Act 1878, referred to the Sheriff of Lanarkshire, and heard and determined by him. By his award, dated 22nd April 1899, he awarded and ordered that the condition above mentioned ought not to be attached to the consent of the Corporation, and he further awarded, ordered, and consented that the Postmaster-General should be at liberty to place a line or lines of underground telegraphs in or under the streets or public roads mentioned in the notice dated 21st December 1898, and along the routes therein specified and shown on the plan annexed thereto.

On 5th May 1899 the Corporation gave notice in writing to the Postmaster-General that they were dissatisfied with the award of the Sheriff, and they thereby required that the difference which had arisen between the Postmaster-General and the Corporation should be referred to the Railway and Canal Commissioners.

In the reference to the Railway and Canal Commissioners the Postmaster-General contended that the condition attached by the Corporation to their consent was an unreasonable and improper condition, and that the order and award of the Sheriff that the condition ought not to be attached to the consent of the Corporation was reasonable and just, and further that the consent given in the Sheriff's award was reasonable and just.

In the reference to the Railway and Canal Commissioners the Corporation submitted that the consent given in the Sheriff's award was unreasonable and unjust, on account of the facts and reasons which they set forth in detail in their pleadings and evidence.

By order dated 12th August 1899 the Railway and Canal Commissioners determined that the condition demanded by the Corporation ought not to be attached to the consent of the Corporation, and further ordered and consented that the Postmaster-General should be at liberty to place lines of underground telegraphs under the streets therein mentioned.

By note of appeal dated 25th August 1899 the Corporation appealed to this Court against the order of the Railway and Canal Commissioners, and the Postmaster-General maintains that the appeal is incompetent.

It may be a question whether the appeal from the Commissioners to a superior Court of Appeal allowed by section 17 of the Railway and Canal Traffic Act 1878 applies to cases arising under the Telegraph Acts, but assuming that it does, I am of opinion that the appeal is incompetent, because it is not upon a question of law, but of the reasonableness or unreasonableness of the condition which the Corporation seek to have attached to the consent—a matter not depending upon law but upon fact and opinion upon fact.

It was contended by the Corporation that the question is one of law, because Lord Stormonth Darling, the *ex officio* Commissioner, in delivering the judgment of the Commissioners, expressed the opinion that the Corporation "had no right to clog their consent with the condition" above mentioned, and "were not entitled" to attach that condition to their consent. It does not, however, appear to me that in using the words "had no right" and "were not entitled" his Lordship intended to decide or did decide any legal right, or to indicate that any question of legal right was raised for decision. I think that he only meant to say that the Corporation had no right, and were not entitled, to prevail in insisting on the condition being annexed to the consent, because it (the condition) was unreasonable. In a similar case between the Postmaster-General and the Corporation of London, Mr Justice Wright, the English *ex officio* Commissioner, in delivering the opinion of the Commission, said—"I think that we ought to hold that the condition sought to be imposed is not a reasonable one, and not one that ought to be sanctioned by the Court;" and it appears to me that Lord Stormonth Darling intended in the present case to express the same view.

The best test however of what the Commissioners decided is the formal order which they made, and it is "that the said condition ought not to be attached to the consent of the Corporation." This does not involve any statement that either the Corporation or the Sheriff or the Commissioners had no power to attach the condition, but merely that the condition was unreasonable, and therefore ought not to be attached.

I therefore consider that the question brought before us by this appeal is not one of law, and consequently that we have no jurisdiction to entertain it.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Appellants—Shaw, Q.C. —Craigie. Agents — Campbell & Smith, S.S.C.

Counsel for the Respondent—Solicitor-General (Dickson, Q.C.)—H. Johnston, Q.C. —Fleming. Agent—John S. Pitman, W.S.

Friday, January 26.

FIRST DIVISION.

RUSSELL *v.* MACKNIGHT'S TRUSTEE.

(*Ante*, November 7, 1896, 34 S.L.R. 73; 24 R. 118.)

Process—Jury Trial—Order for New Trial—Failure to Proceed—A.S., February 16, 1841, secs. 41 and 46—Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 40.

Section 41 of the Act of Sederunt 16th February 1841 provides—"All regulations as to notices of trial, as to abandonment of the suit, as to not proceeding to trial, and as to not appearing and proceeding with evidence at the trial, and all other matters and things herein provided for regulating the conduct of parties as to trials, shall be the same in

the case of a new trial as in the case of an original trial."

Section 46 provides— . . . "If the pursuer or party appointed to stand as pursuer shall not proceed to trial within twelve months after issues have been finally engrossed and signed, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause be shown for the delay to the satisfaction of the Court."

Section 40 of the Court of Session Act 1850 provides that "where an issue or issues is or are approved as aforesaid, it shall be competent to the Lord Ordinary in the cause, on the motion of either of the parties, to appoint a time and place for the trial of such issue or issues."

The defender in a jury trial, after a verdict had been pronounced against him, successfully moved for a new trial, and the pursuer for a period of more than twelve months thereafter took no further step in the action. The defender having applied for absolvitor, *held* (1) that the provision in section 46 of the Act of Sederunt was not impliedly repealed by the alternative procedure provided by the 40th section of the Court of Session Act 1850, and (2) that it applied to the case of a new trial granted after a verdict had been set aside.

Macfarlane v. *Beattie & Son*, July 1, 1892, 19 R. 954, *commented on.*

This case is reported *ante, ut supra.*

On 6th February 1896 Mrs Jessie Morison or Russell raised an action against Mr A. E. Macknight, Edinburgh, for payment of £1000 as damages for the death of her husband, who had been tenant of a house in South Queensferry belonging to the defender, and had died in consequence of an accident caused, it was alleged, by the absence of a hand-rail on the stair of the house. The case was tried before a jury, who returned a verdict for the pursuer, and assessed the damages at £150.

The defender having moved for a new trial, the First Division on 7th November 1896 granted a new trial.

The defender now moved the Court to assoilzie him from the conclusions of the summons in respect that the pursuer had taken no steps in the action since the granting of the new trial, a period much in excess of twelve months.

Argued for defender—(1) Section 40 of the Act of 1850 only provided an alternative remedy, and was in no way intended to repeal the provisions of the Act of Sederunt, which were constantly put into operation at the present day—*Wilson* v. *Haggart*, July 15, 1863, 1 Macph. 1115. The defender here had no wish to go to trial, and therefore employed the older remedy. (2) Section 41 of the Act of Sederunt in express terms showed that the remedy provided by the 46th section would be applicable to the case of a new trial. The only explanation of the case of *Macfarlane* v. *Beattie & Sons*, July 1, 1892, 19 R. 954, was that section 41 was not cited to the Court.

Argued for pursuer—(1) The machinery provided by the Act of 1850 had by implication repealed that in the Act of Sederunt. All jury-trial procedure was a creation of statute, and the later statutes must be looked to for appropriate procedure—*Baird* v. *Cornelius*, July 16, 1881, 8 R. 982. (2) The case was directly ruled by *Macfarlane* v. *Beattie & Sons.*

LORD PRESIDENT—The defenders in this case, founding on the Act of Sederunt of 16th February 1841, move the Court for absolvitor upon the ground that the pursuer has not proceeded to trial within twelve months after a new trial was granted, and that no sufficient cause has been shown for the delay. To this the pursuer replies that the Act of Sederunt of 16th February 1841 is in effect repealed, or at all events superseded by the Court of Session Act 1850, and, *separatim*, that section 46 of the Act of Sederunt does not apply to the present case, inasmuch as the only period therein referred to is twelve months after issues have been finally adjusted, or in other words, that the section is applicable only to a first trial, and not to a new trial after a verdict has been set aside. In answer to this argument the defenders refer to section 41 of the Act of Sederunt, which provides "that all the regulations as to notice of trial, as to abandonment of the suit, as to not proceeding to trial, and as to not appearing and proceeding with evidence at the trial, and all other matters and things herein provided for regulating the conduct of parties as to trials, shall be the same in a new trial as in the case of an original trial," and it appears to me that this section directly applies to the case, and warrants the Court in granting absolvitor, the pursuer having failed to show any sufficient cause for the delay in proceeding to the new trial. Reference was made by the pursuer to the case of *Macfarlane* v. *Wm. Beattie & Sons*, 19 R. 953; but it is to be observed that section 41 of the Act of Sederunt was not brought under the notice of the Court in that case, the defenders having, as the report bears, founded on section 46 of the Act of Sederunt, "and maintained that the spirit of that Act applied although the words did not in terms." It appears to me, however, that section 41 makes the provisions of section 46 directly applicable to the present case.

LORD M'LAREN—I think that it is clear that the Act of Sederunt of 1841 is still in force. I have myself seen it applied hundreds of times in the course of my experience as a lawyer and a judge. It is equally clear that the 41st section is directly applicable to the case presented to us. The only question is whether section 41, and the other sections which are governed by it, have been repealed by implication through the effect of the Act of 1850. In support of that view all that has been said is that in the case of *Macfarlane* v. *Beattie*, where counsel founded on a wrong section of the Act of Sederunt, the Court, being in doubt

whether the section applied, without pronouncing an interlocutor, suggested as a way out of the difficulty that the defenders might apply to have the case set down for trial. That may have been an appropriate remedy in that case, but there are many cases in which it very clearly would be inappropriate. There may be cases where the verdict is set aside on the ground of misdirection or excessive damages, and where it is necessary that a second trial should proceed in order to the ascertainment of the correct amount of damages. But where the verdict is set aside as being contrary to evidence, and no further evidence is available, it would be useless, and it is not consistent with professional practice, that the pursuer should avail himself of his right to a new trial, and it would certainly be very inexpedient for the defender to do so. I am of opinion that the alternative remedy under the Act of 1850 does not interfere in any way with the right conferred on the defender by section 41, but that the pursuer may move for absolvitor if the pursuer has not moved for a trial within the statutory period.

LORD ADAM and LORD KINNEAR concurred.

The Court assoilzied the defender from the conclusions of the action.

Counsel for Pursuer—A. M. Anderson. Agent—D. Howard Smith, Solicitor.

Counsel for Defenders—Dewar—Grainger Stewart. Agents—Hugh Martin & M'Kay, S.S.C.

Saturday, January 27.

SECOND DIVISION.

[Sheriff-Substitute at Dumbarton.

CURRIE AND SCOTT *v.* WEIR.

Reparation—Slander—Relevancy—General Averment of Malice.

A builder raised an action of damages for slander against an innkeeper. The pursuer averred that the defender had asserted in presence of a police constable that he had stolen an ink-bottle while transacting business in her inn, and that on the same day she had reported the statement to the police inspector, and had requested the police inspector and constable to search the house and person of the pursuer for the ink-bottle. He further averred that the statements so made by the defender were quite unfounded and were false, calumnious, and malicious, and without any probable cause. The pursuer proposed an issue in which malice was inserted.

Held that the averments of malice on record were relevant and sufficient, and the issue proposed by pursuer *allowed.*

James Currie, a builder, and Thomas Scott, a commercial traveller, raised an action of damages for slander against Mrs Janet Scott or Weir, spirit merchant, Railway Inn, Milngavie.

The pursuers averred—"(Cond. 2) On or about Friday the 7th day of July 1899 the pursuers visited the defender's spirit shop, known as the Railway Inn, Milngavie, to transact certain business, and entered one of the rooms of said shop, in which they used an ink-bottle supplied by and belonging to the defender, in discharging an account, and after partaking of certain refreshments left the shop. (Cond. 3) On said date the defender, in her said shop, and in presence of Constable Vance, Milngavie (who had called at her request), said of and concerning the pursuers 'James Currie, builder, and another man whom I do not know' (by whom she meant the pursuer Thomas Scott), were in the room to-day, and have stolen an ink-bottle belonging to me. I am certain that they, or one of them, have taken it, as no-one entered the room after they left, and I found the contents in the ashpan'—or words of like import and effect. On or about the same date the defender also made similar statements regarding the pursuers to Inspector M'Intyre, Milngavie, and she requested the said Constable Vance and Inspector M'Intyre to search the houses and persons of pursuers for said ink-bottle. (Cond. 5) The statements so made by the defender were quite unfounded, and were false, calumnious, and malicious, and without any probable cause."

The defender pleaded—"(1) The pursuers' statements are irrelevant, and insufficient to support the prayer of the petition."

On 10th October 1899 the Sheriff-Substitute (GEBBIE) before answer allowed parties a proof of their averments.

The pursuers appealed for jury trial.

James Currie proposed the following issue for the trial of the cause:—"(1) Whether, on or about the 7th day of July 1899, and within the Railway Inn, Milngavie, occupied by the defender, the defender, in presence and hearing of Constable Vance, Milngavie, uttered the following words, or words of like import and effect: 'James Currie, builder and another man whom I do not know' (meaning thereby the pursuer Thomas Scott), 'were in the room to-day, and have stolen an ink-bottle belonging to me. I am certain that they, or one of them, have taken it, as no-one entered the room after they left, and I found the contents in the ashpan;' and whether said statement is in whole or in part of and concerning the pursuer James Currie, and is false and calumnious, and was uttered by the defender maliciously and without probable cause, to the pursuer's loss, injury and damage? Damages laid at £100."

A similar issue was proposed by Thomas Scott.

Argued for defender—The averments of malice on record were irrelevant for want of specification. What the defender had done had been in discharge of her duty