design of their own which should not copy or colourably imitate the complainers'. Now, if they had set about making a design in that view, and had produced the complainers' design, with this difference, that the moulding of the door overlapped the adjacent mouldings at the side instead of fitting between them, the question is, whether that design involves the exercise of any inventive skill at all, and whether it is capable of being distinguished from the complainers' design as a design?

"I think that in this case the difficulty, if there be any, is in finding out the question for consideration, because when that is once stated I think it carries its own answer. If it be the question whether, in the assumed knowledge of the complainers' pattern, and wishing not to imitate it, the respondents have successfully achieved their object in making the door which is the subject of complaint, I think no one can doubt that the attempt is a failure—that to present what is a mere copy of the complainers' door, but to place it so that the moulding overlaps instead of fitting in between the adjacent parts, is not an independent design, but a very plain and obvious imitation of the complainers' design. I do not call it a colourable imitation, because I rather think it is the identical thing. It is either directly and literally the complainers' design, or it is in my judgment a very obvious imitation of it, and that being my view of the facts I shall give decree in the terms sought, interdicting the respondents from making, vending, or using fire-doors of the description complained of, with expenses."

The respondents reclaimed, and argued—The question was one falling under section 58 of the Act of 1883 (46 and 47 Vict. cap. 57) and the words "such design or any fraudulent or obvious imitation thereof." It could not be said that the respondents' door was either the same as the complainers,' or a fraudulent or obvious imitation thereof, as the differences were apparent to the eye, besides being clear to a mechanic. In looking at a design of this kind it was only fair to look at it as a whole in order to determine its resemblance or dissimilarity to another design. The respondents' design showed a material novelty, and in respect of the novelty the complainers were not entitled to interdict—*Houldsworth* v. *M'Crea*, 2 L.R., E. & I. App. 380; *Barran* v. *Lomas*, 1880, 28 Weekly Reporter, 973.

Counsel for the respondents (complainers) were not called on.

At advising—

Lord President—This question is one of infringement of patent, and entirely a question of fact. In the former case we held that the subject of the patent was a new and original design, and therefore a proper subject of registration under the Patents, Designs, and Trade-Marks Acts of 1883.

The only question remaining therefore is, whether the reclaimers' design is not obviously an imitation of that of the complainers. Upon that matter I am entirely of the opinion expressed by the Lord Ordinary. Either the respondents' door is an obvious imitation of the complainers' door, or it is identical with it. In these circumstances I am for adhering.

Lord Shand—I am of the same opinion. There can be no doubt that these two designs are the same, and that there is nothing to distinguish the one from the other.

I do not think in a case of this kind that it is necessary for the complainers to make out that the imitation has been wilful and intentional; it is enough if they show that the design is the same in order to have the infringement put a stop to.

Lord Adam concurred.

Lord Mure was absent from illness.

The Court adhered.

Counsel for the Complainers—D.-F. Mackintosh—Ure. Agents—Auld & Macdonald, W.S.

Counsel for the Respondents—Jameson—Younger. Agents—J. & J. Ross, W.S.

Saturday, May 26.

FIRST DIVISION.

[Lord Trayner, Ordinary.

CLARKE *v.* M'NAB AND OTHERS.

Process—Suspension—Expenses—Modification—Audit.

In a note of suspension the Lord Ordinary on the motion of the suspender refused the note, and modified the expenses for which the suspender was found liable to £5, 5s. *Held* that the Lord Ordinary, in the exercise of his discretion, was entitled to modify the expenses.

Hare v. *Stein*, 9 R. 910, *followed.*

Ante, March 10, 1888, p. 389.

On 24th January 1888 David Wilkie Clarke, joiner and builder in Dundee, was charged at the instance of Mrs M'Nab and others, in virtue of an extract registered bond and disposition in security, and warrant following thereon, to make payment of the sums borrowed by him.

On 31st January 1888 Clarke presented a note of suspension, praying the Court *simpliciter* to suspend the said charge and whole grounds and warrants thereof. At the same time Clarke presented to the First Division a petition for recall of inhibitions which had been used against him by Mrs M'Nab and others. The grounds of suspension and for recall of the inhibitions were the same, and the suspension was allowed to lie over to await the decision of the First Division in the petition for recall of the inhibitions.

On 10th March 1888 the First Division refused the petition, and on 14th March 1888 the Lord Ordinary (Trayner) pronounced this interlocutor in the process of suspension:—"On the motion of the suspender refuses the note of suspension; finds the suspender liable in expenses; modifies the same to Five pounds five shillings sterling.

Mrs M'Nab and others reclaimed against the Lord Ordinary's interlocutor in so far as it modified the expenses to £5, 5s., and argued—The motion made to the Lord Ordinary was "to refuse the note with expenses." His Lordship ought to have remitted the respondents' account of expenses to be taxed by the

Auditor in the usual way, instead of which, and without applying his mind to the matter, the Lord Ordinary had just fixed a random sum of £5, 5s. It was not disputed that the Lord Ordinary had the power to modify the expenses, but it was urged that this should only be done on cause shown—*Hare* v. *Stein*, June 8, 1882, 9 R. 910. That case was distinguished from the present, because in it the Lord Ordinary had applied his mind to the matter, and stated his reasons for what he had done in his note, while in the present case the Lord Ordinary had come to an arbitrary decision. The accounts should still be remitted to the Auditor.

Replied for the respondent (the suspender)—It was not accurate to say that the Lord Ordinary had not applied his mind to the question, because he had the whole matter fully before him. It was stated to him that there were two actions, and that all the accounts had already been paid in the petition for recall of the inhibitions in which the facts were the same. Two sets of fees could not be allowed in such circumstances where the papers were the same, and the £5, 5s. allowed amply covered all extra expense.

At advising—

Lord President—I am for adhering to the Lord Ordinary's interlocutor. I cannot see any distinction between this case and that of *Hare* v. *Stein*, to which we were referred. I see from the observations made both by Lord Shand and myself in that case, in which the Lord Ordinary had fixed a sum which would in his opinion cover expenses, and would thereby save the parties the expense incurred in a taxation before the Auditor, that we approved of what the Lord Ordinary had there done. In this case the Lord Ordinary has just followed the same course, and I am not disposed to interfere with what he has done.

Lord Shand—I am of the same opinion. The Lord Ordinary has modified the expenses in this case at £5, 5s. with the view of avoiding further outlay. In ordinary circumstances no doubt a sum of £5, 5s. would hardly have paid the actual outlay, but in the present case it must be kept in mind that this is only one of two duplicate actions which were being carried on at the same time. That being the state of matters, though perhaps I should not have fixed the sum of expenses at £5, 5s., I do not think any such case has been made out as to warrant our interference.

Lord Adam—I concur. No doubt, as Lord Shand has pointed out, the circumstances of this case are somewhat peculiar, but the power of the Lord Ordinary to deal with the matter of expenses in such cases is a very useful one, and ought not arbitrarily to be interfered with.

Lord Mure was absent from illness.

The Court adhered.

Counsel for the Reclaimer—G. W. Burnet. Agents—Watt & Anderson, W.S.
Counsel for the Respondents—Dickson. Agent—J. Smith Clark, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, May 26.

(Before Lord Young, Lord M'Laren, and Lord Rutherfurd Clark.)

DINGWALL *v.* H. M. ADVOCATE.

Justiciary Cases—Criminal Procedure (Scotland) Act, 1887 (50 *and* 51 *Vict. c.* 35), *secs.* 2, 5, *and* 8, *and Schedule A—Omission of "Falsely and Fraudulently" from Indictment—Relevancy.*

Held (*diss.* Lord Rutherfurd Clark) that where falsehood and fraud are essential to make the act charged a crime, the words "falsely and fraudulently" must be inserted in the indictment notwithstanding the provisions of the Criminal Procedure Act, 1887.

Opinion (*per* Lord Young), that in a suspension the whole circumstances connected with the sentence sought to be suspended are to be looked at, and that if it appears that the real question at issue was not the one the jury were asked to try, that is a sufficient ground for the interference of the Court.

The Criminal Procedure (Scotland) Act, 1887 (50 and 51 Vict. c. 35), sec. 2, enacts that "all prosecutions for the public interest before the High Court of Justiciary, and before the Sheriff Court, where the Sheriff is sitting with a jury, shall proceed on indictment in name of Her Majesty's Advocate, and in all cases in which by the existing law and practice such prosecutions proceed on criminal letters, indictment shall be used instead thereof, and such indictment may be in accordance with the forms contained in Schedule A appended to this Act, or as nearly conform thereto as the circumstances permit, and shall be signed by Her Majesty's Advocate or one of his deputes, or by a procurator-fiscal, and the words 'By authority of Her Majesty's Advocate' shall be prefixed to the signature of such procurator-fiscal."

Sec. 5 enacts that "it shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime."

Sec. 8 enacts that "it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,' or 'knowingly,' or 'culpably and recklessly,' or 'having good reason to know,' or 'well knowing the same to have been stolen,' or to use any similar words or expressions qualifying any act charged; but such qualifying allegation shall be implied in every case in which according to the existing law and practice its insertion would be necessary in order to make the indictment relevant."

Schedule A gives examples of indictments, and, *inter alia*, the following—"You did pretend to Norah Omond, residing there, that you were a collector of subscriptions for a charitable society, and did thus induce her to deliver to you one pound one shilling of money as a subscription