel. I am bound to say that I think the jury were flagrantly wrong, because their finding of a verdict for the defender affirmed that this article did not charge the pursuer with dishonesty. Lord M'Laren has said that this is the first time in the history of jury trials in Scotland that the verdict of a jury in a case of libel has been set aside as being contrary to evidence. I am not aware how that stands in point of fact. Assuming that it is so, it only proves that juries have been very successful in dealing with such cases, and have not gone wrong. But as I am of opinion that the jury have here gone manifestly wrong, I think the pursuer is entitled to a new trial.

Rule made absolute.

Counsel for Pursuer—Asher, Q.C.—Kennedy. Agent—Gregor Macgregor, S.S.C.

Counsel for Defender—Dickson—G. W. Burnet. Agent—Robert Emslie, S.S.C.

Saturday, November 20.

OUTER HOUSE.

[Lord Fraser.

RUTHERFORD *v.* WARREN.

Process—Res judicata—*Identity of Interest—Previous Pursuer—Judgment* in rem.

It is sufficient to entitle a defender to have the plea of *res judicata* sustained that the former action on which the plea is founded have been before a competent Court, that the question involved and the *media concludendi* were the same, and that the pursuer's interest was the same. It is unnecessary that the pursuer be the same as in the former action or be his representative.

A decree of putting to silence was obtained against two brothers who represented themselves to be the lawful sons of a person deceased. In the case of the one brother the decree was given after defences had been lodged and proof led; in the case of the other, though there had been personal service, no defence had been put in, and the decree was in absence. The latter brother a few years afterwards raised an action, as being the lawful son of the deceased, to obtain a share of his estate. No material new averments were made. *Held* that the question having been tried in the previous action on the same *media concludendi*, and with a person having the same interest, the decree therein was *res judicata* against the pursuer.

John Rutherford, manufacturer, Dunfermline, who was born on 30th June 1810, died in the Crichton Asylum, Dumfries, on 13th December 1877. The defender in this action, his sister Catherine Rutherford or Warren, was decerned executrix-dative *qua* one of the next-of-kin to him. The amount of the estate as given up by her was about £50,000.

This was an action by Andrew Rutherford, labourer, Edinburgh, for reduction of (1) the decree decerning Mrs Warren executrix; (2) the testament-dative following thereon; and (3) of a decree of putting to silence, which pursuer had obtained in the circumstances after narrated against the pursuer and against his brother William Rutherford, and which, *quoad* the present