[*Having considered the evidence, his Lordship continued*]—Having in view all these considerations, and regarding the defender as the pursuer of this particular issue, I am not satisfied that the *onus probandi* incumbent on the defender has been discharged, or that he has proved his averment. If the defender's averment is not proved, it follows that the pursuer is entitled to remuneration on the ordinary footing." . . .

The defender reclaimed. At the hearing counsel for the pursuer stated that they did not desire to insist in their second plea-in-law, and the decision of the Court was therefore asked merely on the facts as shown in the proof.

The Court adhered.

Counsel for Pursuer — Baxter — Guy. Agent—A. C. D. Vert, S.S.C.

Counsel for Defender—Mackenzie—Findlay. Agents—Gill & Pringle, W.S.

Wednesday, November 8.

FIRST DIVISION.

SNODGRASS *v.* HUNTER.

Process—Jury Trial—Res Noviter—Confession of Perjury by Witness.

A party who had been found liable in damages for slander opposed a motion to apply the verdict on the ground of *res noviter*, in respect that one of the three witnesses for the pursuer had confessed that he had committed perjury at the trial. *Held* that the question whether the witnesses were telling the truth was a question for the jury at the trial, and that the defender's statement did not amount to *res noviter*.

Mrs Snodgrass brought an action for slander against Mrs Hunter, and on 21st July 1899 obtained a verdict with £250 damages. On 4th November 1899 a motion for a new trial on the ground that the damages were excessive was refused.

On 8th November Mrs Snodgrass moved to apply the verdict. Mrs Hunter presented a note in which she averred that one out of the three witnesses for the pursuer had confessed that he had committed perjury at the trial, and the criminal authorities were investigating the case. It was argued for her that this constituted *res noviter veniens ad notitiam*, and that the motion to apply the verdict should be opposed in the meantime.

LORD KINNEAR cited *Lockyer* v. *Ferryman*, March 6, 1877, 4 R. (H.L.) 32, opinion of Lord Chancellor Cairns at p. 35.

LORD ADAM—I am of opinion that the note for the defender here should be refused. I think this is an unprecedented application. We had this case before us on Saturday on a motion for a new trial, and we heard nothing of what is now put forward. It is now said that there is *res noviter*, but that *res noviter* is the very question which was before the jury—that is, whether the witnesses were telling the truth, or whether, as it was stated by the defender on record, this was a trumped-up case. According to the authorities and the case cited by Lord Kinnear that is not *res noviter*. I am for refusing this note.

LORD M'LAREN—It is always competent for a defender against whom the verdict of damages has gone forth to move for a new trial on the ground that the verdict is contrary to the evidence, and when a motion for a new trial in this case was before us last week I should have thought that the defender, if she knew that the witnesses for the pursuer had committed perjury, would have moved for a new trial on that ground, but the only ground mentioned was that the damages were excessive. The present application is in substance nothing more than an application for a new trial on the ground that the verdict is contrary to the evidence because witnesses were not speaking the truth. As to the fact that one of the witnesses has made a statement to the procurator-fiscal, that I agree is not *res noviter*, and forms no ground for refusing to apply the verdict.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court refused the note and applied the verdict.

Counsel for the Pursuer—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender—A. M. Anderson. Agent—J. Knox Crawford, S.S.C.

Thursday, November 9.

FIRST DIVISION.

(Without the Lord President.)

PATERSON *v.* PATERSON.

Parent and Child—Custody of Children—Petition for Custody Superseded by Action of Divorce.

When a husband who was the petitioner in a petition for the custody of his children subsequently raised an action of divorce against his wife, the Court sisted the petition to await the result of the action of divorce.

Alexander Paterson brought a petition for the custody of the children of his marriage. Answers were lodged by Mrs Paterson, and in July 1899 the petition was remitted to the Sheriff of the Lothians to inquire into the whole circumstances of the case, and to report.

Thereafter Mr Paterson raised an action for divorce, containing conclusions for the custody of the children, and moved that the petition for custody should be sisted.

The respondent moved that the petition be dismissed, and argued that, on the authority of *M'Callum* v. *M'Callum*, January 24, 1893, 20 R. 293, when the petition was presented after the action was raised, that was the proper course.

The Court sisted the petition.

Counsel for the Petitioner—J. C. Watt. Agent—W. H. Farquharson, S.S.C.

Counsel for the Respondent — A. M. Anderson. Agent—R. G. Bowie, S.S.C.

Friday, November 10.

FIRST DIVISION.

BARCLAY, CURLE, & COMPANY, LIMITED *v.* M'MILLAN.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7, *sub-sec.* 3, *and Schedule* 2, *sec.* 14 (*c*)—*Question of Fact or Law—Dock "Near" a Yard.*

A workman was injured while working on a ship which had been removed from the shipbuilding yard to a dock about two miles away in order to be completed. In a claim under the Workmen's Compensation Act 1897, the Sheriff held that the dock was "near" the yard within the meaning of sub-section 3 of section 7 of the Act, and awarded compensation.

In a case stated for appeal, *held* that the decision of the Sheriff was right, and (*dub.* Lord M'Laren) that the question whether a dock was near a yard was one of fact and not of law, and that the appeal was therefore incompetent.

The Workmen's Compensation Act 1897 provides, section 7, sub-section 3—"A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon any vessel in any dock, river, or tidal water near the yard."

Section 14 (*c*) of Schedule 2 provides—"Any application to the Sheriff as arbitrator shall be heard summarily," . . . "subject to the declaration that it shall be competent to either party" . . . "to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the Sheriff with instructions as to the judgment to be pronounced.

This was a case stated by the Sheriff-Substitute of Lanarkshire (SPENS) in an arbitration under the Workmen's Compensation Act 1897, at the instance of Barclay, Curle, & Company, shipbuilders, in an application at the instance of Donald M'Millan, shipwright, a workman in their employment.

The following facts were stated by the Sheriff to be admitted as proved:—"(1) That the respondent was on 25th April last employed as a shipwright by the appellants, who are shipbuilders, and on that date was working on board the ship 'Ismore' in the Prince's Dock. (2) That said vessel had been launched from the appellants' shipbuilding yard sometime before, and had thereupon been taken up the river to Finnieston Quay, or near thereto, and been furnished with engines, and thereafter again removed to the Prince's Dock, for the purpose of having its internal fittings adjusted and finished, and otherwise for its total completion as a ship. (3) That the above arrangement was for the convenience of the appellants, who had no private dock of their own in which said vessel could be conveniently completed. (4) That the respondent was on the foresaid date (25th April) injured while working at said ship by an accident arising out of and in the course of his employment, and admittedly had it happened in the appellants' shipbuilding yard there was liability. (5) That said Prince's Dock and Queen's Dock are situated on opposite banks of the river Clyde and about two miles from the appellants' shipbuilding yard, and are the nearest public docks thereto. The Queen's Dock is about 100 yards nearer said shipbuilding yard than Prince's Dock. (6) That up to the hearing of the case the respondent from the date of the accident was wholly incapacitated. (7) That the average weekly earnings of the respondent during the twelve months previous to the accident were 34s. 7d."

The Sheriff-Substitute held, that on a sound construction of sub-section 3 of section 7 (quoted *supra*), and having regard to the circumstances above detailed, the accident occurred when the ship in question was being finished in a dock "near the yard." He awarded compensation at the rate of 17s. 3d. a week.

He stated the following question of law—"Whether the Prince's Dock *quoad* the completion of the s.s. 'Ismore' by the appellants is a dock 'near the yard' in terms of section 7, sub-section 3, of the Workmen's Compensation Act 1897?"

Argued for the appellants — The Act applied only to workmen who were in or about a *locus;* "near" must therefore be construed as equal to "in close proximity." Otherwise there would be no limit, and a dock on one side of Scotland might be considered near a yard on the other. The cases allow a distance of 1½ miles; that should not be extended—*Louth* v. *Ibbotson* [1899], 1 Q.B. 1003; *Aberdeen Steam Trawling Company, Limited* v. *Peters*, March 16, 1899, 1 F. 786; *Whitton* v. *Bell & Sime*, June 17, 1899, 36 S.L.R. 754; *Jackson* v. *Rodger & Company*, July 4, 1899, 36 S.L.R. 851. The case disclosed a question of law, mingled, doubtless, with fact, viz., what was the legal construction of the word "near?"

Counsel for the respondent was not called upon.