

[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.