the offences struck at are specified. By that section it is provided that "Each of such persons shall, on being summarily convicted thereof before a justice of the peace, . . . forfeit and pay such sum of money not exceeding £5 as to the said justice shall seem meet, together with the expenses of process."

Now, in the Act of 1862, while by the second section a penalty not exceeding £5 is imposed, together with the forfeiture of game, guns, &c., the section is silent as to expenses.

It seems to me that this is the part of the two statutes in which we must find the limits of the power of the magistrate to impose either penalty or expenses. In the 8th section of the Act of 1832, which deals with the recovery of the sums in payment of which the accused has become liable, both penalty and expenses are mentioned, but this is because expenses are authorised and may be adjudged, not under that section but under the first section, which corresponds with the second section of the Act of 1862. And therefore when the Act of 1862 says that the penalty imposed by that statute (not penalty and expenses) shall be recovered in the manner provided by the Act of 1832, this simply means that, *reddendo singula singulis*, it shall be recovered in the manner in which the latter statute authorises a penalty to be recovered.

In Mr Mackenzie's ingenious argument he laid stress on the case of *Walker* v. *Bathgate*, 2 Coup. 460, which at first sight seems directly in point. But on examination of the statutes referred to in that case I find there is a marked difference in the manner in which they are framed, which is quite sufficient to account for the judgment of the Court. By section 41 of the Salmon Fisheries Act of 1868, it is provided that the penalties imposed by the Act, so far as applicable to the Tweed, should be recoverable and applicable in the same manner as penalties imposed by the Tweed Fisheries Act 1857; and further, that the sections of the Act applying to the river Tweed should be read and taken as if they formed part of the Tweed Fisheries Act 1857.

Now, the structure of the Act of 1857 is this. In a series of sections various offences are described, and it is said that anyone guilty of them shall be liable to certain penalties, but nothing is said as to the Court before which offenders are to be tried, or the manner in which the penalties shall be recovered.

But section 82 deals with the recovery of penalties in the widest sense, describing the Court before which the accused are to be brought, the procedure before the Court, and the sentence which shall be pronounced, which includes, if the Judge thinks fit, an award of costs or expenses.

I need only add that the sections of the Salmon Fisheries Act of 1868, which are made applicable to the Tweed, are framed on the same footing as those in the Act of 1857—that is, they simply state that the offender shall be liable to a specified penalty.

I think the difference in the structure of these statutes and the Poaching Acts, upon which the present prosecution is rested, is quite apparent.

In the 82nd section of the Tweed Fisheries Act of 1857 it is provided that the justices shall on conviction adjudge the defender to pay the penalty incurred (under an earlier section) as well as such costs attending the conviction as such sheriff or justice or justices shall think fit. In the Poaching Acts, on the other hand, the power to adjudge costs or expenses is authorised, not by the sections which deal with the recovery of penalties, but in the sections which define the offence and fix the penalty which the offender is bound to pay upon conviction. Under the Day Trespass Act the magistrate is authorised in that part of the Act to impose a penalty, and in addition an award of expenses, in the corresponding part of the Act of 1862 the penalty alone is named.

I therefore think that the suspension should be sustained and the conviction quashed.

The LORD JUSTICE-CLERK and LORD ADAM concurred.

The Court suspended the conviction.

Counsel for the Complainer — Munro. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Respondent—C. K. Mackenzie — H. A. Young. Agents — Morton, Smart, & Macdonald, W.S.

Tuesday, November 21.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Moncreiff.)

JENKINSON & INGLIS *v.* NEILSON BROTHERS.

Justiciary Cases — Trade - Mark — False Trade Description—Acting Innocently—Merchandise Marks Act 1887 (50 *and* 51 *Vict. cap.* 28), *sec.* 2, *sub-sec.* 2.

By the Merchandise Marks Act 1887, sec. 2, sub-sec. 2, a person who sells goods to which a false trade description is applied is guilty of an offence unless he proves certain facts, "or that otherwise he acted innocently."

A manufacturer of aerated waters sold some of his waters in bottles embossed with a trade description belonging to another firm, which he was aware he had no right to use. It was proved that he had affixed to each bottle before selling it a printed label bearing his own name and address, and a certificate of the purity of the aerated water manufactured by him, and that he had taken various measures to prevent the use in his manufactory of bottles bearing the trade description in question, but that these had not proved effectual. *Held* that the ques-

tion whether the accused had "acted innocently" within the meaning of the sub-section was a question of fact for the judge who tried the case, and that there was no error in law in the conviction.

Justiciary Cases—Evidence—Competency—Question if Witness had Committed Similar Offence.

In a prosecution under the Merchandise Marks Act 1887 of a manufacturer of aerated waters for using bottles with a false trade description embossed thereon, the complainer (who was also a manufacturer of aerated waters) gave evidence. It was proposed to ask him whether he had sold bottles of aerated waters with the name of another firm embossed thereon. *Held* that the question was rightly disallowed.

Justiciary Cases—Proof—Parole Evidence—Proof of Title of Complainer.

Held that a complainer in a prosecution for using a false trade description might competently prove his title to the trade description in question by parole evidence.

The Merchandise Marks Act 1887 provides, section 2, sub-section 2—"Every person who sells . . . any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves . . . (*c*) That otherwise he has acted innocently, be guilty of an offence against this Act."

By section 3, sub-section 3, it is provided—"The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person," and for the purpose of this enactment the expression false name or initials means, as applied to any goods, any name or initials of a person which (*b*) are identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials."

By section 5, sub-section 2, it is provided, *inter alia*—"A trade-mark or mark or trade description shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing."

Robert Jenkinson and William Inglis, carrying on business under the name of W. & J. Jenkinson, aerated water manufacturers, 80 St Andrew Street, Leith, were charged, at the instance of Neilson Brothers, aerated water manufacturers, West Calder, and successors to A. Woodrow, aerated water manufacturer, with the consent and concurrence of the procurator-fiscal, with a complaint setting forth the following charge—"(*First*) That on or about 31st March 1899, in the shop at Main Street, West Calder, occupied by George Hogg junior, ice-cream saloon keeper there, they did sell to the said George Hogg junior one patent stopper bottle of potass water, to which patent stopper bottle of potass water a false trade description, namely, 'A. Woodrow, West Calder,' to which trade description the complainers have sole right, was then applied as regards the contents of said bottle, which were not of the manufacture of the said Neilson Brothers, or of the said A. Woodrow, all contrary to the Merchandise Marks Act 1887 (50 and 51 Vict. cap. 28), section 2, sub-section (2), section 3, sub-section (3), and section 5, sub-section (2). (*Second*) That on or about 13th April 1899, in the shop at Main Street, West Calder, occupied by Thomas Meldrum, wine and spirit merchant there, they did sell to the said Thomas Meldrum one patent stopper bottle of lemonade, to which patent stopper bottle of lemonade a false trade description, namely, 'Neilson Bros., West Calder,' being the trade name of the complainers the said Neilson Brothers, was then applied as regards the contents thereof, which were not of the manufacture of the said Neilson Brothers, all contrary to the aforesaid Act and sections foresaid. (*Third*) That on or about 31st March 1899, in the shop at Main Street, Mid-Calder, occupied by Mrs Elizabeth M'Alpine or Pow, grocer there, they did sell to the said Mrs Elizabeth M'Alpine or Pow (1) two patent stopper bottles of lemonade, to each of which patent stopper bottles of lemonade a false trade description, namely, 'Neilson Bros., West Calder,' being the trade name of the complainers the said Neilson Brothers, was then applied as regards the contents thereof, which were not of the manufacture of the said Neilson Brothers; and (2) one patent stopper bottle of lemonade, to which patent stopper bottle of lemonade a false trade description, namely, 'A. Woodrow, West Calder,' to which trade description the complainers have sole right, was then applied as regards the contents thereof, which were not of the manufacture of the said A. Woodrow, or of the said Neilson Brothers, all contrary to the aforesaid Act and sections foresaid; and (*Fourth*) That on or about 14th April 1899, in the shop at Raw Toll, Edinburgh Road, Mid-Calder, occupied by Mrs Janet Reid or Headridge, merchant there, they did sell to the said Mrs Janet Reid or Headridge one split patent stopper bottle of ginger beer, to which split patent stopper bottle of ginger beer a false trade description, namely, 'Neilson Brothers, West Calder,' being the trade name of the complainers the said Neilson Brothers, was then applied as regards the contents thereof, which were not of the manufacture of the said Neilson Brothers, all contrary to the aforesaid Act and sections foresaid; which offences were stated to be first offences, whereby the said Robert G Jenkinson and William Inglis, or one or other of them, were, in respect of each of such offences, liable on summary conviction to imprisonment for a term not

exceeding four months, or to a fine not exceeding £20, in terms of section 2, subsection (3) II. of the aforesaid Act, and to forfeit to Her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offences had been committed, in terms of section 2, subsection (3) III. of the aforesaid Act, and to pay to the complainers, as prosecutors thereof, the costs of the prosecution, in terms of section 14 of the aforesaid Act, and in default in payment of said fine and costs, to imprisonment in terms of section 6 of the Summary Jurisdiction (Scotland) Act 1881."

The case was tried before the Sheriff-Substitute of Edinburgh (MACONOCHIE) on 12th June 1899. Jenkinson and Inglis pleaded not guilty, and evidence was led.

In the course of the examination of the complainer William Wood Neilson, counsel for the accused objected to the admissibility of parole evidence to prove that the complainers were the successors of A. Woodrow, aerated water manufacturer, West Calder, and had the sole right to the trade description of "A. Woodrow" libelled in the complaint, on the ground that, as the complainers admitted that they had acquired their right by a written instrument or deed, the deed itself was the only competent mode of proof. The Sheriff-Substitute repelled the objection.

In the cross-examination of the complainer the said William Wood Neilson, and of Thomas Meldrum, a witness adduced for the complainers, counsel for the accused asked these witnesses if certain bottles of aerated waters supplied by the complainers since the service of the complaint had the name of W. &. J. Jenkinson embossed thereon, and bore the label of the complainers. Counsel for the complainers objected to the question being put to these witnesses, and the Sheriff-Substitute sustained the objection.

The following facts were proved:—"(1) That the accused are manufacturers on a large scale of aerated waters of various kinds, their output amounting to between 5000 and 6000 bottles per day. (2) That the complainers are also manufacturers of aerated waters on a large scale; that they trade under the name of Neilson Brothers, and are successors to A. Woodrow, aerated water manufacturer, West Calder, whose business they bought in December 1898; and that they now have the sole right to use in their trade bottles embossed with the trade description 'A. Woodrow, West Calder.' (3) That for the purposes of their trade, the complainers use patent glass stopper bottles embossed, some of them with the trade description 'A. Woodrow, West Calder,' and some with the trade description 'Neilson Brothers, West Calder.' (4) That on or about March 24, 1899, the accused received the circular produced by the witness John Muir, warning them against using in their trade bottles bearing the trade description of the complainers, and that prior to the receipt of said circular they had not been warned verbally or by letter against using bottles bearing the trade descriptions above-mentioned. (5) That the complainers, when they supply their customers with aerated waters, do not sell the bottles to the customer, but lend them until they are empty, and that it is the duty of the customers to return the bottles to the complainers; that the bottles cost the complainers about 1s. 6d. per dozen, and that they sell their aerated waters at 9d. per dozen. That large numbers of bottles are lost to the complainers owing to their not being returned to them. (6) That shortly before March 24, 1899, the accused sold the bottles of aerated waters (the contents of which were manufactured by them), set forth in the first, third, and fourth charges respectively, to the persons named in said charges respectively. (7) That on or about April 13, 1899, the accused sold the bottle of aerated water (the contents of which were manufactured by them) set forth in the second charge to the person named in said charge. (8) That on each of the bottles so sold there was embossed the trade description set forth in the complaint, as having been applied to each of said bottles respectively. (9) That to each of the bottles so sold there was affixed a printed label bearing the name and address of the accused, and a certificate as to the purity of the aerated waters manufactured by them. (10) That the said trade descriptions were used by the accused without the leave of the complainers having been obtained by them. (11) That the accused knew that in using the bottles bearing the said embossed trade descriptions they were using bottles bearing trade descriptions which they had no right to use. (12) That on receipt of the circular above referred to, the accused took various precautions with a view to preventing further use in their manufactory of bottles embossed with the trade descriptions belonging to the complainers, but that notwithstanding such precautions the bottle set forth in the second charge was thereafter sold by them. (13) That loss has resulted to the complainers in consequence of the use of the said bottles bearing their trade descriptions by the accused. (14) That the accused, in selling aerated waters in bottles bearing the embossed trade descriptions above set forth, sold goods bearing false trade descriptions within the meaning of the Merchandise Marks Act 1887."

On these facts the Sheriff held that the accused had failed to prove that in so selling the aerated waters labelled they had acted innocently, and therefore convicted them of the offences charged.

In a case stated at the instance of the accused, the Sheriff narrated the facts stated above, with the following questions of law:—"(1) Whether it was competent for me to admit and act upon the parole evidence to the admission of which the accused objected. (2) Whether I was right in refusing to allow the question proposed by the accused, above set forth, to be put to the witnesses for the complainers. (3) Whether the facts proved warranted a conviction under the Act libelled."

Argued for the appellants—(1) the title

of the respondents to the trade description "A. Woodrow, West Calder," rested on their own showing on a deed. That deed should have been produced, and parole evidence of its contents was incompetent. (2) The questions disallowed were proper and competent. Their object was to prove that whatever precautions might be taken it was impossible to prevent a bottle slipping through now and then, and they were therefore relevant to the defence that the appellants had acted innocently. This Act was one under which the accused should have the widest limits in cross-examination, because under its provisions the burden of proof of innocence was laid upon him. (3) The appellants had acted innocently; no intention to defraud had been proved, and they had taken precautions to prevent the use of the respondent's bottles —*Kirshenbohm* v. *Salmon & Gluckstein*, [1898] 2 Q.B. 19; *Coppen* v. *Moore* [1898] 2 Q.B. 300 and 306.

Argued for the respondents—The title to the trade description was not in dispute, and *prima facie* evidence of it was sufficient. (2) The questions disallowed were incompetent as tending to introduce a trial within a trial. This was not allowed, on the principle that the guilt of another person cannot affect the guilt of the panel —*Kennedy* v. *H.M. Advocate*, Jan. 8, 1896, 2 Adam 51; *Dickie* v. *H.M. Advocate*, June 15, 1897, 2 Adam 331; *Burns* v. *Turner*, Dec. 17, 1897, 2 Adam 450. (3) The appellants had not "acted innocently" within the meaning of the sub-section. It was not enough to prove that there was no intention to defraud—*Coppen* v. *Moore*, *ut supra*, or that ineffectual precautions were taken —*Wood* v. *Burgess*, Nov. 26, 1889, 24 Q.B.D. 163.

At advising—

LORD JUSTICE-CLERK—The first question in this case is, whether the Sheriff was entitled to receive parole evidence to the effect that the complainers in the case were the successors of A. Woodrow, aerated water manufacturer, and had the sole right to the trade designation "A. Woodrow." I am of opinion that it was competent to receive such evidence. It has never been held that in criminal causes the person complaining is called upon to prove his title by written instrument. The most familiar case is that of a complaint for poaching on lands. It is in such a case competent to lead parole evidence to prove that the lands were the lands of A B. It lies with the defence if challenge is to be made of ownership or the like to do so, and if he does so he may succeed in getting rid of the charge. But if he raises no question of that kind, he cannot object to the position of a complainer being proved by parole. It would complicate criminal proceedings if anything more was necessary; the practice is well established not to require it, and no injury to the administration of justice has or, as I think, can arise from the existing procedure.

The second question is, whether the Sheriff properly rejected evidence, the purpose of which was to show that the complainers had, at a later date than the date libelled as that of the offence charged, done something of a similar nature to that charged. I am of opinion that such an inquiry was totally irrelevant, and that the Sheriff properly refused to allow the questions to be put. It is a sound principle that a court of law is not to try cases within cases. Even if the question here had not been objected to and the evidence taken it could not affect the issue, which was, whether an offence had been committed by the accused. The decision of that question could not be affected by its being proved that some-one else, even the complainer, had done something similar on another occasion. And it is evident that to deal with such side issues would necessarily hamper and protract criminal proceedings. Accordingly, such side issues have always been excluded in cases before the Court of Justiciary.

The only remaining question put by the Sheriff is not in satisfactory form. It is too common for Judges in stating cases to put a question of law in this form, but it is not satisfactory. The question of law is not whether the conviction was "warranted," but whether the Judge has legally pronounced a conviction on the facts found by him. In other words, did he, in holding that the facts proved justified him in convicting, err in applying the law to these facts? If there was nothing illegal in convicting, the question whether a conviction is warranted or not, is one for the judge trying the case. In this case I am of opinion that the Judge committed no error in law in convicting the appellants. He has found in fact that they issued bottles with the respondent's name upon them to the effect of injuring the respondent's trade. It was for him to judge whether there were any grounds in fact sufficient to exonerate the appellants from guilt under the complaint. He has by convicting found that there were not, and has convicted the appellants. I see no ground for saying that he could not do so legally.

LORD ADAM and LORD MONCREIFF concurred.

The Court answered the questions in the case in the affirmative, and refused the appeal.

Counsel for the Appellants—A. S. D. Thomson. Agents — A. & G. V. Mann, S.S.C.

Counsel for the Respondents—Hunter—James. Agent—A. B. Horn, S.S.C.