

person to the police office for. I asked if there were any precedent, and was informed there was none. If it had been supposed that this was slander we should before this year 1897 have had some actions against policemen for slander of the kind, and if we were to hold this case relevant we should probably have a considerable number of them in the future.

LORD TRAYNER—I am not so clear as your Lordships on the second issue, but my doubts are not sufficient to make me dissent. On the first issue I am quite clear, and have nothing to add.

LORD MONCREIFF was absent.

The Court dismissed the action as irrelevant.

Counsel for Pursuer—W. Campbell—W. Thomson. Agent—Charles George, S.S.C.

Counsel for Defender—Balfour, Q.C.—Guy. Agent—Peter Macnaughton, S.S.C.

Wednesday, June 17, 1896.

OUTER HOUSE.

[Lord Kincairney.

GIBSON & COMPANY v. ANDERSON & COMPANY.

*Reparation—Decree in Absence—Breach of Agreement to Stop Action—Malice.*

A raised an action in the Debts Recovery Court against B, who made a payment to account, on the express undertaking by A that the action would be stopped. Through a mistake decree in absence was taken, with the result that B suffered injury through the consequent publication of his name in certain black lists. In an action of damages by B against A, held (*per* Lord Kincairney)—*distinguishing Davies & Company v. Brown & Lyell*, June 8, 1867, 5 Macph. 842—that the pursuer was entitled to an issue without an averment of malice, on the ground that the injury resulted from breach of an express contract by A that the action should be stopped.

See the sequel of the present case in *Gibson & Company v. Anderson & Company*, February 23, 1897, *ante*, p. 435.

This was an action of damages at the instance of Gibson & Company, retail chemists, Edinburgh, against Anderson & Company, wholesale chemists there, under circumstances which are fully stated in the opinion of the Lord Ordinary.

On 17th June 1896 the Lord Ordinary (KINCAIRNEY) approved of the issue proposed by the pursuers.

*Opinion.*—“The averments on which this action of damages is founded are these—That on 5th November 1895 the defenders raised an action against the pursuers in the Debts Recovery Court (I presume at Edinburgh) for £43, 14s. 6d. That on 6th

November Mr Anderson (sole partner of Anderson & Company, defenders) agreed on payment of £25 to allow a reasonable time for payment of the balance, and intimated that if that payment were made there would be no occasion for the attendance of the pursuers at Court, as Mr Anderson ‘would undertake to see that all proceedings in the pending action would be at once stopped,’—thus the pursuer concurred in this agreement, and in implement of it paid £25 to the defender early on Friday 8th November; that the defender instructed his agent by letter to stop proceedings, but that on 11th November his agent took decree in absence for the balance. The pursuers say that the agent’s explanation was that the defender’s letter did not reach him until after decree had been taken. That explanation, however, does not concern this case, for the defender does not dispute his responsibility for the act of his agent. There is no averment of malice. Indeed, the pursuers’ averment that the defender directed that the proceedings should be stopped of itself negatives malice. No proceedings were adopted to enforce the decree.

“The averment as to damage is that ‘the name of the pursuers’ firm was posted in public prints in the list of persons against whom decree in absence had been obtained,’ and in the black list and other lists of a similar character, whereby the pursuers’ credit had been greatly injured.

“This is not a very usual kind of action; such actions having usually been based on wrongful use of diligence. The defenders have maintained that it is irrelevant for want (1) of an averment of malice, and (2) of an averment of damage caused by this act of the defenders. The defenders’ argument was rested on the case of *Davies & Company v. Brown & Lyell*, 9th June 1867, 5 Macph. 842, which undoubtedly closely resembles this case. That was an action of damages on account of a decree in absence taken by the defenders against the pursuer notwithstanding payment of the sum sued for. It was decided that the pursuers were entitled to an issue with malice and want of probable cause inserted, but not to an issue without malice and want of probable cause. I doubt whether in such a case the insertion of want of probable cause would now be insisted on, having regard to the recent case of *Rhind v. Kemp & Company*, 13th December 1893, 21 R. 275, in which in an action of damages against a debt collector for having taken a decree in absence against the pursuer in name of his constituent after the action had been settled, and contrary, as was averred, to his constituent’s instruction. An issue whether he had taken the decree maliciously was adjusted in the Inner House.

“These cases decide (1) that there may be an action of damages for taking a decree in absence after the sum sued for has been paid although no negligence has followed, but (2) not unless the decree has been taken maliciously.

“There is, however, a little difficulty as to the precise point decided in the case of

*Davies*, because the Judges in the majority express two grounds of judgment which appear totally unconnected—the one was that the decree taken by the pursuer was a judicial proceeding. Lord Curriehill, who dissented, thought it was not, because he held that as the whole conclusions were satisfied no competent action remained. He was therefore of opinion that there was no privilege, and thus the pursuers are entitled to an unqualified issue. Had he held the decree to be a judicial proceeding taken in a depending process he would have concurred. There is no doubt that in the present case the decree was a step in a depending action, because the payment of £25 was only a payment to account and did not exhaust the conclusions.

“The Judges in the case of *Davies* (except Lord Curriehill) referred very pointedly to the admitted fact that the pursuers took no steps to prevent the decree, which they held to be their duty as much as the duty of the defenders. I am in doubt whether they intended to refer to that fact as a separate ground of judgment. At any rate, I cannot see that it came in any way in aid of the former ground, and I think that notwithstanding these remarks the case decided the general point, that although a pursuer takes decree for the sum sued for after it has within his knowledge been paid he is not liable in damages unless he has done so maliciously.

“The pursuers, however, endeavoured to distinguish the present case from these cases by the averment that the defenders had undertaken to stop proceedings and that the failure to do so was a breach of contract. The distinction is very narrow, because it is difficult to suppose that when a pursuer receives payment of the sum he sues for he does not agree by implication not to take decree for it, yet it is true that neither the case of *Davies* nor of *Rhind* was based on breach of contract, and there seems to be authority for the distinction.

“In *Sturrock v. Welsh & Forbes*, November 14, 1890, 18 R. 109, the Court adjusted an issue whether the defenders, having obtained a decree wrongfully and in breach of an agreement, charged the pursuer; and in *MacRobbie v. M'Lellan's Trustees*, 31st January 1891, 18 R. 470, the issue adjusted was whether the defenders having obtained decree against the pursuers did wrongfully charge them upon said decree.

“It is true these were actions of damages for wrongful use of diligence, but in the latter case Lord M'Laren supposes the very case here averred, and he says—‘In such cases if the contract or undertaking is violated, the question between the parties is merely one of breach of contract, and there would be no propriety in holding that the person who sued for damages for the breach must prove that the defender acted maliciously.’ Lord Kinnear in the judgment proposed, concurred without any expression of dissent from the views of Lord M'Laren.

“On the whole matter I hold that it must be admitted that on the authority of the two cases of *Davies* and *Rhind*, that an action lies for taking decree in absence after payment has been made, and (deferring to the opinion of Lord M'Laren) that when it is averred that the decree has been taken in breach of agreement, I think in that case damages may be due although there is no malice—the principle of the cases of *Davies* and *Rhind* being in that case displaced.

“The other point on which the Judges in *Davies* commented so particularly seems avoided in this case by the averment of the pursuer, that he was expressly told by the defender that it was not necessary for him to attend the Court.”

Counsel for the Pursuers—A. J. Young—Kemp. Agent—Francis S. Cownie, S.S.C.

Counsel for the Defenders—Jameson—Watt. Agent—William Manuel, S.S.C.