

The respondent presented a note asking the Court to ordain the reclamer to find caution for expenses.

In the Single Bills the reclamer argued—The general rule was that a defender was not bound to find caution—*Weir v. Buchanan*, October 18, 1876, 4 R. 8, 14 S.L.R. 18; *Buchanan v. Stevenson*, December 7, 1880, 8 R. 220, 18 S.L.R. 132—although it might be more stringent when the defender was in reality insolvent as he was not in the present case—*Stevenson v. Lee*, June 4, 1886, 13 R. 913, 23 S.L.R. 649. But even in the case of an insolvent defender caution was not invariably required—*Taylor v. Fairlie's Trustees*, March 1, 1833, 6 W. and S. 301—but the matter was one of circumstances. Here the pursuer was the only non-acceding creditor, and the decree reclaimed against had been greatly instrumental in bringing about the defender's financial difficulties; caution should not be ordered.

Argued for the respondent—The whole matter lay in the discretion of the Court. In the present case the reclamer was practically bankrupt, and in spite of inhibition had disposed to a trustee who refused to sist himself in the action. The respondent's position was not that merely of a pursuer as he was in possession of a judgment. The reclamer should find caution.

At advising—

LORD PRESIDENT—In this case a motion has been made that the defender should be ordained to find caution as a condition of being allowed to proceed with his reclaiming note. The only reason that was given for the motion being granted was that the judgment in the Outer House was against the defender, and that the defender had executed a trust deed in favour of his creditors. I have looked into the authorities, and it is not easy to extract from them any rule other than the general doctrine that in a case of insolvency a pursuer is usually bound to find caution but a defender is not. There may, of course, be special circumstances, but in this case there are no special circumstances. The defender has been found to be wrong by the Lord Ordinary. He has taken a reclaiming note, which is his right. To compel the defender to find caution would in effect be to force him to acquiesce in the judgment against him. I do not think that we can grant this motion unless your Lordships are prepared to go the whole length of saying that wherever a defender has granted a trust deed for creditors he must as a general rule be ordained to find caution. That does not seem to me to be an expedient general rule. There are obvious distinctions between the position of a person who has been sequestered and the position of a person who has granted a trust deed. Accordingly, there being no special circumstances brought to our knowledge, I think the reclaiming note ought to be allowed to proceed in the ordinary manner.

LORD KINNEAR—I agree. I would only say in addition that it would, in my opinion, require a very exceptional ground to justify

an order upon a defender to find caution merely because he has granted a private trust deed for creditors. I know of no authority for so restricting the right of defence. The distinction between an insolvent who has become bankrupt and an insolvent who has granted a private trust deed is vital. In the case of a bankrupt his whole estate vests in the trustee to the entire exclusion of the diligence of creditors, and therefore if a contending litigant obtains a decree for expenses he cannot enforce it against his opponent or his estate unless the trustee in bankruptcy has made himself a party to the suit. But in the case of an insolvent who grants a trust deed his property is not protected in any way but is still open to the diligence of any creditor who may not have acceded, and even to the diligence of the creditors who have acceded so long as any other creditor holds out.

We cannot, in my opinion, compel a defender who has not been divested of his estate, however little, to find caution at the instance of the very person who has called him into Court, merely because his circumstances make it doubtful whether he will be able to meet the pursuer's costs if he is unsuccessful. He is still entitled to say that decree shall not pass against him until he has been heard.

LORD M'LAREN and LORD PEARSON concurred.

The Court refused the note with expenses modified to two guineas.

Counsel for the Reclamer and Defender—Aitken, K.C.—Wilton. Agents—Mackay & Young, W.S.

Counsel for the Respondent and Pursuer—Morison—Ballingall. Agents—P. Morison & Son, S.S.C.

Thursday, March 15.

FIRST DIVISION.

[Jury Trial.

CAMPBELL AND OTHERS v. SCOTTISH EDUCATIONAL NEWS COMPANY, LIMITED.

Reparation—Slander—Process—Jury Trial—Action of Damages for Slander—Application for New Trial on Ground Verdict Contrary to Evidence.

In actions of damages for slander a motion to set aside the verdict as being contrary to evidence and to grant a new trial is to be granted or refused on precisely the same grounds as in any other action. *Ross v. M'Kittrick*, December 17, 1886, 14 R. 255, 24 S.L.R. 190, approved.

Observations per Lord President on criterion to be applied in reviewing verdicts in such cases.

Expenses—Jury Trial—Slander—Verdict for Defender on Pursuer's Issue—No Verdict Returned on Defender's Counter

Issue of Veritas—Motion by Pursuer for Modification of Expenses.

A jury, in an action of damages for slander, returned a verdict for the defender on the pursuer's issue, and following the direction of the presiding judge, to which no exception was taken, found that it was unnecessary to return a verdict on the defender's issue of *veritas*. The pursuer asked a modification of the expenses in respect of the issue of *veritas*, which had not been established. The Court granted the defender his expenses without modification.

Process—Jury Trial—Issues and Counter Issue—Verdict on One Issue only.

The Lord President—"In a case where the verdict on one of the issues tabled exhausts the case and leads either to decree as craved or to absolvitor, any answers on the remaining issues is matter not of right but of convenience."

On 21st March 1905 John Campbell, joiner, Donald Blair, grocer, and Peter M'Intyre, baker, all of Tarbert, raised an action of damages for slander against The Scottish Educational News Company, Limited, Edinburgh, concluding for £250 each. The case was heard before the Lord President and a jury, and the jury returned a verdict for the defenders, finding for them on the first issue, and finding it unnecessary to return a verdict on the other issues. The pursuers applied for and obtained a rule and the case now came before the Court on the rule.

The issues for the pursuers were in the following terms:—"It being admitted that the defenders published the article printed in the appendix hereto—(1) Whether the said article is of and concerning the pursuer . . . and falsely and calumniously represents that the pursuers combined to secure the dismissal of Robert Aird from the post of teacher in the Tarbert School solely from motives of personal hostility to him, and not in the *bona fide* discharge of their duties as members of the School Board of Tarbert, to the loss, injury, and damage of the pursuer . . . (2) Whether the said article is of and concerning the pursuer . . . and falsely and calumniously represents that he had preferred and subsequently circulated what he knew to be a false charge of neglect of duty against the said Robert Aird as a pretext for dismissing him, to the loss, injury, and damage of the pursuer . . ."

A counter issue on behalf of the defenders was also submitted in the following terms:—" (1) Whether in or about 1904 the pursuer . . . conceived feelings of personal hostility to the said Robert Aird, and whether in consequence thereof the said . . . in October 1904 preferred what he knew to be a false charge of neglect of duty against the said Robert Aird as a pretext for dismissing him from his office of headmaster, and did on said pretext, on or about 24th November, and in conjunction with the said . . . and . . . cause the said Robert Aird to be dismissed from said office."

The important portion of the article in the *Educational News*, of which paper the defenders were proprietors, upon which the action was based ran as follows:—" . . . After years of a steady policy of building up a secondary department, in which evidently both the School Board and the headmaster took a deep interest and a proper pride, a change of policy occurred on the part of the School Board coincident with the return of a new set of members to that body. The staff was cut down to such an extent that the efficiency of the work was maintained only by the special efforts of the headmaster and staff. H.M. Inspector frankly pointed out the folly of the policy (dictated purely by motives of economy); the County Council withdrew its grants; the intelligent and educated minority of the School Board never ceased to protest. Yet all to no effect. It is not often that what may, without offence, be styled the 'working-class' element in the community is so short-sighted as to cut off deliberately the one agency by which their children may hope to make good the difficulties and drawbacks which handicap them in their onward and upward struggle for existence. Yet this is what we find in Tarbert. The teacher had warmly identified himself with the success of the higher work, and did not hesitate to express his regret at seeing the work, so carefully fostered for years, so ruthlessly demolished in an hour. The consequence to him has been serious. The opposition of the majority of the School Board to the policy with which he was identified developed into personal hostility to himself. 'We must get rid of this pestilent fellow.' But the small cunning which is never very far away from the mainsprings which move certain types of mind at once suggested that to dismiss a teacher for such an alleged reason would be to court the public condemnation which it would assuredly call forth. Some other ostensible reason must therefore be found to put before the public as the reason for his dismissal. This was done in Mr Aird's case by making a charge against him in connection with his absence from school on the afternoon of Friday the 21st October 1904, an absence due to temporary indisposition as is conclusively proved by the testimony of competent witnesses, even as the baseless charge is refuted as conclusively by the same testimony. But one more degree of cunning is here introduced. It is not necessary to allege 'cause' in dismissing a teacher. The *ipse dixit* of a bare majority is sufficient so long as the other obligatory processes of the Mundella Act are duly observed. Therefore the Tarbert School Board 'dismisses'—as it believes—Mr Aird by legal process, and gives no reason for its action. That of course does not hinder the unofficial and subterranean diffusion of the story of the alleged cause of the School Board's action, and the story has been spread abroad in that amorphous and indefinite form which is warranted and expected to do the most harm to Mr Aird, and at the same time safeguard his traducers. . . ."

The Lord President's charge to the jury at the trial was as follows:—"Gentlemen of the Jury—This case has been conducted with very great ability, and in a certain way with very great moderation, by the learned gentlemen on both sides of the bar. It is a case of a kind that has been committed by the law to the determination of a jury, and not to a judge, and accordingly I am afraid that I cannot relieve you of the responsibility that is put upon you of deciding these matters, nor even of telling you how I think you ought to decide them. But what I can do for you, and what I hope to do, is to bring your minds precisely to the question that you have got to decide. In the course of the very able speech to which you have just listened, there is I think only one remark which I must rather caution you against, and that is the remark with which it concluded. It may be perfectly true that the effect of your verdict may be rather more far reaching than the confines of this case, and that its effect may be on the one side or on the other as the learned counsel put it. But, gentlemen, you have not got anything to do with that. You have not got to think what the effect of your verdict is going to be elsewhere. You have taken an oath to do justice in this case between these two parties, and you have got to do that without fear or favour, reflecting that, after all, the consequences of that do not depend on you, you having done your duty.

"The action as you know very well is an action brought against a newspaper by three private individuals, members of this School Board, who say that newspaper has slandered them. Gentlemen, it is certainly the case that those who go into public life in this country must not hope to indulge in the luxury of a very thin skin. Public life as we like it to be conducted, and as most of us believe it is on the whole for the public benefit that it should be conducted, subjects those who take public positions to very free criticism. And those of us who have been in public life for many years would really I think scarcely ever have been out of court if we had always rushed into the law courts whenever we saw a criticism which we thought was somewhat intemperate and unjust. But at the same time, while that is so, it is undoubtedly the case that there is a line not very easy to define and yet I think commending itself to any man of common sense—there is a line of criticism which must not be crossed. You must confine your criticism to the man's public actions. I do not say that you may not impute motives to him. I think it is a better style of criticism which does not impute motives, whether in the political or any other world. But as long as his motives are kept to purely public actions, then I cannot say that that is a thing which a person can come to a jury and attack. But when you go further, and under the guise of attacking a man's public life you really attack his private character, and state or insinuate that he has been guilty of a disgraceful action in his private character, and that by means of that dis-

graceful action he has done certain things in public life, then it is a libel, it is a slander, and unless it can be justified upon the truth of it, an action of damages will lie, just as if the whole matter had happened in the domain of private life, and there had not been anything in respect of public life at all. I do not think I need comment further upon these matters, because I think it is a matter really of common sense. It is a matter I have no doubt that is absolutely present to all of your minds as men who read newspapers and appreciate the advantages of a free press, and who see that a free press must not be debased into a licence for attacking private people.

"Let us now apply this general principle to the particular case in question. Now, in the case in question there is tabled before you a certain article. The issue on which it is put before you puts this question of fact—'Whether the said article is of and concerning the pursuer.' No doubt there is a separate issue—of course you have three of them; but as I have already said I do not think it is probably necessary to have two issues at all; and I think for all purposes we may be content with the second. I do not think there is really any difference between them. I think your verdict would naturally be the same on the first or the second as it would be on both—either for the pursuer or the defender. But it is easier to explain my remarks if you confine attention to the second issue, 'Whether the said article is of and concerning the pursuer John Campbell, and represents that he had preferred and subsequently circulated what he knew to be a false charge of neglect of duty against the said Robert Aird as a pretext for dismissing him.' Now, gentlemen, I do not think you will have any difficulty in feeling that that is a good innuendo as the term is, that is to say, that that is a charge of having done something which oversteps the bound of public criticism. That is to say, in other words, that if you do falsely and calumniously represent that somebody else has preferred and subsequently circulated a false charge against a man as a pretext for dismissing him, and has dismissed him, you do go beyond public criticism, and you allege that the person has done something which is disgraceful in itself, and doubly disgraceful when it is used as a cloak to doing something which is not consistent with public duty.

"I do not think you will have any difficulty so far. That really is not a question for you at all, because unless the Court had originally thought it a good innuendo, that is to say, a slanderous innuendo, they would not have laid the matter before you at all. The next question really, which is the first question for you, is whether that is to be truly carved out of the article. And this, as Mr Ure said, does not mean whether by any possible twisting of the words of the article you could hold that such a meaning is possible. But it means—What do you as men of ordinary common sense think that article means? Now, in a case of this

sort, where it deals with matters with which you are all quite familiar—I mean this question of school board and teacher, and so on—the real point is, that you are the best judges of that yourselves. I mean that although it is quite customary and common for persons, for pursuers before the Court, to bring witnesses to say, ‘Well I read the article and I thought it meant so and so’—in a case of this kind I do not think that so much matters as what your own view of the reading of the article as men of common sense would be. The point really on which I think your judgment on the matter ought to turn—and I tell you it is a question for you and not for me—would be this. Supposing you had been for your summer holidays in Tarbert, and that you had got a copy of this *Educational News*, and read that article about people all strangers to you—only names, so far as you are concerned—still, if you had nothing better to do and read the article, what sense would you have taken out of it? Would you have taken or not taken the sense put to you in this issue? Would you have said—‘Well, I do not know who this John Campbell is; I never heard of him before; but I see this newspaper writer says that John Campbell circulated what he knew to be a false charge of neglect of duty against Robert Aird, a schoolmaster, as a pretext for dismissing him, and on the top of that he did dismiss him.’ That is the test I put to you. Of course here one or two people were put into the witness-box to say that this was the meaning of the article, and they said ‘Yes,’ and I am bound to say there was not much cross-examination put to them. But after all I am bound to say that I do not attribute much to that evidence one way or the other. There are some cases where you would have had to have evidence of a technical character, or with regard to a foreign language, or terms of art, which the ordinary jurymen might have been expected not to know about, and then it would have been quite good evidence in order to put you in what might be called an intelligent frame of mind. But this matter is dealing with everyday life, in which you have as intelligent a mind as the witnesses. And it is just for that reason that a case of this sort is given to a jury instead of to a judge. It is not that we are not men of the world too, and do not understand, but it is because you do not want to get—and that is the criterion of it—so much what I might call the trained mind to say what is the meaning of it. But the point is, What does the man in the street, to use an ordinary expression, what does he think of it? Because it depends on what the man in the street thinks whether it is a libel or not. For it is the man in the street, the men among whom the circulation of a newspaper goes, who are the judges as to whether it is fair ordinary criticism in this article, or if there is libel. Therefore the first question in this case—and you cannot stir a foot until you have solved it yea or nay—is taking this article and reading it, of course by those passages which I do not need to comment upon—they have been

commented upon again and again to you—reading that article as men of common sense, do you take from it the sting, the innuendo as it is called technically, that the article represents that they had preferred and subsequently circulated what they knew to be a false charge of neglect of duty against Mr Aird as a pretext for dismissing him, and dismissed him?

“Now, of course, if you cannot take that out of it, you must find for the defenders on the first issue, and of course there is an end of the case. You do not need to go any further. But if, on the other hand, you think that the meaning of the article is that, then we have to go on to the second portion of the case. You will then have found that the article is ‘of and concerning the pursuer,’ and represents that he preferred, and so on. But there are two words you will have noticed I left out—‘falsely and calumniously.’ The law upon that matter is this, that when a statement is libellous or scandalous, the law always presumes it is false unless the other person can prove it is true. And therefore if you have considered that this is a slanderous statement, as I have said, then you start with the presumption that it is a false statement, unless the other person can show you that it is not false. And that is the meaning of the counter issue, and that is why the counter issue goes, you will see, exactly on the lines of the issue. The counter issue to which I now ask your attention is this—‘Whether in or about 1904 the pursuer John Campbell conceived feelings of personal hostility to the said Robert Aird, and whether in consequence thereof the said John Campbell in October 1904 preferred what he knew to be a false charge of neglect of duty against the said Robert Aird as a pretext for dismissing him from his office of headmaster.’ You will notice that is exactly an echo of the words that are in the other issue. It would not have been, for instance, a counter issue to have put—‘Whether on such and such a date Mr Aird was drunk and was unfit for his duties.’ That would not have come up to the sting—the innuendo. Accordingly, if you come to the conclusion that your verdict ought to be for the pursuer on the first issue, you have then got to start with the idea that the thing is false, unless the other party the defender proves that it is true. The onus or weight of that, as lawyers say, is on the defender. It is for him to show. The question you meet on the second issue depends of course upon a question of fact, and it is with regard to the elucidation of that fact that we have had these three long days of evidence, not too long in this sense, that I do not think any time has been wasted, and it is not for you or me to complain of our duty. . . .

“I hope I have made it clear that you have two steps to consider. The first is whether that innuendo, which as I say I do not think there is any doubt is a good innuendo, of charging something more than true criticism—whether that is to be gathered out of the article. If it is not, the case is at an end, and you will find a verdict

for the defenders. But if it is to be fairly gathered out of the article, then we must take it that it is a false and calumnious charge, unless the defenders to your satisfaction make you say yea to the question in the counter issue, and not to any other. There are two issues on one certain point. If you give the first issue in favour of the pursuers, you will give the second in favour of the pursuers also."

On the return of the jury, when the foreman had intimated that they found for the defenders "on the ground that there was no libel in the article complained of," counsel for the pursuers asked for a verdict on the counter issue. The foreman, however, said the jury thought that their verdict would cover everything, and the Lord President said they were quite right, it did so, and there was nothing more to be said. A verdict finding for the defenders on the first issue and finding it unnecessary to return a verdict on the other issues was thereafter, with the Lord President's approval, recorded.

Argued for the defenders—A new trial should not be granted. The Court would not, save as to whether the words used applied to the pursuer or did not, disturb the verdict of a jury on a question of slander, and certainly not where the question involved public conduct. The innuendo, held possible by the Court, having gone to a jury, and the jury having found as ordinary readers that it was not in the words used, there was no room for a second jury considering it. The article complained of was fair criticism of the pursuers in their public capacity and was not slanderous. The jury had so found, and it was for them to decide—*Sexton v. Ritchie & Co.*, March 18, 1890, 17 R. 680, 27 S.L.R. 536, 18 R. (H.L.) 20, 28 S.L.R. 945; *Waddell v. Roxburgh*, June 9, 1894, 21 R. 883, 31 S.L.R. 721. There were only two cases in Scotland in which the Court had set aside a verdict in cases of slander, viz., *Smith v. Gentle*, January 31, 1844, 6 D. 565; and *Ross v. M'Kittrick*, December 17, 1836, 14 R. 255, 24 S.L.R. 190. In England there was no case where the verdict had been set aside where it was left to the jury to say whether the article in question was or was not a libel—*Odgers on Slander* (4th ed.) p. 105; *Australian Newspaper Company v. Bennett*, [1894] A.C. 284. On the evidence the verdict was right.

Argued for pursuers—The case of *Ross v. M'Kittrick* showed that the Court would set aside a verdict in a slander action if contrary to evidence, just as in any other kind of action. If the charge here was baseless (as the facts proved showed) the jury were not entitled to find that there was no libel. The article charged the pursuers with inventing a reason which they knew to be false. The jury could not reasonably attribute any other meaning to the article. That being so the pursuers had been slandered. There was no such rule as the defenders contended for in regard to verdicts in slander cases. The verdict here was clearly contrary to evidence and must be set aside.

At advising—

LORD M'LAREN—This case raises an interesting question as to the limits within which the Court will exercise its undoubted jurisdiction in correcting the errors which may be found to have influenced a jury in its verdict. In actions other than these which are founded on defamation the same difficulty has not presented itself, because the respective functions of the judge and jury in such cases are well understood. Relief will always be given against a verdict that is plainly in disregard of the directions of the judge, and the Court will, in general, grant a new trial where the verdict is against the weight of the evidence. I think there is much force in the argument of the Solicitor-General—though I should not be prepared to assent to it in the unqualified terms in which he formulated it—that the Court as a general rule will not be disposed to interfere with the verdict of a jury in cases of defamation. The Court, I think, will be especially reluctant to do so where the verdict is in favour of the defender, because one cannot help observing that juries are very ready to make an award of damages if any real ground exists for doing so. The case of *Ross v. M'Kittrick* (14 R. 255) is a clear authority for the proposition that the verdicts of juries in cases of defamation are not exempt from review. That was a case relating to private character, for the pursuer was slandered in his trade. I agree with the argument of the Solicitor-General that the caution which the Court always exercises in such cases will be exercised with peculiar care where the libel in question is one affecting public conduct, or public character generally, because people who undertake public duties, whether in Parliament or local bodies, invite criticism of their public acts, and as such criticism is not always in the best taste, it may often happen that things are said which are hurtful to the feelings of an individual, though they do not allow ground for an action of damages. In the case where a man's public character is attacked, if the jury put a benevolent interpretation on the words used, I should be slow to interfere with their verdict. The present case cannot be regarded as exceptional. The pursuers undertook to establish that the defender had made a charge affecting the conduct of certain members of the School Board of Tarbert, the charge being that they had dismissed the schoolmaster upon a false ground, upon the pretext that he had on one occasion been absent from his duties, while the real reason was the hostility of the pursuers with respect to the teacher's views on higher instruction and greater efficiency in the school. A charge of that kind may or may not be libellous according to the sense in which it is read. If we read it as meaning that these members of the Board, actuated by private hostility to the teacher, had perverted their office and dismissed him in circumstances which did not warrant dismissal, I should have little doubt that this would amount to a slander for which the law would give redress. If,

on the other hand, the charge only meant this, that the pursuers had not approached the question with that dispassionate and fair mind which one would naturally expect an employer to exhibit in considering the conduct of an employee, but had intemperately dismissed the teacher—if that were the meaning, there would be nothing libellous in it, because that would only be a reflection upon the manner in which the pursuers performed their public duty, and not a reflection on personal character.

I can only understand this verdict on the supposition that the jury were of opinion that the article complained of was fair criticism on the public conduct of the pursuers, and I cannot say that the language used excludes such a meaning. It is a possible view, and a view which the jury were entitled to take. Although I might not have agreed with the view taken by the jury, because I rather think the article does overstep fair criticism, I am unable to say that it is so demonstrably and clearly beyond the bounds of criticism that no reasonable jury could take a different view. I am of opinion that we ought not to interfere with the verdict.

LORD KINNEAR—I have come to the same conclusion. I am of opinion—and I have the less hesitation in saying so because I am only repeating the opinion of Lord Adam—*Ross v. M'Kittrick*, 14 R. 255—that we should grant or refuse a new trial in actions for slander on precisely the same grounds as in any other case. The functions of the judge and the jury appear to me to be the same in the one class of case as in the other. The law is for the judge and the question of fact for the jury. It makes no difference that in the present instance an innuendo is put on the words used, and the jury are asked to say whether the words bear the meaning put on them in the innuendo. I understand the law to be that the question whether written language is capable of the defamatory meaning ascribed to it is a question of law for the Court; but when the Court has decided that it is so capable it is a question for the jury whether, in the circumstances of the case, the language complained of did convey the meaning which the pursuer ascribes to it. The issue sent to the jury here was:—“... [His Lordship read the second issue for pursuer, *supra*.] . . .” The questions of fact therefore put to the jury were—Does the article in question relate to the pursuer? Does it represent that he preferred and circulated a charge which he knew to be false as a mere device for dismissing the teacher? Did he do so intending to injure the pursuer? and, Was the charge a false one?

Reading the language complained of with reference to the circumstances in which it was published the jury returned a verdict for the defenders. I think that verdict must be treated as any other verdict would be treated. The verdict is not to be set aside merely because we disagree with it. If all we think of it is that we should not have agreed with it, then to set it aside

would be to take upon ourselves the function of the jury. On the other hand, if it is apparent that the jury have not duly performed their functions, and have given a verdict which no reasonable jury, properly instructed, would have given, or, as the late Lord President put it, if it is flagrantly wrong, the Court will set it aside, and that whether it be a verdict on a question of slander or on any other question of fact. The question then is, is the verdict before us so flagrantly wrong that no reasonable jury discharging their duty honestly under proper direction would have given it? I am disposed to agree with the observation of Lord McLaren that if there be any difference in the function of the Court in dealing with different verdicts we should probably be more reluctant to disturb a verdict in cases of this kind than in others. But still the true question we have to determine is just the same, and if a jury has returned a perverse verdict in an action for defamation we are bound to set it aside on the same principle as if they had been trying any other question of fact. But considering the verdict in question in that way I am of opinion that the jury may very reasonably have come to the conclusion that the article in question did not contain the specific charge preferred by the pursuer. It is enough to say that on either side of the bar plausible grounds have been brought forward for opposite views as to the meaning of the article, and that being so it is really a question for the jury to say whether ordinary people would be likely to read it as conveying the defamatory imputation complained of by the pursuer.

LORD PEARSON—I am of the same opinion.

LORD PRESIDENT—I presided at this trial and I thought the question under the issue one of considerable difficulty and doubt.

The Solicitor-General in his able argument strove to prove that a motion for a new trial, on the ground of the verdict being contrary to evidence, in a case of this sort stands in a different position from such a motion in any other case. His argument was that once the Court had granted an issue upon an innuendo and the jury had said that the words complained of did or did not bear the meaning put upon them in the innuendo, that ended the matter. I am satisfied that that is not sound. I adopt what your Lordships have said, and think the case is governed by *Ross v. M'Kittrick* (14 R. 255). But then we must consider what is the criterion to be applied in reviewing verdicts in such cases. After all, according to our practice the determination of the Court as to whether a certain document will or will not bear an innuendo is just a judgment on relevancy. If the innuendo which is tabled is an impossible one, the Court in saying so simply say that the case is not relevant. But what is the criterion by which we are to judge whether the innuendo is proved? I do not think, so far as I am concerned, I can express the matter better than in the words I used to the jury in this case—“What do you, as men of

ordinary common sense, think that article means?" I go on to say that one or two people were put into the witness-box to say what was the meaning of the article. "But after all I am bound to say that I do not attribute much to that evidence one way or the other. There are some cases where you would have had to have evidence of a technical character, or with regard to a foreign language, or terms of art, which the ordinary jurymen might have been expected not to know about, and then it would have been quite good evidence in order to put you in what might be called an intelligent frame of mind." On further consideration I think there might be added to that also evidence of a local character which would tend to show that certain expressions when read by people in that locality would bear a different meaning from that which they have to people in other parts of the world who have not the local knowledge. "But the point is—what does the man in the street, to use an ordinary expression, what does he think of it? Because it depends on what the man in the street thinks whether it is libel or not." I adhere to that view and think the criterion is—what would ordinary people think?

To give a new trial we must say that the jury had gone so far wrong that their verdict did not and could not represent what would be ordinary opinion on the matter.

I agree with what your Lordships have said as to this case. Although I myself think the article went somewhat beyond fair criticism, yet the point is so narrow that I cannot say the jury went so far wrong in giving the verdict which they did as to warrant us giving a new trial. Therefore I agree with your Lordships as to discharging the rule.

The Court discharged the rule and of consent applied the verdict.

Counsel for the defenders having moved for expenses, counsel for the pursuers opposed the motion.

Argued for the pursuers—The defenders had not substantiated their defence, for the counter issue had not been adjudicated upon. [LORD PRESIDENT—It seems to me that before you go into that you must first say I was wrong in directing the jury that they need not consider the counter issue.] No expenses should be allowed *quoad* the case relating to the counter issue—*Stoppel & Company v. Maclaren & Company*, December 18, 1850, 13 D. 345; *Johnston v. Smellie's Trustees*, July 15, 1856, 18 D. 1234; *Lord Clinton v. Brown*, July 10, 1874, 1 R. 1137, 11 S.L.R. 665; *Shepherd v. Elliot*, March 20, 1896, 23 R. 695, 33 S.L.R. 495. [LORD KINNEAR—This should have been raised at the trial by excepting. It is really equivalent to saying that there has been a miscarriage and that the issues have not been exhausted.] The defenders ought to have moved to have the counter issue upheld, not having done so *sibi imputent*—*Wardlaw v. Drysdale*, May 17, 1898, 35 S.L.R. 693.

Argued for the defenders—The defenders were bound to state all their defences whether it were necessary to prove them or not. The pursuers had failed in their case and the defenders were entitled to full expenses—*King v. Reilly*, May 31, 1849, 11 D. 1095. In cases tried with a jury no modification of expenses would be allowed unless there had been divided success on the issues. There was no reason why this case should be treated exceptionally.

LORD PRESIDENT—In this case the motion is to apply the verdict and find the defenders entitled to expenses. The question which has been raised, and which in the particular circumstances is a novel one, is as to whether in view of the fact that there was a counter issue not adjudicated upon, there must not be a direction to the Auditor to deal with the expenses connected with that branch of the case in a different manner from the expenses of the rest of the case.

The course of procedure here was as follows:—There was an issue whether the innuendo could be drawn from the statements made by the defenders, and there was a counter issue whether, assuming that it could, the statements in question were true. I told the jury at the trial that if they came to the conclusion that there was no libel, that ended the case, and they need not consider the counter issue. The jury returned a verdict for the defenders on the first issue. The junior counsel for the pursuer then asked that they should return a verdict on the counter issue. The foreman of the jury then said that they understood that an answer to the counter issue was not required, as in their opinion the verdict they had given covered the whole case. I thought they were right, and so did not direct the jury to return a verdict on the counter issue.

Whether my direction was right or wrong, I think the true answer to the pursuer's contention—an answer which it is impossible to get over—is the fact which was pointed out by Lord Kinnear, that even assuming my direction to have been wrong, the only way of submitting it to review was by bill of exceptions. This not having been done, the question may be allowed to end there.

But I think it well to express an opinion on a matter of principle. In a case where the verdict on one of the issues tabled exhausts the case and leads either to decree as craved, or to absolvitor, any answer on the remaining issue is matter not of right but of convenience.

Where a judge thinks that the verdict on the first issue may result in a motion for a new trial being granted, he may ask for a verdict on the other issue also. But I do not think a party has the right to ask for a verdict on the second issue when the verdict on the first issue exhausts the case. I think therefore that the direction which I gave to the jury was right.

For the purpose of this discussion it is matter of practical importance from its bearing on the question of expenses. It seems to me that the criterion in awarding

expenses is first of all what is laid down in the Act of Sederunt, 15th July 1876, that a pursuer who is unsuccessful in one branch of his case will not be allowed expenses. By "unsuccessful" the Act I think means that his opponent has been successful. I do not think the present case falls under that head. Again, apart from the Act of Sederunt, I think the Court may order that expenses may not be awarded to a party if by his conduct unnecessary matters have been gone into thereby causing additional expense. I do not think this case falls under that head either.

Further, I agree with all that was said by Lord President Robertson in *Shepherd v. Elliot*, 23 R. 695, as to the principles on which the Court proceeds in awarding expenses in actions tried with a jury.

As this case does not fall within any of the categories I have indicated, I think we should follow the ordinary rule, apply the verdict, and find the defenders entitled to expenses.

LORD M'LAREN—I am of the same opinion. It cannot be said that the defenders have failed on the counter issue because in the circumstances it came to be unnecessary in the view of the Judge and the jury to consider it. Accordingly, the provisions in the Act of Sederunt as to disallowing the expenses of a part of the litigation in which a party has been unsuccessful do not apply. I think we must consider that in the proper conduct of the case it was necessary that the witnesses in regard to the counter issue should be examined, and that the expense of bringing forward these witnesses should be expenses in the cause. I see no reason for treating this case exceptionally.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON—I also agree.

The Court found the defenders entitled to expenses.

Counsel for Pursuers—Guthrie, K. C.—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Defenders—The Solicitor-General (Ure, K.C.)—T. B. Morison. Agents—Kirk, Mackie, & Elliot, S.S.C.

Friday, March 16.

SECOND DIVISION.

MACFARLANE'S TRUSTEES v. MACFARLANE AND OTHERS.

Succession—Vesting—Survivorship—Conditional Institution—Accretion—Clause of Exclusion—Substitution of Issue for Parents—Parents' Rights Conditional—Effect on Children's Rights—Clause of Exclusion as to Original Shares Applicable to Accreting Shares.

A testator who died in 1863 directed his trustees twelve months after the

decease of the longest liver of himself and spouse to convert his estate into cash, divide the proceeds into a certain number of parts, and "pay" certain of them to the children of his son A. There followed immediately declarations to the following effect—(1) That the shares in question should not be payable to the grandchildren till the death of both parents, who were meantime to receive the income; (2) That E, one of the grandchildren (otherwise provided for) should not participate in the bequest; (3) That in the case of any of the grandchildren dying without issue before the period of payment, such predeceasers' shares should go to their surviving brothers and sisters, unless the predeceasers left children, in which case such children should take their parents' share.

There were four grandchildren, C, D, E, F. The testator's widow died in 1871; the survivor of the grandchildren's parents in 1904. C died without issue in 1883. D died in 1895 leaving issue still surviving. E died in 1880 leaving a son G surviving. F was still alive.

In a special case brought to determine the rights of parties in the succession to C, held (1) that vesting of the grandchildren's shares was postponed till the death of their mother in 1904; (2) that the express exclusion of E sufficed *per se* to exclude his son G; (3) that D's issue, as conditional institutes and in their own right, took only D's original share of the bequest and not the proportion of C's share which would have accreted to D had D survived the life-rentrix; (4) that the whole of D's share by the express clause of survivorship was carried to F.

Martin v. Holgate, (1866) L.R., 1 E. & I. Ap. 175, and *Young v. Robertson*, 1862, 4 Macq. 337 (second case), *discussed*.

This was a special case brought to determine certain questions arising on the trust-disposition and settlement of Alexander Macfarlane of Thornhill, who died on 11th March 1863. By his trust-disposition and settlement he conveyed his whole estate to trustees for various purposes.

By the *second* purpose the trust directed his trustees to pay to his spouse Mrs Helen Mitchell or Macfarlane, in case she should survive him, an annuity of £200 sterling, and also to allow her the life-rent use of the mansion-house of Thornhill and others. By the *third* purpose he further directed his trustees, after payment of said annuity, to pay and divide the free income arising from his heritable estate and also from his moveable estate, until divided as therein appointed, among his children or grandchildren (whose share of income should be paid as after appointed) according to the proportions of the residue of his estates payable to them as thereafter directed. By the *fourth* purpose the trust directed his trustees, within twelve months after his decease, or sooner if his trustees should be in a position to do so (after setting aside