Wednesday, June 16.

SECOND DIVISION.

JOHNSTON *v.* DILKE AND OTHERS.

Jury Trial—Excessive Damages—Motion for a New Trial—Damage assessed by the Court of consent.

Where an action had been raised against the proprietors of a journal for criticisms on an atlas, and £1275 damages were awarded by a jury,—*held*, on a motion for a new trial, that the damages were excessive, and damages of consent assessed at £100 by the Court, and rule refused.

Jury Trial—Motion for New Trial—Expenses.

A new trial was moved for on the ground (1) that the verdict was contrary to evidence, and (2) that the damages were excessive. The motion was refused on the first ground absolutely, and on the second after the Court had of consent assessed the damage at a much lower sum: *Held*, in a question as to the expenses of the application, that the point as to damages only having been made out, the party thus successful partially were entitled to one half the taxed expenses.

This case was tried before Lord Moncreiff, Lord Justice-Clerk, and a Jury, on March 24, 1875, upon the following issues:—"It being admitted that in the number of the 'Athenæum' newspaper published by the defenders on 11th July 1874, the article printed in the schedule appended hereto, appeared: 1. Whether the said article was of and concerning the pursuer and his firm of W. & A. K. Johnston, and falsely and calumniously represents—That the pursuer and his said firm had falsely, and for the purpose of deceiving the public, issued as the work of A. Keith Johnston an atlas which was not the work either of A. Keith Johnston the first or A. Keith Johnston the second, but of persons not skilled in making an atlas; to the loss, injury, and damage of the pursuer. 2. Whether the said article was of and concerning the pursuer and his said firm of W. & A. K. Johnston, and falsely and calumniously represents—That the pursuer and his present firm of W. & A. K. Johnston were no longer capable of producing good and useful atlases or geographical works; to the loss, injury, and damage of the pursuer. Damages laid at £5000."

The article referred to was as follows:—"The number of the *Proceedings* of the Royal Geographical Society just published contains a letter from Dr Livingstone to Sir Henry Rawlinson, in which the great traveller says:—'It was gratifying to find that, though my letters disappeared, Keith Johnston *secundus*, as he ought to be called, had, with the true geographical acumen of my lamented friend Keith Johnston *primus*, conjectured that the drainage (from Lake Bangweolo) went to the north-west, as I found it, and to the Congo, as I often feared.'

"The atlas now before us, though bearing the name of A. Keith Johnston, is the work of neither the *primus* nor the *secundus* of that name, for the son is no longer connected with the house established by his late father, the merited reputation of which he was so well qualified to maintain, but is gone to seek his fortune in Paraguay. And not merely from the present work, but from others which have lately come to our notice, we regret to observe unmistakeable signs of the absence of that 'true geographical acumen' which Livingstone so justly lauded.

"This 'Educational Atlas,' though nicely got up, and in this and in other respects following the traditions of the firm under whose name it appears, is scarcely a work likely to maintain the special character of that firm, it being one that might have been prepared at the work-table of any map-maker of ordinary ability. We are far from saying that in its maps of the known portions of the globe it contains any material errors or omissions, or that the general execution and finishing of the work are deficient; but the engraving, though artistically, or rather mechanically good, is so delicate and faint, and the maps are so overcrowded with names, as to render them indistinct and difficult of reference—the first essential, as it appears to us, in an 'educational' atlas. In these respects the 'School Atlas' published by the same firm some twenty years and more ago, is, to our mind, superior.

"To the maps is appended an 'alphabetical index to every place contained in the atlas,' comprising some 20,000 names, which ought, one would have thought, to leave little, if anything, to be desired in the way of reference. And yet, curiously enough, we happen at this very moment to have before us a letter, dated 'Greenisland, Otago, New Zealand,' and a tract published at Listowel, Ontario,' or Canada West; and wishing to ascertain the positions of those two out-of-the-way places, we have looked for them in vain, both in the index and on the maps of 'New Zealand' and 'Canada' in the atlas. We are far from taking these two omissions as specimens of the whole work; still they certainly form a strange and unlucky coincidence.

"In this index of names the position of each place is indicated by the notation of its latitude and longitude to the nearest minute, precisely as is the case in the 'Tables' of Claudius Ptolemy, and this serves to show that such precision of notation is no proof of geographical accuracy resulting from astronomical observation or actual survey; the fact being that each spot is first marked on the map with as near an approach to accuracy as is practicable, and sometimes from most uncertain *data*, and then the latitude and longitude of the position thus assumed is measured off from the map, and noted in the Index or Table.

"Take, for instance, Livingstone's Lake Bangweolo. In the index, we find it registered as lying in 11° 30′ S. lat., and 28° 0′ E. long.; which notation truly serves as a guide to its position on the map, No. 28, of 'North Africa,' but might be most misleading were we to regard it as anything but an approximation to the actual position of that lake, which Livingstone had no means of determining positively.

"In the map of Africa we notice several important variations from former maps made, we cannot exactly say how correctly or on what authority. The 'Sources of the Nile' are placed in about 10° S. lat., and 35° E. long., and the river is thence led through Lake Liemba into Lake Tanganyika; but there it stops, there being no sign whatever of any outlet from that lake, or of any connection between these 'Sources' and the Nile itself. This is as if the idea of Keith Johnston *secundus*, advocated by Mr Findlay, and recently maintained by Sir Samuel Baker, that Tanganyika is 'one water' with the Albert Nyanza, were abandoned by the present cartographer in deference to the alleged

autopsy of Dr Livingstone and Mr Stanley, but he has not had the 'geographical acumen' to follow out his own conclusion by erasing the words Sources of the Nile' from the map, where, as they stand, they are perfectly absurd.

"On the other hand, a 'Source of the Nile' of a very different character is ruthlessly annihilated; namely, that of the Godjeb, which river was thirty years ago declared by M. d'Abbadia to be the head of the White Nile, and to have been crossed by him on his way to Kaffa, though he subsequently declared the Gibbe of Enarea, a branch stream of the Godjeb, whose source he visited, to be the veritable head of the White Nile. (See his letters in the *Athenæum*, Nos. 1041 and 1042, of October 7th and 14th, 1847.) Now the river formed by the union of the Godjeb and Gibbe is by Messrs Johnston (following, if we mistake not, the German geographer Kiepart), turned altogether away from the Nile, and laid down as the upper course of the Juba—the 'Goschop' of Dr Krapf and Major Harris—which falls into the Indian Ocean near the Equator; and thus is restored to its place on the map of Africa the river Zebee (Bruce's Kibbee), crossed by Father Antonio Fernandes in 1613, and described by Ludolf in his 'Historia Æthiopica,' lib. i. cap. 3, on the authority of his Abyssinian friend Abba Gregorius, in these terms :—'De fluminibus, quæ vicinum Oceanum intrant, Gregorius plura non narravit quam supra retulimus. *Zebœus in Enarea ortus*, et finitimum Regnum Zendjero instar Nili in modum peninsulæ ambiens, *in meridiem decurrit*, et juxta Mombacem mari Indico misceri creditur.'

"Further, the draughtsman, not having the fear of Colonel Grant before his eyes, divides Captain Speke's Victoria Nyanza into three lakes! We must confess an inclination on our own part of his opinion; only we could never admit the eastern lake to bear the name of 'Ukerewe,' whilst the island of 'Kerewe' is within the southern lake.

"And, lastly, assuming Keith Johnston *secundus* to be right in turning the river which flows from Lake Bangweolo away from the Nile, and carrying it north-westward to the Congo, we cannot believe that that able geographer would have given its assumed course such a turn round to the south as is shown on the present map. But whilst we are writing this, we read in the *Times* of June 30th a letter from Lieutenant Cameron, dated Ujiji, February 25th, in which he says,, 'I hear from the people here that the Lualaba from Nyangwé goes into the Mwootanzige or Bahari Unyoro, *so it must be the Nile after all.*'

"On the whole, we miss in this atlas the presence of the master-mind which, in both father and son, gave to the house of W. *and A. K.* Johnston the character it has so long enjoyed, but we fear is now losing, in the world of science."

The jury gave the pursuers £1275 damages. On 14th May 1875 the defenders moved the Court for leave to be heard on a motion for a rule to show cause why the verdict should not be set aside and a new trial granted. The Court appointed counsel to be heard on this motion, and ordered a copy of the notes of the evidence taken by the presiding Judge to be printed. The case now came up for hearing.

At advising—

LORD JUSTICE-CLERK—Having presided at the trial of this case, I may as well, before your Lordships deliver your opinions upon the question before the Court, state the impression which the evidence made on my mind, on the first ground on which the motion is based for a new trial, viz., that the verdict is contrary to the evidence.

The issue relates to a long and elaborate article upon the subject of a geographical publication, and it contains a variety of matters which the pursuers felt to be injurious to them. The two issues which were granted by the Lord Ordinary—I assume after discussion—were those that are now before the Court. The whole sting of the issue is in the innuendo attributed to the article as a whole. That the article is of and concerning the pursuer is quite certain. That some of the statements contained in it are untrue is also certain; but the real question brought before the jury was, whether the article bore the innuendo which is appended to and forms part of the issues that were approved of and sent to trial? Now, my Lords, I do not think that, although an issue is adjusted containing an innuendo which the pursuer undertakes to prove it is beyond the power of the presiding Judge, looking to the evidence and to the import of the language said to have been used, to say to the jury that no case has been presented to them which would justify that innuendo, and that the words will not bear it. But, on the other hand, when an issue is sent to a jury, and there are no collateral circumstances founded on to modify the natural meaning of the words, it appears to me that, *prima facie* at all events, it is a matter for the consideration of the jury. In this case I find that these two issues had been carefully adjusted by the Lord Ordinary, and that he had expressed his views in a note which he added to his judgment.

In regard to the second issue, which puts to the jury whether the article represented that the pursuer and his present firm of W. & A. K. Johnston "were no longer capable of producing good and useful atlases or geographical works," my impression was that that was altogether a forced and fanciful construction to be put upon the article; it would require very strong words indeed to deduce that result from anything that could be said upon such a work. But I did not think it necessary to withdraw that from the jury. I told the jury that such was my impression on the evidence, and they accordingly adopted or coincided in the view that I expressed.

In regard to the first issue, the matter was considerably more perplexing; because it contains a very complex innuendo containing various elements, all of which it was necessary that the pursuer should maintain and establish. "That the pursuer and his said firm had falsely, and for the purpose of deceiving the public, issued as the work of A. Keith Johnston an atlas which was not the work either of A. Keith Johnston the first or A. Keith Johnston the second, but of persons not skilled in making an atlas." The question that arose for the jury was, whether the article meant all those things. Now, my lords, if the article had simply said that, looking to the nature of this atlas and its abounding errors, the critic came to the conclusion that it could not be the work of the experienced geographers who had been in the habit of making the maps of A. K. Johnston, I do not know that there would have been much of a case to send to the jury. At all events, it would have been impossible to maintain it on the footing of this innuendo. Probably a critic is entitled to say, if he gives the grounds on which he says it, "I assume from the excessive carelessness of the work which we are criticising

that it cannot be the production of the experienced men whose works we have been accustomed to receive." That, at all events, would have been a very different case. But that is not the statement contained in the article in any view of it; for the statement is that, as matter of fact, although the work bears the name of A. Keith Johnston, it is not the work of either the first or the second of that name. And the reason why the critic says it is not the work of either the first or the second A. Keith Johnston is not the inaccuracy which he finds in the work itself, but the fact that the son is no longer connected with the house established by his late father, "the merited reputation of which he was so well qualified to maintain, but has gone to seek his fortune in Paraguay." And therefore the kind of case which was suggested of a mere inference from the nature of the work itself is entirely out of this question. And it is very important in this discussion to keep that in mind. Whether the allegation be true or false, injurious or not injurious, the allegation is, that in point of fact it is not the work of either the father or the son, and the reason is that the son has ceased to be connected with the firm. In regard to the inaccuracy, so far is that from being the ground on which that statement of fact is made, the statement of fact is made to be the explanation of the inaccuracies which are found in it. That the statement was false was clearly proved, and that is not in dispute. It was a statement which the proprietors or publishers of the *Athenæum* could not fail to know to be at least derogatory to the reputation of the firm, because they say so in so many words, and that is the whole gist of the article. It turned out to be false, and I regretted at the time, and I regret still, that having made a statement in point of fact which they knew to be injurious, and which turned out to be false, the editors of this very distinguished publication should not at once have said, "We are very sorry that we were misled in that matter." Probably if they had done so we should have heard no more of this case.

But then came the question, assuming the statement that it was not the work of A. Keith Johnston the first or the second, as represented in the article, whether the pursuer and his said firm had falsely, and for the purpose of deceiving the public, issued as the work of A. Keith Johnston the first or the second an atlas which was not the work of these parties, but of persons not skilled in making an atlas. Now—to pass for a moment from the purpose of deceiving the public—it appeared to me that there was evidence to go to the jury that the article meant to represent the maps as the work of persons not skilled in making an atlas—that is to say, not eminently skilled. That they could make a map is of course assumed in the article itself, for it is assumed that this map might be made by a map-maker of ordinary ability. But these references are to the true geographical acumen which occur two or three times in this article—in the second paragraph, in the last, and especially in paragraph 4, where they say that the present cartographer has not the geographical acumen to follow out his own conclusion by erasing the words, "Sources of the Nile." I think the jury entitled to judge for themselves, and to affirm that part of the issue, if they were satisfied on the subject.

The last, and by far the most difficult point in the inquiry, was whether the article meant to say that the Messrs Johnston, by putting the name of the firm upon the book, intended to deceive the public. I think they did mean to say that the public were deceived, or would be so, but for their caution, for they say that "the work before us, though bearing the name of A. Keith Johnston, is the work of neither the *primus* nor the *secundus* of that name"—that is, that the public would naturally have expected that it was the work of one or other of them, but that in point of fact it was not. Now, whether that was said with the intention of representing that by putting that name upon the book the firm intended to lead the public to believe what was contrary to the fact,—that it was the work of the old hands, and not of new—was the question which the jury had to consider. I think that a strong inference to draw from the words, and so I told the jury. But I am not in a position to say that it is not an inference which they were entitled to draw. I cannot say that it is contrary to the evidence. I might not myself have drawn the inference, but the jury had the whole case before them, and heard the whole evidence such as it was, into which I do not think it necessary to go—it was not very strong of its class, but there was a certain amount of it—I am not prepared to say that the jury, being in this position and having found as they did, went contrary to the evidence in so finding. And therefore I was satisfied with this part of the verdict as it was returned, and I would not be disposed to have this investigation over again before a fresh jury.

In regard to the matter of damage, I must fairly say that I think there was no justification and no foundation for the amount of damage which the jury gave. I may perhaps take some blame myself that I did not make any observations to the jury upon that subject, led mainly by the fact which was stated by Mr Fraser yesterday, that he appealed to the jury mainly for a vindication of the character of this work, and very much on the ground that he had no expression of regret for the mistake in point of fact which had been made. The jury have found a verdict of £1,275. As I have said, I think that is entirely without evidence, and accordingly it appears to me that if that verdict is to be taken as it is, it would be impossible for us to avoid giving a new trial on that ground,—which is quite a sufficient ground. But I think we are quite entitled to take the course of putting it to the pursuers to accept a reasonable sum—what we consider reasonable—in name of damages; and if they are willing to do that, and to allow the verdict to be modified to that extent, then I think there wil be no necessity for any new trial.

Lord Neaves.—I do not go into the question whether the innuendo was made out, for this reason, that it does not appear that your Lordship was asked to say that the language used in the article was not capable of the meaning which the jury put on it. But I think the jury have strained matters very much, and have been carried away by the severity of the criticism, which was quite allowable, whether right or wrong. The article may have been shabby or harsh as Mr William J. Chambers said; but in a question between "English Bards and Scotch Reviewers," or Scotch geographers and English critics, I do not see why

a harsh and keen article should not be considered within the province of the critics. This has been, and I presume will continue to be so, and not without good reason. The jury was no doubt carried away by that, thinking the pursuers assailed unjustly. But I consider the amount of damages grossly excessive, and utterly unsupported by a tittle of evidence—I would almost use the word outrageous—but, at all events, they are quite unjustifiable in any view.

Lord Ormidale—In regard to the second ground, upon which a case has been made for a new trial, I entirely concur in the observations made by both your Lordships. Not only does it appear to me that the damages here are excessive, which is enough to entitle the party to have a new trial, but I agree with Lord Neaves in thinking that they are outrageous. It is impossible to understand upon what principle they can have been fixed at the large sum of £1275. From the peculiarity of the sum one would suppose that there had been matter for calculation—that there had been specific damage proved, and specific damage sustained, and that the jury had to go into a species of accounting and calculation in order to arrive at the particular sum of £1275. But the case is wholly void of any feature or matter of that description, and therefore whatever were the grounds on which the jury arrived at that sum, it appears to me quite impossible that such a verdict could be sustained.

In regard to the other ground upon which the application has been made for a new trial, I do not feel that it would be safe for me to indulge in any observations. I am very much impressed with what fell from his Lordship in the chair, who presided at the trial, and, who was in a much better position to judge of the matter probably than any other Judge who had not that advantage. I am disposed to think that the observations which his Lordship has made are well founded. At the same time, if there is a new trial—and whether there is to be one or not depends on the concession which the pursuer is ready to make—it occurs to me that the less we say on the subject of the first ground of application the better, as it is quite possible that any observations which might fall from the bench on that subject might, in the event of a new trial, prejudice the party at that trial. There may be new evidence. The case may possibly be presented to the jury, who will be a different jury, in a different way, and on other evidence. Therefore it is better, if there is to be a new trial, that the case should go unprejudiced by any remarks that might be made on that subject.

Lord Gifford—The only question of delicacy and difficulty which I have found in this case is that part of the reason for a rule which is that the verdict upon the first issue was contrary to evidence; and that difficulty turns upon this, Was there, or was there not, evidence to go to the jury to support the innuendo in the first issue? for that is the state of it. Now, I fairly confess that I do not remember any case where an innuendo so complicated and difficult as this was supported by evidence so exceedingly slender; and very little more would enable me to say that it was against evidence, and should go back to the jury on that ground alone. But I feel with Lord Ormidale that I am not in a very favourable position to come to that conclusion, even if it were of any consequence, seeing the views which your Lordships take; and I concur mainly from the impression which the evidence has made on your Lordship—a matter to which I give the greatest possible effect. Therefore, upon the first ground, on which a rule is moved for, I think we cannot grant a new trial. As to the amount of damages, I quite concur in the observations of all your Lordships. I think that this is a verdict which, to use the expression of an old judge, would make people hold up their hands in astonishment. I think we have the means of getting at the grounds which may have misled the jury, for the sting of the article complained of is not only in the innuendo which is put in the first issue, but in the sharpness and severity of the criticism which the article contains. Now, I can quite understand how the jury utterly failed to distinguish between the injury which sharp and severe criticism inflicted and the injury which an imputation that the presenting the work as the work of Dr Johnston and his son would inflict upon the firm. The jury would find great difficulty in discriminating, so to speak, between the damage which was done by an allegation against the Johnstons, that they put on the title page something calculated to mislead the public as to the authorship of the atlas, and the injury which was inflicted by the very severe criticism indulged in against the maps themselves. That was the injurious thing; for whether the authorship was with Dr Johnston and his son to any extent or not would not greatly matter if the maps were perfect maps. The dispute about the authorship, if intended to mislead, might injure, but the sting of this article was really in the allegations which the critic thought he was entitled to make, and in the opinion which he thought he was entitled to express, that the maps were imperfect and faulty in many respects, containing serious omissions on the one hand and serious mistakes on the other, especially in regard to the contested region of Africa. I think the jury have utterly failed to distinguish between that damage which they were not entitled to give the pursuers, and any very moderate damages which they might be entitled to give, upon the footing of accusing the pursuers of having misled the public as to the authorship of the maps. And therefore I consider, with your Lordship, that unless a very different amount is accepted, we must grant a new trial upon the second ground asked.

Mr Fraser—In regard to the amount of damage, I am authorised by the pursuer to state that he leaves himself entirely in the hands of the Court.

Lord Justice-Clerk—Then we are of opinion that £100 would have been a reasonable amount of damages, and that nothing beyond that ought to have been given. And therefore, if the pursuer is willing to accept £100, we shall refuse the rule.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel, in respect that the pursuer consents that the amount of damages found by the verdict of the jury shall be reduced to £100, discharge the rule, and find the defender entitled to expenses in connection with the application for a rule, which modify to one-half of the taxed

amount, and remit to the Auditor to tax said expenses, and to report."

On the question of expenses—

The DEAN OF FACULTY asked for the expenses of the application.

Mr FRASER—I ask for the expenses of this application. I have got the rule discharged. The main ground which I stated from the beginning was that this matter of damage was never made an important thing by the pursuer at all; and I so stated to the jury.

DEAN OF FACULTY—There was never any offer to accept a less sum of damage. On the contrary, the pursuer has been maintaining his right to have the verdict left standing, which assesses the damage at £1275. Unless the pursuer had been obliged to accept the sum which your Lordships had awarded I should have been entitled to my rule. Your Lordships have been in my favour upon that point, and I have only lost in consequence of the pursuer now agreeing to accept £100.

LORD JUSTICE-CLERK—On the matter of the expense of this discussion there has been a divided success undoubtedly, and the rule has been refused on the first ground—viz., that the verdict was contrary to evidence. We have found that it was not contrary to evidence, but we have also found that the verdict cannot stand as it is expressed, and the defenders were obliged to come here for the purpose of obtaining redress against what we felt to be a very manifest wrong. I think they are entitled to expenses to a certain extent, and we modify the expense to one-half the taxed amount.

Counsel for the Pursuer—Fraser and Trayner. Agents—Keegan & Welsh, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark), Q.C., Lancaster, and Robertson. Agents—Tods, Murray, & Jamieson, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, June 17.

(Before Lord Justice-Clerk, Lord Neaves, and Lord Young.)

SUSPENSION—CRAIG *v.* PEEBLES.

Public-Houses Amendment (Scotland) Act § 17—*Conviction—Licensed Premises.*

Where certain premises for which the proprietor held the statutory public-house license were damaged by fire; *held* the certificate was not voided by the subsequent unfitness of the premises for carrying on the business, especially as the proprietor had at once commenced to repair them.

This was a bill presented by James Craig for suspension of a conviction and sentence obtained and pronounced in the Airdrie Police Court, at the instance of Mr Peebles, procurator-fiscal of that Court, in respect of an alleged breach of the Public-Houses Amendment (Scotland) Act, section 17. In his statement Craig set forth that he had held a public-house licence for twelve years for premises in West Merry Street, and while the certificate was still in force these premises were very considerably damaged by a fire which occurred on the 1st of May 1875, with the result that the burgh authorities considered the premises to be unsafe for the lieges. The suspender, however, who both intended and actually took steps to put the house again in a proper condition, meantime sold excisable liquors within the premises, notwithstanding warnings from the police authorities to desist from so doing. In these circumstances, a complaint was, on the 8th of May 1875, served upon him charging him to appear at the Police Court to answer for selling excisable drinks without a certificate; and under that complaint he was on the 20th May convicted of the offence and fined, and imprisoned for a short time until payment of the fine was forthcoming. The complainer now sought to suspend this conviction and sentence, on the ground that he was selling drink in licensed premises. The prayer of the suspension was opposed, on the ground that the premises having been rendered by fire unfitted for carrying on the business for which the certificate was granted, the certificate was thereby voided and ceased to be of any effect.

After hearing counsel—

LORD JUSTICE-CLERK—My Lords, in giving an opinion upon this case, in which I understand that your Lordships concur, I should not be prepared to affirm the proposition that because an accident happens, by fire or otherwise, which for a time renders any licensed premises undesirable or unsuitable for a licence, should it then be applied for, as has occurred in the present case, and this although the tenant should at once begin and go on executing repairs, intending or hoping thereby to be able to resume his business in them, he would be committing the offence libelled if he sold in such premises exciseable liquors which any person might choose to purchase from him.

LORD NEAVES and LORD YOUNG concurred.

Their Lordships accordingly sustained the suspension, finding the suspender entitled to expenses.

Counsel for the Suspender — Solicitor-General (Watson) and M'Kechnie. Agent—R. A. Veitch, S.S.C.

Counsel for the Respondent—Balfour.

Wednesday, June 17.

SUSPENSION—BAIN *v.* MACKAY.

SUSPENSION—LANGLAND *v.* MACKAY.

Act 23 *and* 24 *Vict. cap.* 84, § 2 *and* § 4—*Conviction — Error by Magistrate — Discretionary Powers.*

A person was charged under the statute, before a magistrate, with selling "as pure and unadulterated" milk which was not in that state. Some of the milk obtained by the police was analysed by an expert, who reported