Friday, June 13.

FIRST DIVISION.

[Dean of Guild Court, Edinburgh.

MACDONALD'S TRUSTEE *v.* SOMERVILLE.

Burgh — Dean of Guild — Demolition of Ruinous House—Expenses of Interdict by Tenant—Liability of Owner—Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. cap. cxxxii.*), *sec.* 166.

Section 166 of the Edinburgh Municipal and Police Act 1879, dealing with the removal of the occupants of ruinous houses and the demolition or repair thereof, provides that if the owner of a ruinous house fails to pull down or repair it within a specified time, the Dean of Guild Court may order its demolition or repair. In that event it is enacted that "all the expense of enforcing such removal . . . or of taking down such house . . . shall be paid by the owner thereof."

The owner of a ruinous house having failed to implement the order of the Dean of Guild to take it down, the Procurator-Fiscal of Court, without previously executing a warrant which he had obtained for the removal of tenants, instructed a firm of contractors to execute the work. The tenant of the house presented an application for interdict, which was ultimately refused, with expenses. The tenant having proved unable to pay these expenses, *held*, in an appeal, that the owner was not liable for them, in respect that they were not incurred in enforcing the removal of the tenant within the meaning of section 166 of the Act of 1879.

This case is reported *ante*, January 25, 1901, 3 F. 391, 38 S.L.R. 296.

Section 166 of the Edinburgh Municipal and Police Act 1879 enacts—"If any house, . . . or other erection of whatever form or material, or anything affixed thereon, be deemed by the Burgh Engineer to be in a ruinous or insecure state, and dangerous to passengers or to the occupiers thereof, or of the neighbouring houses or buildings, the Burgh Engineer shall immediately cause such occupiers endangered thereby to remove from the occupancy of such houses or buildings until the same are put into a safe condition, and shall . . . cause a notice to be given to the owner of such house or building . . . requiring such owner forthwith to repair, take down, or secure such house or building, wall, or other erection, as the case shall require, and if such owner do not begin to repair, take down, or secure such house . . . within the space of three days after such notice has been so given . . . the Dean of Guild Court shall, on the complaint of the Procurator-Fiscal of such Court, order the owner of such house or building, wall, or other erection, to take down, rebuild, repair, or otherwise secure the same to their satisfaction within a time to be fixed by the Court; and in case the same be not taken down, repaired, rebuilt, or otherwise secured within the time so fixed, the Court shall cause all or so much of such house or building, wall, or other erection as shall be in a ruinous or insecure condition, or dangerous, to be taken down, repaired, rebuilt, or otherwise secured in such manner as shall be requisite; and all the expenses of enforcing such removal . . . or of propping up or of shoring up such house or building, or of taking down, repairing, rebuilding, or securing the same, shall be paid by the owner thereof."

This section was amended by section 34 (3) of the Edinburgh Improvement, &c. (Amendment) Act 1893 (56 and 57 Vict. cap. cliv.), but the amendment is immaterial to the present report.

On 20th October 1900 an interlocutor was pronounced in the Dean of Guild Court, whereby Mrs Isabella Macdonald or Armour, trustee of the late Dr Macdonald, surgeon, Edinburgh, was ordained to take down certain premises belonging to the trust at 89 High Street, Edinburgh, which were declared to be insecure. Failing her commencing to do so within six days, and completing the operation within fourteen days thereafter, warrant was granted to the Procurator-Fiscal to employ proper persons to execute the work. Warrant was also granted to remove tenants and occupants if necessary. That interlocutor was appealed to the First Division of the Court of Session, and on 25th January 1901 the interlocutor of the Dean of Guild Court was affirmed by the First Division, with the variation that warrant was granted to the Procurator-Fiscal to employ proper persons to execute the work of taking down the premises in question at the expense of Mrs Armour, on failure by her to do so within ten days from the date of the interlocutor, and completing the work within fourteen days thereafter.

Mrs Armour failed to begin the work within ten days of the interlocutor of the First Division, and on 8th February 1901 the Procurator-Fiscal instructed Messrs Waddell & Sons, contractors, to execute the work. He did not proceed to execute the warrant which he had obtained for the removal of tenants and occupants. On 25th February 1901 Mrs Leah Miller, who was tenant of the premises at 89 High Street belonging to Mrs Armour, presented a petition to the Sheriff Court against the contractors, Messrs Andrew Waddell & Son, craving that they should be interdicted from interfering with her possession of the premises, and the Sheriff-Substitute granted interim interdict until the Thursday following, 28th February. Upon the contractors applying to him the Procurator-Fiscal instructed them to defend the action. At the hearing on Thursday, 28th February, the interim interdict was at once recalled, and subsequently, on 28th May 1901, the Sheriff-Substitute dismissed the petition, and on 25th July 1901 an appeal to the Sheriff was also dismissed. Mrs Miller was found liable in expenses, amounting to £21, 5s. 2d., but it was found impossible to recover anything from her.

In producing his accounts against owners who had failed to carry out work ordered by the Dean of Guild Court, the Procurator-Fiscal included in the account due by Mrs Armour in respect of the operations on 89 High Street, amounting to £39, 3s. 8d., a sum of £21, 5s. 2d., being the expenses incurred by the contractors in the action raised by Mrs Leah Miller. Mrs Armour lodged objections, in which she made the following statement—"She was proprietor of the shop 89 High Street and of the premises behind, this being the only part of the tenement in which she was interested. This part of the property belonging to her was taken down under a separate order of the Court which had reference to this part of the property alone. The contractors' account for taking down her property amounted to £13, 10s. There is, besides, an account of £2, 18s. for furnishing tarpaulins to keep out the rain after the upper flats of the tenement had been taken down. This account does not show whether these tarpaulins were used exclusively for the shop 89 High Street or were partly for the adjoining shop, but even if they were used exclusively for 89 High Street the total expense to be allocated upon this respondent cannot exceed these two sums of £13, 10s. and £2, 18s., being together £16, 8s. This respondent would point out that in the account rendered by the contractor for the taking down of the shop 89 High Street, there is included an account of £21, 5s. 8d., said to be incurred by him for law expenses in defending an action of interdict raised against him at the instance of the tenant of the shop, and apparently Mr Hay has allocated all this expense on the present respondent. The respondent maintains that in no possible view of the case is she liable in this expense. The petition for interdict was never intimated to this respondent, and she had nothing whatever to do with it. In these circumstances the respondent objects to being found liable for anything beyond the expense of actually taking down the shop in terms of the order of Court and of the expense incurred in supplying the tarpaulins."

The Procurator-Fiscal lodged answers, in which he set forth the facts above narrated.

On 20th February 1902 the Dean of Guild pronounced an interlocutor, whereby he decerned and ordained Mrs Armour to make payment to the Procurator-Fiscal of the said sum of £39, 8s. 8d.

Note.—"A question of importance is raised in this case under the objections for the respondent Mrs Armour, Dr Macdonald's trustee. The respondent was the owner of premises at 89 High Street which the Court held to be insecure, and which the Court ordered her on the twentieth December Nineteen hundred to remove in terms of the 166th section of the Edinburgh Municipal and Police Act 1879. The respondent did not implement the order, and in terms of the same section the Court ordained the Procurator-Fiscal to have the premises taken down. When the contractors employed by the Procurator-Fiscal to take down the premises commenced their operations the tenant of the respondent presented an application for interdict in the Sheriff Court against any interference with the premises. The tenant obtained interim interdict, but the Sheriff, after considering the petition with answers, recalled the interim interdict and found the tenant liable in expenses. The contractor was unable to recover these expenses from the tenant, and has charged the same against the Procurator-Fiscal. The question is, whether the Procurator-Fiscal is entitled to recover these expenses from the respondent. The respondent argues that she is not liable in these expenses, and that the only expenses for which she is liable are the expenses of the Procurator-Fiscal in taking down the property. It might be a perfectly reasonable provision that the owner of insecure property who did not choose to carry out the order for demolition himself should only be liable in the expenses necessary for the act of demolition, but section 166 of the 1879 Act seems to the Dean of Guild to impose upon the owner of the property a wider obligation. Under that section the duty of demolishing insecure property is laid in the first place upon the owner of the property. If the owner of the property recognising his duty carries out the order of the Court he would have to meet every expense necessary for doing so, and if one of his tenants tried to prevent him from carrying out the order of the Court the expenses incurred by the owner in enforcing the order of the Court against such a tenant would be an expense for which the owner alone would be liable. It appears to the Dean of Guild that if the owner does not carry out the order of the Court and leaves it to the Procurator-Fiscal to do so he cannot relieve himself of any of the expenses for which he would be liable if he carried out the order of the Court. This view seems to be borne out by the concluding words of section 166, which are as follows—'All the expense of enforcing such removal (*i.e.*, of the tenants) . . . or of taking down the same (*i.e.*, the buildings) shall be paid by the owner thereof.' It appears to the Dean of Guild that if a tenant objects to being removed from the premises which have been declared insecure, and raises any form of action to prevent the Dean of Guild Court's order from being carried out, the expenses incurred by the Procurator-Fiscal in meeting such an action are expenses of enforcing the removal of the tenant, and are expenses for which the owner of the premises is liable. The Dean of Guild thinks it is right to record that in the present instance there is no suggestion that the opposition raised by the tenant was in any way one collusive with the owner. The case presents an appearance of hardship on the owner, but if the expenses in question are not payable by the owner they must be paid by the public. There seems to be no reason why the public should bear an expense which arises from a private individual allowing his property to become ruinous, and the Dean of Guild's interpretation of the section

of the Act is that such expenses are payable by the owner."

Mrs Armour appealed.

The arguments for both parties sufficiently appear from the opinions of the Judges.

LORD PRESIDENT — We had this case before us on a previous occasion, the question then being whether the Dean of Guild authorities were entitled to have the order which they sought against the owner of the property in respect that it had fallen into a condition of decay, and we upheld the decision which affirmed that they had that right. It appears that the property was under lease to a tenant, so that the owner had no right of occupancy at the time when the question arose; and it further appears that when the municipal authorities desired to proceed with the taking down of the ruinous building the tenant of the owner, the present appellant, initiated a proceeding for interdict against the municipal authorities doing this. It was not a defensive proceeding on the part of the tenant, but the tenant instituted it without, so far as appears, any communication with the owner. The question then comes to be, whether the expenses which were incurred by the municipal authorities or the procurator-fiscal in resisting this proceeding for interdict at the instance of a third party, to which the owner of the property was not a party, and as to which, according to a statement in the note of the Dean of Guild, there was no collusion, are to be borne by the owner. The question comes to be this sharp and important one, whether a person who has let a house to some one else, and is out of the possession and control of that house, is to be liable for the expense improperly incurred by that tenant in a proceeding with which the owner had nothing whatever to do. Of course, Parliament can do anything, but I apprehend that it would require to be a very clear provision to create such a liability. The question then comes to be whether such a provision is to be found in the 166th section of the Edinburgh Municipal Act of 1879 as amended. I do not think that the amendment is material to the present question. The part of the section which I understand is relied upon is, "And all the expense of enforcing such removal and of putting up every such hoarding or fence, or of propping up or of shoring up such house or building, or of taking down, repairing, or rebuilding or securing the same, shall be paid by the owner thereof." That, no doubt, is a strong clause, but the proceeding here was not a proceeding for enforcing removal. It was a proceeding of a different kind, taken by the tenant to interdict the municipal authorities from doing what they desired to do. A proceeding so initiated and carried on does not seem to me to fall within the words "enforcing such removal." If the municipal authorities asked and obtained the kind of warrant which they are entitled to obtain to clear the house, the expense of this might very well fall under the section. I may say that it seems to me that where a proceeding of this strong kind requires to be taken, it would be right that the municipal authorities should obtain a warrant and proceed in the regular way. But it seems to me that although the words used are very wide they cannot have been intended to cover a case like the present, where the expense was incurred not in any proceeding initiated either by the municipal authorities or by the owner of the property but by a tenant whom the owner had no power to control, and with whom it is not said that the owner was in any collusion.

LORD ADAM—I am of the same opinion. It seems to me the expenses in question were not expenses properly incurred in the execution of the Act in the proper reading of the Act. They were incidental, but I do not think they fall within section 166 of the Act, which I had the opportunity of considering last night.

LORD M'LAREN—I agree. I think, giving the widest possible construction to the power in the Act of Parliament to recover expenses, that these can only be expenses incurred in the execution of the Act. Now the expenses in this case are expenses incurred in resisting an application which was refused because it was found contrary to the Act. I cannot think it was intended to lay the owners of subjects under an obligation to pay any expenses that might be incurred by the procurator-fiscal in resisting an unfounded action relating to the subject-matter in question.

LORD KINNEAR—I am of the same opinion. The 166th section requires that in the circumstances in question the Burgh Engineer shall immediately cause the occupiers to remove. Then when he has got them removed he can proceed to pull down the houses which they occupied. Then it provides that all the expenses of enforcing such removal, and also the expense of hoarding and fencing and repairing buildings that are to be repaired, shall be paid by the owner of the buildings. I cannot see any room for doubting that the expenses of enforcing such removal, which are those laid upon the owner, mean the expenses of proceeding by the forms of law which the law enables them — enables the Burgh Engineer—to take for putting the occupiers out of the premises if they do not choose to go voluntarily. Therefore I have no doubt they cover all the expenses of the Burgh Engineer in directly enforcing the removal of the tenant. The means that are open to him are perfectly clear, and are very well established upon the face of this proceeding, because he has got a warrant from the Dean of Guild by an interlocutor in process for the removal of the tenants and occupiers if necessary. If he had proceeded to execute that warrant, the expense, which would probably have been very slight, because it would not have involved litigation, would have fallen upon the owner. But then he did not do that. It is a question for the judgment of the authorities in a case of the kind whether

it is necessary to take and enforce a proceeding by executing the warrant of the Dean of Guild or not. It is only if they do take such a proceeding that the statute gives expenses. Instead of doing that he took a course which we must presume, in consequence of the judgment of the Sheriff, to have been one that no reasonable or sensible occupier of the premises would have resisted. He gave notice in some form, and sent a contractor to pull down the buildings. It so happened that the occupier was not a very reasonable or very well-advised person, and brought an untenable proceeding by way of interdict to prevent the buildings being pulled down. In that he was unsuccessful, and caused expense to the town authorities. That is not an expense of removing a tenant, but is an expense which must be borne by the person who caused it, and not by the owner, who is an innocent third party, and who has not got these expenses to pay by any express provision of the statute. It seems to me that the expense which is here involved in this case is very clearly not an expense of removing tenants or occupiers, but an expense consequent upon failing to remove tenants or occupiers, and if there is any expense caused by that course I am afraid it must fall upon the tenant or occupier, or, if the town cannot recover from the tenant or occupier, then upon the town itself.

The Court recalled the interlocutor of the Dean of Guild dated 20th February 1902, and remitted the case to him.

Counsel for the Appellant — Campbell, K.C.—T. B. Morison. Agents—Nisbet & Mathison, S.S.C.

Counsel for the Respondents — C. K. Mackenzie, K.C.—W. Thomson. Agents—Graham, Johnston, & Fleming, W.S.

Thursday, June 19.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

CUNNINGHAM *v.* SKINNER.

Reparation — Slander — Innuendo — Dishonesty—Fair Retort—Company.

An advisory committee appointed to investigate the affairs of a company issued a memorandum, in which they made statements with regard to a person who had formerly been managing director. These statements were made in answer to a report by the managing director, in which he made allegations against the advisory committee. In the memorandum it was stated that the sum charged by the managing director for office expenses was much in excess of what was either required or disbursed, and that sums had been paid away really in connection with his private business, but had been charged to the company, and that the time of a clerk had been occupied with such business. In an action of slander brought by the managing director, and based upon the memorandum, he innuendoed it as imputing dishonesty to him. *Held* that he was entitled to issues.

Reparation — Slander—Privilege — Action by Former Managing Director of Company Against Advisory Committee of Shareholders—Memorandum Issued by Advisory Committee of Shareholders in Answer to Statements made by Managing Director—Company.

In an action of damages for slander, where the allegations complained of had admittedly been made by the defenders as members of a committee appointed by the shareholders to investigate the financial position of a company of which the pursuer had been managing director, and in answer to accusations made against them by the pursuer, *held* that the defenders were entitled to have the word "maliciously" inserted in the issues which were allowed.

Res Judicata—Dismissal.

In an action of damages for slander based upon averments practically the same as those in a previous action brought by the pursuer, which had been dismissed upon the ground that he, having become bankrupt, and having been consequently ordained to find caution, had failed to do so, *held* (*diss.* Lord Young) that the present action could not be excluded by the plea of *res judicata*, in respect that the decree in the previous action was one of dismissal and not of absolvitor.

Mora.

In an action of damages for slander based upon statements in a document issued more than ten years before, the pursuer explained that he had been prevented from bringing the action sooner owing to his being an undischarged bankrupt, and to his being unable to pay the expenses awarded in a previous action on the same grounds, which had been dismissed in respect of his failure to find caution for expenses, and also to his not being able to obtain possession of certain necessary documents and papers. *Held* that the action was not barred by *mora*.

Process—Caution for Expenses.

In an action of damages for slander brought upon the same grounds as a previous action which had been dismissed ten years before in respect that the pursuer having become bankrupt had failed to find caution for expenses, the defenders alleged that the pursuer was *vergens ad inopiam*, and asked that he should be ordained to find caution for expenses. The pursuer had obtained his discharge and had paid the expenses of the previous action. *Held* that he was not bound to find caution.

This was an action of damages for slander at the instance of John Ralston Cunningham junior, merchant, Glasgow, against George Skinner, baker, Glasgow, and others.