

two kinds, either that of sale or of joint-adventure, and I quite realised that, in deciding that it fell under one or other of these two categories, all the incidents of the contract were carried with it. After hearing the argument I pronounced my interlocutor, which I still consider a sound one, that this contract was one of sale, and that the property stipulated for passed to the buyer with all the usual results from such a purchase.

In the second place, I think that, in the event of the buyer's bankruptcy, the only right that the seller has is a personal claim for the price upon the bankrupt estate.

The other view is, that, if this concern was a joint-adventure, we must hold as incident to that contract that the asset of the adventure—namely, the printed book—did not fall into the sequestrated estate, but that only the publishers' interest so fell, with the effect that Mr Cunningham did not rank upon the estate merely for his interest, but that he was entitled to have half of the profits of the joint-adventure paid over to him. It was suggested that in a joint adventure the asset might be the property of one of the partners, although the others might have a share in the profits. That view I think is quite an admissible one, and in some circumstances may be the correct one. I do not, however, think it is the right view here, because I think the pursuer was not merely a partner for profits, but that he made a sale of this publication to his publishers.

I think also that this question has already been decided in this Court, and that the case is ruled by that of *Venables v. Wood*. I therefore adhere to the judgment I pronounced in the Outer House.

The Court adhered.

Counsel for the Appellant—D. F. Balfour, Q.C. — W. Campbell. Agents—Lindsay Mackersy, W.S.

Counsel for the Respondent—Graham Murray—Ure. Agents—Jamieson & Donaldson, S.S.C.

Friday, January 30.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

MACROBBIE v. M'LELLAN AND OTHERS.

Reparation—Wrongous Use of Diligence—Law-Agent—Issue—Malice.

The law-agent of a body of trustees at his own hand improperly obtained a decree for expenses against a defender in an action of mails and duties, charged upon the decree, and threatened to petition for *cessio* unless the decree was implemented.

In an action of damages for the wrongous use of diligence—held that the issue against the law-agent need not contain malice and want of probable

cause, and that the pursuer was not entitled to a separate issue against the trustees.

This was an action of damages by James MacRobbie, accountant, Glasgow, against the trustees of the late Peter M'Lellan, iron merchant there, and Forbes, Bryson, & Carrick, writers in Glasgow, their law-agents, for the wrongous use of diligence.

MacRobbie was trustee under a trust-deed granted by the late William Barrie, manufacturer in Glasgow, for behoof of his creditors.

Barrie, who was possessed of heritable subjects in Glasgow, had borrowed from Peter M'Lellan's trustees a sum of £1700, in security for which he granted a bond and disposition in security. This sum became repayable at Martinmas 1873, and various negotiations took place between the parties, resulting in 1890 in a petition of mails and duties being raised in the Sheriff Court at Glasgow by M'Lellan's trustees against MacRobbie as trustee, and also against the tenants and occupants of the subjects.

The prayer of the petition concluded thus:—"And in the event of any of the defenders appearing and offering opposition hereto, to find such appearing and opposing defenders liable jointly and severally in expenses."

The *induciae* of the petition expired on the 24th February 1890, and on that day MacRobbie posted to the Sheriff-Clerk an intimation in the following terms:—"Notice of appearance for James MacRobbie, accountant, Glasgow, in the action of mails and duties at the instance of the trustees of the late Peter M'Lellan. (Signed) JAMES MACROBBIE." This notice was not received by the Sheriff-Clerk until the 25th, after the *induciae* had expired.

When the case was called on the following day the attention of the procurator for M'Lellan's trustees was called to MacRobbie's intimation, and he thereupon wrote upon the interlocutor-sheet the following:—"Glasgow, 24th February 1890.—I consent to the above being received.—(Signed) (for Samuel Carrick, pursuer's agent), WM. GEMMEL, Procurator."

On the 27th day of February 1890 the Sheriff-Substitute (MURRAY) pronounced the following interlocutor:—"On the pursuers' motion, and of consent, Allows the notice of appearance for James MacRobbie to be received, and in respect that he has failed to lodge defences, and the other defenders to lodge a notice of appearance, holds them all as confessed: Decerns in the mails and duties as craved: Finds the said James MacRobbie liable in expenses, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report."

On the 7th of March 1890 the Sheriff-Substitute pronounced as follows:—"Approves of the Auditor's report on the pursuers' account of expenses, and decerns against the defender James MacRobbie for payment to the pursuers of the sum of fourteen pounds fourteen shillings and one penny of taxed expenses."

This decree was extracted, and on 26th May 1890 MacRobbie was charged thereon. On the same date a notice was sent to MacRobbie that failing payment of the sums mentioned in the charge, a petition for *cessio* would be presented in the Sheriff Court at Glasgow, at the instance of M'Lellan's trustees.

The pursuer averred that he had no interest or intention to oppose the prayer of the petition of maills and duties, and that he only desired to be informed of what was being done in the action; that at the diet at which the defenders consented to his intimation of appearance being received they moved the Court, in his absence, and without any notice to him, to find him liable in expenses as defending the action. The interlocutor of the Sheriff-Substitute of 27th February 1890 was *ultra vires*, and all that followed upon it was illegal and irregular; no intimation of any of the proceedings was ever made to him, and the diligence was oppressive. In consequence he had suffered in his credit and professional reputation, and the proceedings taken against him were done recklessly, maliciously, and without probable cause.

The defenders substantially admitted the pursuer's averments, and the defender Carrick accepted on behalf of himself and the other defenders all responsibility for what had occurred. They denied that the pursuer had suffered any loss or damage from any informality that existed in the procedure.

The Lord Ordinary (KINCAIRNEY) adjusted the following issue for the trial of the cause:—"Whether, in the Sheriff Court at Glasgow, the defenders Forbes, Bryson, & Carrick, and Samuel M. Carrick, on or about 7th day of March 1890, wrongfully, maliciously, and without probable cause, obtained decree against James MacRobbie for payment of £14, 14s. 1d., and on or about 26th day of May 1890 they charged him or caused him to be charged on said decree, and on or about 26th day of May 1890 served notice of *cessio* upon him, or caused such notice to be served, all to his loss, injury, and damage? Damages laid at £250."

The pursuer reclaimed, and moved their Lordships of the First Division to vary the issue by omitting the words, "maliciously, and without probable cause."

Argued for the reclamer—The whole procedure had been so irregular that the pursuer was entitled to an issue, not only against the law-agent, but also against the trustees. There had been a deliberate manipulation of the forms of process to enable the defenders to bring the pursuer within the prayer of the petition. This was more than a mere irregularity—it was a trick—and the diligence which had been used on the decree so obtained was damaging to the professional position of the pursuer. It was not necessary to aver malice, nor should the pursuer be required to insert it in the issue—*Bell v. Gunn*, June 21, 1859, 21 D. 1008; *Ormiston v. Brown*, February 24, 1866, 4 Macph. 488.

Argued for respondents—The decree was pronounced by a Judge in a competent Court, and in such a case it was essential that malice and want of probable cause should be inserted in the issue. If the decree was good in the present case, and it was not seriously challenged, then all that followed upon it was quite regular. The pursuer might have entered appearance for his own private purposes and without meaning seriously to defend the action, but the defenders could not know this and were bound to take decree against him—*Davis v. Hepburn*, May 31, 1867, 5 Macph. 804.

At advising—

LORD PRESIDENT—The trustees of the late Peter M'Lellan, iron merchant, Glasgow, in February 1890 raised an action of maills and duties in the Sheriff Court there against various parties who were tenants and occupants of certain heritable subjects in Glasgow, and also against the pursuer as representing the proprietor. The prayer of the petition concluded with these words—"And in the event of any of the defenders appearing and offering opposition hereto, to find such appearing and opposing defenders liable jointly and severally in expenses." Now, while there was no occasion for anyone to appear in such an action unless for the purpose of defending, there was upon the other hand nothing irregular in the proprietor of the subjects entering appearance to see what was being done, and accordingly appearance was entered for James MacRobbie in these terms—"Notice of appearance for James MacRobbie, accountant, Glasgow, in the action of maills and duties at the instance of the trustees of the late Peter M'Lellan.—JAMES MACROBBIE." This notice of appearance was not received until the *induciae* had expired, so the Sheriff-Clerk could not have given effect to it; but the agent for the pursuers in the Sheriff Court action on the same date entered this minute upon the interlocutor sheet—"I consent to the above being received." At the same time, however, he craved decree against the defenders and to find the defender MacRobbie liable in expenses.

There can be no doubt, I imagine, that this was a wrongful act upon the part of the pursuers' agent, because he thereby obtained more than the prayer of the petition asked. It concluded only for expenses against those of the defenders who appeared and opposed the action, and it is perfectly clear that MacRobbie did not do this, and accordingly Carrick's action in the matter was undoubtedly wrongful. But this is not an action for that wrongful act but for the wrongous use of diligence following upon this proceeding, and this consisted of a charge on the decree and a notice served on MacRobbie that if he failed to pay the sums mentioned in the charge a petition for *cessio* would be presented against him in the Sheriff Court of Glasgow.

Upon the averments I think it cannot be

doubted that there was here a wrongous use of diligence, but it is not with the merits of this case that we have at present to deal; it is before us merely on the question of relevancy and for the purpose of fixing the terms of the issue.

In an action for the wrongous use of diligence I do not think that it is at all necessary that malice need be averred or inserted in the issue. The issue should be one simply for the wrongful use of diligence, and it is not even necessary to insert in the issue that wrongous getting of the decree as a substantive ground of issue.

It was the use of the diligence and not the getting of the decree that constituted the wrong, and the issue should accordingly be framed so as to bring that out.

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

The Court approved of the following issue:—"Whether in the Sheriff Court at Glasgow the defenders Forbes, Bryson, & Carrick and Samuel M. Carrick, on or about the 7th day of March 1890, having obtained decree against James MacRobbie for payment of £14, 14s. 1d. sterling, did, on or about 26th day of May 1890, wrongfully charge him or cause him to be charged on said decree; and on or about 26th May 1890 did wrongfully serve notice of *cessio* upon him, or cause such notice to be served, all to his loss, injury, and damage. Damages laid at £250."

The Court refused a separate issue against M'Lellan's trustees.

Counsel for the Pursuer—Comrie Thomson—Dewar. Agent—T. M'Naught, S.S.C.

Counsel for the Defenders—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, January 30.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

ANDERSON v. HUNTER.

Reparation—Slander—Privilege—Statements made about a Candidate for the County Council.

In an action of damages for slander the pursuer complained that, when he was standing as a candidate for the County Council in the Ness Division of Lewis, the defender stated to various people that it would be of no use to elect him as he would soon be bankrupt. It appeared that the defender was a ratepayer in the parish in which the Ness Division was situated, but was not an elector in the Ness division, but in another division lying in the same parish.

Held that the defender's position was not privileged, and that malice need not be put in issue.

John Norrie Anderson, merchant in Storno-

way, brought an action of damages for slander in the Sheriff Court at Stornoway against Robert Hunter, ground officer and postmaster at Barvas.

The pursuer averred that in December 1889 he agreed, on the requisition of a number of the electors of the Ness Division of Lewis, to stand as a candidate for the County Council for that division; that shortly after he had so agreed to stand, he found that it was currently reported that he was about to become bankrupt; that these reports afterwards reached Stornoway, and became current there, greatly to his injury and annoyance; that on inquiry he found that the defender had on various occasions (several of which were specified) stated to different persons in the parish of Barvas, that it was no use to elect the pursuer as county councillor as he would be bankrupt soon, or used words substantially to that effect; that the said statements were false and calumnious, and were made by the defender maliciously and without probable cause, with the object of injuring the pursuer and ruining him; that in consequence of the said slanderous statements having been made by the defender, they had obtained general currency in the district, though they were totally devoid of foundation, and that the pursuer had thereby been seriously injured in his feelings, his business, and his character.

The defender averred that he was a ratepayer in the parish of Barvas (in which the Ness Division of Lewis was contained), and a member of the School Board; that in his capacity as ground officer he frequently came in contact with crofters, and the ratepayers of the district generally; that he was often applied to by them for information and advice regarding School Board, County Council, and other matters in the district; that on or about the dates mentioned in the condescence the defender was applied to by several ratepayers for information and advice as to the then pending County Council election; that upon these occasions it was possible that the defender might have referred to the current reports mentioned by the pursuer in his condescence; that if the defender did so, it was without malice, with probable cause, and solely in the interests of the ratepayers, and that the reference, if any, by the defender to the current reports concerning the pursuer's bankruptcy on the occasions referred to were privileged in the circumstances.

The defender pleaded—" (3) Any reference made by the defender to the rumours concerning pursuer's bankruptcy having been made (a) without malice, (b) with probable cause, and (c) in privileged circumstances, he is not liable in reparation."

The Sheriff-Substitute on 28th October 1890 allowed parties a proof of their respective averments, and to the pursuer a conjunct probation.

The defender appealed to the First Division of the Court of Session, and on 26th November 1890 the Court appointed the pursuer to lodge issues for the trial of the cause.