

was not entitled to wait. It is a very paltry question on the one side or on the other, and raises no general question at all as to the extent of the Dean of Guild's jurisdiction.

The question whether there are in Dundee two Courts with jurisdiction to grant warrants in such cases has not been competently raised here. If it is worth while to raise it we will decide it, but I give no opinion on that point at present.

LORD MURE—I concur, that in the circumstances of the case there was no sufficient ground for presenting this petition. It was presented after the respondent had been informed that the appellant was going to apply for authority whenever it was necessary. That information was given on the 26th, and this application was made about the 29th of January. Before the latter date it has not been shown, either by the admissions of the appellant or by the Dean of Guild's note, that the appellant had done anything necessarily requiring a warrant from the Dean of Guild. I should have been of that opinion as to the taking down of the partition wall apart from the terms of the Dundee Police Act, but having these in view, I certainly think the appellant was entitled to proceed with these inside operations before going to the Dean of Guild. After giving authority to the Police Commissioners to grant warrants in certain cases the Act proceeds—"Nothing contained in this Act shall prejudice or affect any jurisdiction now competent to the Dean of Guild of the royal burgh of Dundee in preventing encroachments upon the property of the public, or upon the property of any proprietor within the burgh, or in entertaining or disposing of possessory questions; but where no question of possessory right or disputed boundaries is or may be raised or involved, and subject to appeal as by this Act allowed, it shall not be necessary for any proprietor or person to apply for or to obtain any other approval or warrant than that of the commissioners before erecting or altering any building within the burgh." Apparently this Act means something; it grants authority to persons, with the sanction of the Police Commissioners, to do the things we have here described, and to do them without the warrant of the Dean of Guild, provided no question of possessory right or disputed boundaries is involved.

But in the report by the Dean of Guild there is no evidence of anything having been done to interfere with the neighbouring properties. All that the appellant had done was what he admits on record, and he duly gave notice to the Procurator-Fiscal and to Robertson that for his further alterations he intended to get judicial authority.

LORD SHAND—If it had appeared from the averments in this complaint, or from the report of the inspection and the interlocutor of the Dean of Guild, that these operations were dangerous to the lieges, or that the respondent intended to go on without first obtaining a warrant, then I think it would have been competent. But both these elements are wanting. The building is only twenty feet in height, and the operations are all internal, causing no danger to the lieges. The only other question is whether there is danger to the neighbouring proprietor, and the interlocutor and note of the Dean of Guild make it clear that there is not. The appellant intimated to Robert-

son that he would apply to a competent Court for a warrant when it became necessary, and in that state of the case I think this petition was unnecessary and incompetent. Nothing that we say in the present case will interfere with the Dean of Guild's right and duty to put a stop to operations on buildings within burgh which are likely to cause danger to the lieges.

The Court recalled the interlocutor of the Dean of Guild, and dismissed the petition.

Counsel for Respondent (Appellant)—Mackintosh—Pearson. Agent—J. Smith Clark, S.S.C.

Counsel for Petitioner (Respondent)—Keir—Salvesen. Agent—William Lowson, Solicitor.

Friday, March 16.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

MACFARLANE & COMPANY v. OAK FOUNDRY COMPANY.

Copyright—Trade Advertisement—Entry at Stationers' Hall—Alleged Infringement of Copyright—Fraudulent Misrepresentation—Relinquency.

A trading company prepared and circulated gratuitously among its customers an illustrated catalogue containing designs of articles manufactured and sold by them. This catalogue was entered at Stationers' Hall. In an action of suspension and interdict brought against a rival company for alleged infringement of copyright by the reproduction of large portions of the complainers' catalogue in one issued by the respondents—held that the catalogue being copyright was entitled to protection, and that averments that a number of articles in it were alleged to be patent or registered, whereas in truth they had either never been patented or registered, or such protection was subject to objection or had expired, were not relevant as a defence to proceedings for infringement of copyright.

Observations (per Lord President) on the nature of the fraud or improper representation which deprives anyone who may have obtained copyright of a work of the benefits of its protection.

This was a process of suspension and interdict at the instance of Walter Macfarlane & Company, ironfounders, Glasgow, against William Binnie, David Allan Arnot, David Hutchison, and Alexander Hutchison, all ironfounders in Glasgow, the partners of the Oak Foundry Company.

The complainers averred that for thirty-two years they had carried on a large business in Glasgow as architectural, sanitary, and artistic ironfounders, and that the iron-work coming from their "Saracen Foundry," Possilpark, Glasgow, was well known in the trade in all parts of the world.

They further averred that in connection with their business they had caused to be prepared, at great expense, an illustrated catalogue of drawings or designs of their various castings of iron-

work, relating both to private houses and public institutions, with numbers, titles, notes of dimensions, scales, and other letterpress, and this work had proved of very great pecuniary value to them in the prosecution of their business, and had reached a fifth edition, which was published in the year 1871. This fifth edition, however, it was averred, was substantially a new work, as every drawing in it was made direct from patterns, castings, or full sized drawings belonging to the complainers, and it had been prepared at a cost of upwards £12,000.

The complainers further averred that in addition to the illustrated catalogue just referred to they had caused to be prepared an illustrated price list of their castings, which was also of great value to them in connection with their business. Both these books were alleged to be the result of great labour and skill, and were distributed by them gratuitously among their customers with the view of promoting their business. Each of the books was claimed as the exclusive property of the complainers, who alleged that they had a copyright therein, also that the books were entered at Stationers' Hall in conformity with the statutes, and that although the illustrated price list was registered in name of the leading partner it was truly the property of the firm. The certificates of entry were also produced.

The complainers further averred that they had recently discovered that the respondents had prepared and issued an illustrated catalogue of castings, the drawings in which were in many instances copies of, or only colourably different from, the drawings and designs contained in their catalogue and price list already referred to, and that large portions of their catalogue had been transferred to the respondents' catalogue and now appeared therein. They also alleged that the respondents' catalogue was not the product of independent labour or skill, and that it derived any value which it possessed from the respondents having availed themselves unwarrantably of their labour and experience.

The complainers also alleged that their publications were thus being extensively pirated by the respondents, and that they were suffering thereby serious loss and damage; that the copying of their drawings had been effected by means of tracing and lithographic transfer paper, and that this process had been carried on systematically, in the knowledge and on the instructions of the individual respondents, or on one or more of them.

The respondents averred that it had long been the custom for manufacturers and dealers in iron-work to print and circulate catalogues with drawings and illustrations of the articles manufactured or sold by them, that many such books were in circulation before the publication of the fifth edition of the complainers' catalogues so printed and circulated, and that many of the drawings in the complainers' books now founded on had been copied from these prior publications. They also alleged that many of the articles of iron-work manufactured or dealt in by different makers or dealers were frequently identical in outline and design, and were not protected by any copyright, and that a similar identity existed between the drawings in the complainers' catalogues and their own, as well as in those of numerous other manufacturers.

The complainers had mentioned on record a

variety of designs which they alleged the respondents had pirated; these the respondents averred to be incapable of being pirated, as they were representations of the commonest articles, such as pipes, pillars, baths, which had no peculiarity of design, and which were in every-day use before the complainers' firm existed. They also alleged that many of the designs to be found in the complainers' books had been copied by them from catalogues of their trade opponents, and that the complainers could therefore have no copyright or property in these designs.

The respondents' 10th statement of fact was as follows:—"The catalogue founded on by the complainers contains many statements which to the knowledge of the complainers when they published the same were untrue, and intended to mislead the public, and are contrary to public policy. In particular, the complainers in the said fifth edition of their catalogue, have in numerous instances untruly described as 'registered' and 'patent' and advertised for sale as 'registered' and 'patent,' designs and articles which are not and never were registered or patented, and have also in many instances described as 'registered' and 'patent' articles or designs of which the patent or registration had expired long before the date of said fifth edition, and in many cases the designs which the complainers allege the respondents have wrongfully copied are improperly marked as aforesaid, as e.g., the following—"[*here followed the references to certain designs*]. In statement 11 they set forth various designs marked by the complainers as registered, when in fact they were not and never had been so. In statement 12 they averred that a specified number of designs marked as registered in the catalogue, though once registered, had ceased to have that protection before the catalogue was published. In statement 13 they averred "The complainers sometimes registered a design of a complex article and again registered some of the parts thereof. They also in some instances registered as a complete design a part of a complex article, the design of which was too old to be registered, and in other cases having once registered the design of a complex article they without further registration append the registered mark in the books founded on to the various parts of the complex article, these parts being represented as independent designs. For example, the railing No. 57 was registered on 17th March 1866, and an ear, a part thereof, No. 34, is again registered on 1st October 1868. The ear No. 31, is registered on 1st October 1868, this ear being part of the railing No. 94, which was at that time too old to register. The fountain No. 8, is unregistered; it appeared in a former issue of the complainers' catalogue as registered, but in the book now founded on the columns of this fountain are reproduced and marked as registered;" and so on in various particulars. In statement 14 they averred that 66 designs appeared in the complainers' book under the same registration mark, which indicated that they had been registered at the same date, and averred that before such registration many of them were well known to the public. In statement 15 they averred that of four designs that were specified, and which the complainers had marked as registered, the complainers were not the owners of original de-

signs and had no right beyond that of any one of the public in them. In statement 16 they averred that the complainers used in this book the word "patent" as applicable to many articles none of which were patented.

The respondents further alleged that their catalogue was entirely the work of original labour, that every drawing was made from an actual pattern and that in no case were the designs taken from the respondents' books. When there was similarity, this arose from the drawings of both parties being representations of the same kind of articles.

The complainers pleaded that as the catalogue and price list were fit subjects for copyright, and as they were the product of their labour and outlay, the respondents were not entitled to appropriate them or any material part of them for their own benefit. They also pleaded that the copyrights of the books was vested in them. Further—“(4) The respondents' averments are irrelevant and insufficient; and, in particular, their averments as to items marked in the complainers' catalogue as registered or patented are not relevant to be remitted to probation.”

The respondents pleaded—“(4) The note should be refused, in respect—(1st) The respondents have not violated the complainers' rights. (2d) The complainers' catalogue and price list are not fit subjects of copyright. (3d) The complainers have no copyright in the books founded on; *et separatim*, they have no copyright in the designs or drawings as to which complaints are made. (4th) The complainers' books are not the result of independent labour; *et separatim*, the drawings or designs therein are not the invention or the property of the complainers, and they have no exclusive right thereto. (5) The complainers having fraudulently and wrongfully violated the various statutes dealing with copyright and registration of designs as condescended on, they are not entitled to insist in their present pleas.”

The Lord Ordinary allowed the complainers a proof of their averments in the closed record, and the respondents also a proof of their averments, except those contained in articles 10 to 16 inclusive of their statement of facts.

“*Opinion.*—As the pursuer, who is entitled to have the lead in the matter of proof, desires that I should dispose of his objection to the relevancy of the defenders' counter case, I think in the circumstances that I ought to dispose of it at this stage. Another reason for dealing with this question of relevancy is that if the averments that have been the subject of discussion constitute a substantial defence to the action, it is possible that in the event of their being rejected the defender may be induced to reconsider his position, and that a proof may be avoided. Now, dealing with the complainers' fourth plea, that the respondents' averments 'as to items marked in the complainers' catalogue as registered or patented are not relevant,' my opinion is that these averments do not constitute a relevant defence to the action. I think that where a publisher of a copyright book comes into Court complaining of infringement through the publication of designs protected by his copyright, it is not a relevant answer to say that these designs have some writing or some mark affixed to them which amounts to a false representation, or a representation of something which is not true. It is easy to see that if such

a defence were admitted it would open a very wide field of inquiry in actions of infringement, and it might be very difficult in some cases to say whether the disqualifying statements in printed books were or were not false representations in the same sense as the registered marks here are alleged to be so. I think it would be very difficult for a Court of Justice to enter upon a criticism of published works in that spirit, in order to find out whether they contain representations of such a character as to render the work not a suitable subject for protection by copyright. I don't know of any precedent for such an inquiry, and I think the policy of the law is, unless there be something distinctly immoral or pernicious to society, to give to every book registered at the Stationers' Hall copyright protection, leaving it to public opinion and public criticism to correct any errors which may occur in the work. Certainly the fact that a book contains erroneous representations is no reason for allowing a third party who has not written it to be the means of propagating these representations and giving them wider publicity by copying them. That would not be a way of enforcing public morality. Then, leaving these general considerations, there is a doctrine of a more limited character, viz., that where a party is seeking to enforce some right of the nature of a monopoly given to him by statute, he must walk strictly by the statute. The patent laws afford various illustrations: for example, if the patentee claims in his specification something which is not his own invention, and does not avail himself of the means given by the statute of disclaiming with a view to confine the patent to what is really his own, then he will not succeed in an action for infringement, nor will he succeed if he has omitted to describe his invention in such a way that it can be clearly understood and worked; because he is held to have made a contract with the public by which he receives protection on condition of making a full disclosure of his invention, on condition that he discloses the invention fully, and claims nothing but what is his own invention. Just as in cases of private contracts, where the law will not always give a remedy to a party who has himself committed a breach of the contract; neither in the *quasi* contract with the State shall the patentee have redress by interdict or damages if he himself has not fulfilled the counter prestations of his contract with the public. But the defenders' averments here don't raise a question of that character. It is not said that there has been any omission to comply with the provisions of the Copyright Acts, or anything done in violation of the prohibitory injunctions of the Copyright Acts. The averment is that the complainer, while seeking the benefit of the Copyright Acts, has been guilty of a fraud upon the Acts protecting designs by registration. Now, I know no authority for holding that it is the duty of the Court to enforce the fulfilment of one regulating statute by refusing redress to a party who seeks it under another statute, with the provisions of which he has fully complied. Each statute must be considered on its own merits. Of course, if the averments are true, the complainers could have no possible protection under the Registration of Designs Act. They are not here seeking such protection. But I cannot, on the assumption that they have done what is prohibited by a penalty in the Registra-

tion of Designs Act, deny them protection for their copyright, which, according to their contention, has been infringed by the respondents. The case of *Ford*, although not precisely in point, appears to me to proceed upon the principle which I have endeavoured to express, and so far it is an authority; indeed, I think it is none the less an authority that the statutes out of which the question arose were different, or that the question was between a party who claimed protection at common law for his trade-mark on the one hand, and an infringer who alleged on the other hand that a patent right had been claimed. If there was room for any distinction, I think probably there might have been more room for the application of the doctrine for which Mr Dickson contends, where the relief was sought upon common law, the Court having a larger jurisdiction to admit defences to actions founded on common law than they have under statute. If I were to refuse interdict, or to admit the averments in question as a defence to the action for interdict founded on the Copyright Act, I should be simply denying effect to that Act on grounds and exceptions that are not contained within the statute itself, and for which, so far as I can see, there is no warrant. That is my opinion on the series of averments in question. I was at first disposed to pronounce no judgment upon the point until after a proof: but if it is desired I shall give effect to my opinion by allowing a limited proof, that is, under the exception of the articles commencing with statement 10."

Against this interlocutor and note the respondents reclaimed (by leave of the Lord Ordinary) and argued—That the complainers were not entitled to the protection of either the "copyright" or the "copyright of designs," statutes inasmuch as they had themselves infringed the provisions of these statutes. In order to show that the complainers had so acted, it was of the greatest importance that the respondents should be allowed to lead evidence on these averments of which the Lord Ordinary had refused them a proof. These books were not a fit subject for copyright, they had no merit to bring them within the protection of the copyright statutes; they were mere trade advertisements.

Authorities—*Copinger on Copyright*, 84 to 93; *Sebastian on Trade Marks; Leather Cloth Company v. American Leather Cloth Company*, December 21, 1863, 33 L.J., Ch. 199, and 11 H. of L. Ca. 523; *Wright v. Tallis*, July 2, 1845, 14 L.J., C.P., 283; *Ford v. Foster*, L.R., 7 Ch. 611; 5 and 6 Vict. c. 45 and 100, sec. 4; 6 and 7 Vict. c. 65, sec. 4; 8 Anne, c. 19; 21 and 22 Vict. c. 70.

Argued for complainer—The Lord Ordinary was right in limiting the inquiry; the averments upon which the respondents ask for proof are much too vague, and the proof would be of a most complex character. What the complainers objected to was, that the respondents were copying large portions of a book which was entered at Stationers' Hall, and which was protected by the statutes 8 Anne, cap. 19, and 5 and 6 Vict. cap. 45. The books were the result of original labour, and were therefore entitled to protection; they were not to be treated in any sense as mere trade advertisements. The complainers had patents for each of the designs to which the word "patent" was appended. There were more than

3000 designs in the illustrated catalogue, and because it was alleged that there were about thirty mistakes, was the book as a whole to be characterised as a fraud, or to be deprived of the benefit of statutory protection? The respondents could point to no case either here or in England where misrepresentations such as were alleged to have been made here were held to disentitle parties in the position of the complainer here to protection. The respondents' averments were in any view of the case irrelevant.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has allowed the complainers a proof of their averments on the closed record, and the respondents also a proof of their averments with the exception of those contained in articles 10 to 16 inclusive of the respondents' statement of facts. The only question before us is whether the Lord Ordinary did right in excluding the averments in those articles from the allowance of proof, and after examining the matter carefully I have come to be exactly of the Lord Ordinary's opinion. This is an action for infringement of copyright of a book, and it is essential to keep in view that there is no complaint of infringement of any copyright of design, although the book consists entirely of a collection of designs. In short, we have not here directly any question about the Act relating to copyright designs. This book is registered in Stationers' Hall, and the complaint against the respondents is that they have slavishly copied page after page of this book in a book of their own. If that be true, there is an invasion of the copyright. But the object of the averments contained in articles 10 to 16 of the respondents' statements is this—to show that in a number of instances the designs which are published in this book are marked as having been registered designs, and that others are spoken of as patents—patented articles—and it is quite plain, at least as regards the averments in articles 13 to 16 inclusive, that if we were to allow evidence of the averments there made we should be involved in a question, or rather a series of questions, as to whether registrations have been well made of particular designs, whether patents covered combinations only or parts of the combinations, and whether patents have expired or have not expired at the date of the publication of this book, and a variety of other questions of that kind, which, looking to the number of entries that are challenged, would involve the trial of some hundred side issues, to say the least of it; and that itself creates a very strong presumption against the relevancy of these averments. But I think it is made still more clear by a consideration of the only ground upon which, as it appears to me, these averments could be rendered at all available as a defence against this complaint. The book being entered at Stationers' Hall, it is plainly entitled to the protection of copyright. No doubt a book, though entered at Stationers' Hall, will not receive the protection of the Court as a copyright book if there be something connected with that book and its publication which is against public morals or anything of that kind. Nor will the protection of copyright be extended to a book that is a plain fraud upon the public—that is, calculated to make money by misrepre-

sensation. All that is very well settled. But it is quite impossible to say that this book is of that description. There may be inaccurate statements in it. It may very well be that some of the designs which are said to have been registered are not registered, or that their registration has expired, or that articles said to be patented were only patented in appearance but that the patents were bad, or that the things which are said to fall within the patents do not fall within them. All that may be inaccurate, but there does not appear to me to be anything in all these articles from 13 to 16 inclusive which can be said to be a fraudulent misrepresentation or anything at all equivalent to that. The other three articles that I have referred to stand in a somewhat different position, because, besides the general statements in article 10, there is this specific statement in article 11; they say—"Under reference to the general statement in the last article, the following designs are marked in the book founded on by the complainers as registered, when in fact they are not and never were registered, as represented by the complainers." Now, that is a statement of fact which would be much more easily established, and is a much more simple fact, than any of those referred to in any of the other articles I have mentioned. And again in article 12 they give a list of articles which they say, though at one time registered, had ceased to be registered, the protection given to them having expired prior to the publication of the catalogue. Article 11 embraces eight entries of that kind, and article 12 embraces 28. Now, at first sight it might appear that the Lord Ordinary might have allowed these two articles to go to proof; but I am of opinion that, taking them alone—and I dismiss all the others as irrelevant for the reasons I have already stated—taking these two alone, I do not think they amount to a relevant case of defence, because this book contains some thousands of such entries, and to say that in 8 or 28 articles mistakes have been committed in describing them as registered, when they either were never registered or have ceased to have the protection of law, does not amount to a case of fraudulent misrepresentation in this book as a book—a book circulated amongst the public for the purpose of misleading the public, of fraudulently practising upon the credulity of the public for the purpose of making money; and I rather think unless the case came up to that it would not amount to fraud. I assent a good deal to what the Lord Ordinary says in his note which has been laid before us. He says—"Just as in the case of private contracts, where the law will not always give a remedy to a party who has himself committed a breach of contract, neither in this *quasi* contract with the State shall the patentee have redress by interdict or damages if he himself has not fulfilled the counter prestations of his contract with the public." That seems to me to be exactly the position of this case, the complainers having fully complied with the provisions of the Copyright Acts—I mean the Copyright of Books Acts—and it is nothing to say that in some incidental cases they may have made such mistakes in this book as even involve them in penalty under the statutes regulating copyright of designs. The leading case upon this subject to which we were referred—the case of *Wright v. Tallis*—is a

very good illustration of the sort of book that is not to receive the protection of copyright when redress is demanded in a Court of law. In that case the book was not what it professed to be. It was a lie on the face of it. It professed to be a translation of a work by a celebrated German theologian, and that theologian never wrote such a book at all, but under cover of his name, and professing to give a translation of a book by him, the person who had entered the book at Stationers' Hall published to the world a composition of his own. Now, that was a complete fraud upon the public, because he purposed to sell the book and make money by his misrepresentation, and the Lord Chief-Justice in giving judgment in that case said—"The transaction registers itself under the head of crime and falsehood. It is a species of obtaining money under false pretences—that is to say, it is simply swindling." I do not say that there may not be cases where protection of this kind would be refused to a book although it might not quite come up to that description; but I think that case gives a fair enough illustration of the sort of fraud or improper representation which deprives a man who has a copyright of the benefit of its protection. Upon the whole matter, therefore, I am for adhering to this interlocutor.

LORD DEAS—I have come to the same result with your Lordship. Mr Dickson, as I understood his argument, placed it mainly upon this, that this book was not entitled to the protection of the statutes because of the fraudulent and untrue statements contained in it. Now, I can find nothing in it but matters of law and matters of opinion upon which people might differ, and I do not think these can be fraudulent and untrue statements such as would have the effect contended for—to prevent this book being published and used as an advertisement. That being the main ground upon which, according to my notes, Mr Dickson rested his case, I am of opinion, for the other reasons stated by your Lordship, that the result of the interlocutor is quite right.

LORD MURE—I quite concur in your Lordships' view of the matter, and I have nothing to add to what has been said.

LORD SHAND—I am also of the same opinion. If this had been a case in which there was a complaint of an infringement of rights of patent or of rights of copyright, by the making and selling of articles which were protected by letters-patent or by designs which had been registered, of course the averments that are made in reference to each of those articles would have been quite relevant, and the inquiry which the defenders desire would have been quite competent. But the case is not of that class at all. It is that the pursuers have lost all privilege of copyright at all in this book as a whole. Now, it appears to me that in order to sustain a defence of this kind facts must be shown which would really bring the case up to one in which it could fairly be said that the book itself was a dishonest book—as it were, stamped with dishonesty—and that being so, the person who was claiming the benefit of copyright could not make his registration available. I think the averments fall very far

short of that. As Lord Deas has remarked, by far the larger number of instances that are given upon which criticisms and objections are made, particularly in articles 13, 14, 15, and 16 of this record, are really matters of opinion upon which we should have witnesses on each side differing in opinion according to the different views they might take, and involving really questions of very considerable delicacy and nicety in law. No doubt articles 11 and 12 are in a somewhat different position, but the instances there given are comparatively few. They are not such as to stamp the book with being a dishonest book. Out of a book of 590 pages, with 3500 designs, there have been selected comparatively few, and it is said that these are open to the objections there stated. I do not think, even assuming they were so, that that would raise a defence which would be relevant on this question, and I am therefore of opinion that the interlocutor of the Lord Ordinary is sound, and ought to be adhered to.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Complainers—Mackintosh—Pearson. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Respondents—J. P. B. Robertson—Dickson. Agents—Davidson & Syme, W.S.

Friday, March 16.

FIRST DIVISION.

[Lord Lee, Ordinary.]

RITCHIE & SON V. BARTON.

Process—Jury Trial—Motion for New Trial—Slander—Evidence of Malice.

In an action of damages for slander, said to have been contained in certain letters written by the defenders, there was on record no allegation of malice on the part of the defender in writing the letters complained of. At the trial the presiding Judge held that the letters were privileged, and evidence of malice in writing them was led by the pursuer. The jury found for the pursuer. The defender having applied to have the verdict set aside on the ground that the case being one of privilege the pursuer should have averred malice on record, the Court *refused* to set aside the verdict.

Observed that the defender ought to have asked the presiding Judge to refuse to allow evidence of malice, and to direct the jury to find for him on the issue.

Damage.

Where, in an action of damages for slander, the jury assessed the damages at £300, and it was admitted that the pursuers, who were tradesmen, had not suffered in business through the slander—*held* that the damages were excessive, and that a new trial ought to be granted.

This was an action of damages which was raised by Robert Ritchie and James Ritchie, both blacksmiths in Edinburgh, against James Barton, S.S.C., concluding for payment of £300 to each of the pursuers for certain slanderous statements and charges which it was alleged the defender

had made against the pursuers. The pursuers carried on business in partnership under the firm of Robert Ritchie & Son.

The pursuers on 6th December 1881 were asked by John Gavine, a builder in Edinburgh, to give an estimate for the supply of iron railings and gates for property in Eildon Street belonging to the defender Barton, and they accordingly sent in an offer "to provide and erect railing at Eildon Street same as already put up in Eildon Street. . . with gate and lock complete . . . the price to be paid one month after the job is finished." Gavine, who was acting on behalf of the defender, the proprietor of the villas, accepted the pursuers' offer, and they commenced the work forthwith, and on 6th February 1882 they rendered their account to Gavine as for a finished job. He refused payment, alleging that the work was not properly or sufficiently executed, and especially that the gates were not fitted with cranks enabling them to shut automatically, and that this must be put right before payment could be made.

On the 7th August 1882, after a delay of several months, the pursuer James Ritchie removed the gates, as he alleged, to enable him to fit on the cranks. The defender's brother George Barton interfered while Ritchie was in the act of removing the gates, and challenged his right to take them away, but in spite of what was said the pursuer removed the gates in a van, which he had brought with him for the purpose. The defender's brother deponed that Ritchie said he was taking the gates because they were not paid for. He admitted, however, that Ritchie had asked him "how the gates were to be altered without being taken to the shop." This he deponed he thought to be an afterthought, and did not mention to defender for several days afterwards. On the same evening the defender wrote to the pursuers in the following terms:—"Messrs Robert Ritchie & Son, Smiths, 47 York Place, Edinburgh, 7th August 1882.—Sirs,—My brother informs me that at 5 o'clock this afternoon you forcibly, and against his remonstrances, and without any right or authority from me, took off and carried away the two front gates of No. 15 and 16 Eildon Street, my property, and in my lawful possession, having paid for the same to the person with whom I contracted to finish the villas, and obtained delivery thereof. Your carrying off was a theftuous and illegal act; and unless the gates are restored by 10 o'clock to-morrow forenoon, in the same state and place as when removed, I will not only take criminal but also civil proceedings against you. I will also have new gates put up at your expense and risk.—I am, Sirs, your ob. servt., JAS. BARTON." The defender also on the same day lodged with the police authorities in Edinburgh information that the pursuers had been guilty of stealing the gates, in consequence of which two detectives visited the pursuers' premises in order to investigate the charge. After inquiry the police were satisfied that the charge was groundless.

On the following day the defender wrote to the pursuers in these terms:—"Messrs Robert Ritchie & Sons, Smiths, 47 York Place, Edinburgh, 8th August 1882.—Sirs,—Having failed to restore the gates at 15 and 16 Eildon Street, as required by letter to you of yesterday, I beg to intimate I have ordered new gates to be put up, at your expense and risk, and that on the account being rendered I will transmit it to you for payment,