kind, however, appears in the present case, so all difficulty arising from the specialities in the case of *Dudgeon* is entirely removed.

The circumstance of Thomas Ross being assumed into partnership with his father after the date of the interdict exactly corresponds with that of the party Donaldson, who was assumed as a partner by Thomson in *Dudgeon's* case.

As to William Ross, he does not in his answers attempt to raise any question as to the validity of his patent, and he could not well do so, because at one time he appears to have been the owner of this patent, and to have parted with it to the party who assigned it to the complainer.

But Thomas Ross in articles 3 to 7 of his averments has tried to raise this question, and it does not appear to me that he can competently do this.

The complaint against Thomas Ross is that he committed a breach of interdict by aiding and abetting his father in the manufacture and sale of the valves, he being aware of the existing interdict. In these circumstances Thomas Ross cannot be permitted to challenge in the process the validity of the patent.

I am therefore for sending the case to a Lord Ordinary for proof, subject to the limitations I have mentioned.

Lord Mure concurred.

Lord Shand—The simple and only question is, whether the Court having interdicted the infringement of these letters-patent the respondents have continued manufacturing the patented articles in spite of the interdict? It is quite clear that Thomas Ross is not carrying on any independent business, but that he is simply a partner with his father, and it is alleged against the copartnery that it is so being worked as to create a direct breach of interdict. If the complainer succeeds in showing this, then he will also have succeeded in showing that Thomas Ross committed a breach of interdict. As Thomas Ross must have known of the existing interdict, I do not see how he can competently raise any question as to the validity of the letters-patent, and therefore I agree with your Lordship that he should not be allowed a proof of the averments in articles 3 to 7 of his answers.

Lord Adam—I am of the same opinion. As to the father, the only question is, Did he commit a breach of interdict? while as to the son the question rather is, Did he aid and abet his father in the manufacture of these articles in the knowledge of the existing interdict? and that, I think, is sufficient.

The Court remitted to Lord Kinnear, and allowed the complainer a proof of his averments, the respondent William Ross a proof of his averments, and the respondent Thomas Ross a proof of the averments contained in articles 1 and 2 of his answers, *i.e.*, excluding his averments directed against the validity of the patent.

Counsel for Complainer—Ure. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Respondents—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Tuesday, November 16.

SECOND DIVISION.

THE SCOTTISH RIGHTS-OF-WAY AND RECREATION SOCIETY (LIMITED) *v.* MACPHERSON.

(*Supra*, p. 13.)

Process—Appeal to House of Lords—Interlocutory Judgment—Discretion—Act 48 *Geo. III. cap.* 151, *sec.* 15.

The pursuer of an action of declarator of right-of-way (a society suing in the public interest) sought leave to appeal to the House of Lords against an interlocutor whereby the Inner House, reversing the decision of the Lord Ordinary, appointed "the issues in the cause to be tried before the Lord Ordinary without a jury." *Held* that the fixing of the mode of trial being within the discretion of the Court, leave to appeal should be *refused.*

On 8th June 1886 the Scottish Rights-of-Way and Recreation Society (Limited) and Thomas Duncan and James Farquharson raised an action of declarator and interdict against Duncan Macpherson of Glen Doll. The action was for declarator that there was a public right-of-way over a certain road passing through the defender's land of the nature and in the direction stated in the previous report (*supra*, p. 13). Defences were lodged. On 20th July 1886 the Lord Ordinary (Lord Kinnear) issued the following interlocutor:—"The Lord Ordinary on the motion of both parties, Appoints the issues in this case to be tried by a jury within the Court-room of the High Court of Justiciary upon Tuesday the 23d day of November next, at half-past ten o'clock forenoon," &c.

The defender reclaimed, and on 23d October 1886 the Court pronounced this judgment—"Recal the said interlocutor: Appoint the issues in the cause to be tried before the Lord Ordinary without a jury, and remit the cause to his Lordship with instructions to proceed therein accordingly."

Thereafter the pursuers presented a petition to the Court for leave to appeal to the House of Lords against this judgment. The Act 48 Geo. III. cap. 151, sec. 15, enacts—"That hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of Judges pronouncing such interlocutory judgments, or except in cases where there is a difference of opinion among the Judges of the said Division."

The petitioners stated that the question was one of public right depending on inquiry into facts, that they were advised that by the inveterate practice of the Court it ought to be tried by jury, and that they being charged with the public interest in that and similar cases had a material interest in having it so tried, rather than by proof and subsequent reclaiming-note, which would be productive of great expense. They also stated that they were advised that the said interlocutor was incompetent, as by the Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 46, the trial of a cause on issues before a Judge without a jury could

proceed only by consent of parties, which had not here been obtained. But in respect that this was an interlocutory judgment, and none of the Judges had formally intimated dissent, leave to appeal was necessary.

Argued for the petitioners—The question raised by the case was one of public right depending solely upon an inquiry into facts, and the usual way of trying such a case was on issues before a Lord Ordinary and a jury. There was greatly increased cost and uncertainty in an inquiry by proof before a Lord Ordinary compared with the sharp decision given by a jury. As there might be other cases in which the Society would have to act in the public interest it would be well to have the proper course of trial finally sanctioned.

Counsel for the defender was not called on.

LORD JUSTICE-CLERK—The question in this case when it was previously before us was, whether it was more desirable to have this case tried before a jury or by a Judge without a jury? After consideration we found it better to have the case tried before the Lord Ordinary without a jury, and we pronounced judgment accordingly. I need not state what reasons induced us to come to that decision, as they were given at the time. Now, in this matter of procedure we are asked to stop the whole proceedings in the case in order that this company may appeal to the House of Lords. I am of opinion that there is no ground for our granting the request, and think therefore it should be refused.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

LORD M'LAREN—If it could be said that there was any fixed rule that such cases as this should be tried by a Judge without a jury I could see some reason for the petitioners' desire to appeal. But no such rule has been laid down in this Court. It is admitted that the judgment of the Court in the previous stage of this case was given in exercise of that discretion which is vested in the Judge and in the Division to say what is the proper mode of trial. But as in any appeal the House of Lords would refuse to interfere with the discretion of the Court, I see no good that can arise to the petitioners from an appeal.

LORD YOUNG was absent.

The Court refused to grant authority to the petitioners to present a petition of appeal to the House of Lords against the interlocutor of 23d October 1886.

Counsel for Petitioners—Graham Murray—W. C. Smith. Agent—A. Newlands, S.S.C.

Counsel for Respondent—Sol.-Gen. Robertson, Q.C.—Asher, Q.C.—Cosens. Agents—Tait & Crichton, W.S.

Tuesday, November 16.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

GORDON *v.* THE BRITISH AND FOREIGN METALINE COMPANY AND OTHERS.

Reparation—Company—Wrongous Use of Arrestment—Malice.

An action was brought against a company and the individual partners, jointly and severally, concluding for damages for alleged wrongous use by the defenders of the diligence of arrestment. The arrestments were used on the dependence of certain litigations, and the pursuer averred and put in issue that they were used maliciously and without probable cause. The defenders pleaded that the action ought to be dismissed, because the pursuer must prove malice, of which a company could not be guilty. *Held* (1) that this plea should be repelled, because the company being a *persona* capable of taking the proceedings complained of, must be answerable in law for them; but (2) that the pursuer was not entitled to put in issue whether the alleged wrong was done by the defenders or "one or more of them," so as to meet the case of one or more of the individual defenders showing that they never authorised the arrestments.

Reparation—Judicial Slander—Issue.

An action was brought for a slander alleged to have been uttered by the statements of the defender in an action which he had raised against the pursuer, and which had been dismissed. The statements complained of formed the ground of action in that process. They were alleged to have been made groundlessly and maliciously. *Held* (*alt.* judgment of Lord M'Laren) that while the pursuer must prove malice and want of probable cause, an issue could not be altogether disallowed on the ground that the statements in that action were not only pertinent to but formed the ground of it, and that the party had been entitled to submit them to a Court.

In an action of damages for judicial slander the pursuer must not only aver malice, but set forth facts from which a jury may reasonably infer it—*Scott* v. *Turnbull*, July 18, 1884, 11 R. 1131, commented on.

In May 1886 John Gordon junior brought this action for damages against the British and Foreign Metaline Company, manufacturers of metaline carrying on business in Dundee, and William Bruce Thompson, William Stiven, and David Stewart, "the individual partners of the said company, as such partners and as individuals." He concluded against the defenders, "jointly and severally," for £1000 as damages.

The following were the material averments of the pursuer. He stated (Cond. 2) that from about 1st May 1878 to the end of April 1879 he was in the service of and interested in the profits of the Metaline Company, and that three months after that he left their service and set up in business for himself in Dundee. "Since leaving their service, the defenders, the partners of said company, have cherished the strongest feelings of ill-