

The result is that we approve of the first issue, malice being inserted, and disallow the second issue.

LORD STORMONTH DARLING and LORD LOW concurred.

The LORD JUSTICE-CLERK was absent.

The Court allowed the issue.

Counsel for the Pursuer and Appellant—G. Watt, K.C.—A. M. Anderson. Agent—Alexander Ramsay, S.S.C.

Counsel for the Respondent—The Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—Menzies, Bruce Low, & Thomson, W.S.

Friday, November 17.

FIRST DIVISION.

[Lord Dundas, Ordinary.

M'GREGOR v. M'LAUGHLIN.

*Reparation—Decree in Absence—Service of Wrong Summons—Regular Return of Citation—Damages for Decree being Taken in Absence when Summons had in fact not been Served—Malice—Relevancy.*

In an action in the Sheriff Court at the instance of A against B for payment of an account, the sheriff officer instructed to serve the summons inadvertently served a wrong summons on the defender (the summons actually served by him being one at the instance of C against D), but returned a regular execution of citation. A took decree in absence against B, and having extracted the decree, was proceeding to do diligence when the decree was set aside. Thereafter B raised an action of damages against A for wrongfully taking the decree in absence against him, averring that the decree had been published in the "Black Lists," and that he had suffered thereby. B did not aver that A had acted maliciously or that the mistake had been caused otherwise than by inadvertence on the part of the sheriff officer.

*Held (rev. judgment of Lord Ordinary (Dundas))* that as there was no averment of malice on record, the pursuer's statement disclosed no issuable matter, and action *dismissed* as irrelevant.

On 30th January 1905 Edward M'Laughlin, butter and egg merchant, Glasgow, raised an action against William M'Gregor, grocer there, in the Small Debt Court at Glasgow for payment of the sum of £3, 19s. 4d., being the amount of an account incurred in November and December 1904, and on the same date instructed Alexander M'Laren, a sheriff officer in Glasgow, to serve the summons. The execution of citation returned by M'Laren was as follows:—"Upon the 30th day of January 1905 years I duly summoned the within

designed Mr W. M'Gregor, defender, to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification within set forth. This I did by delivering a full copy of the within summons or complaint with a citation thereto annexed and copy account for the said defender in his hands personally within his premises at 6 Steel Street, Glasgow. ALEX. M'LAREN, Sheriff Officer."

M'Gregor now raised an action of damages against M'Laughlin. He averred that no copy of the summons was ever served upon him; that on 30th January there was served upon him by the said sheriff officer a small debt summons at the instance of Alexander Cameron, tailor and clothier, 90 Jamieson Street, Glasgow, against Thomas M'Cartney, boilermaker, 39 Ralecut Street, Glasgow; that on 6th February 1905 the defender took decree in absence against him in said action for £3, 19s. 4d., with 4s. 4d. of expenses; that on 16th February he (the pursuer) was charged by the said Alexander M'Laren, sheriff officer, to pay the said sums within ten free days from said date under pain of pouding and sale and imprisonment, if the same be competent; that the said charge was the first notice the pursuer had that there were proceedings in Court against him; and that the said charge, proceeding as it did upon an illegal decree, was wrongous and illegal.

In answer the defender admitted that the execution of citation was in the terms quoted; that he had taken decree in absence against the pursuer, and that the pursuer had been charged to pay the said sum. He further averred as follows:—"Explained that the defender had no knowledge of the actings of the said sheriff officer in regard to the service of said small debt summons, except what appeared on the face of the execution of citation here quoted by the pursuer. The said execution is in all respects in regular and proper form, and the defender was, in these circumstances, within his right in taking decree in absence against the pursuer on 6th February 1905. If any mistake or irregularity occurred in regard to the service of the summons, such mistake or irregularity did not appear on the face of said execution of citation, and the defender had no knowledge thereof and no responsibility therefor. It was solely the act of the said sheriff officer, who was acting in the performance of his official duty as an officer of court, and for whose actings in such official capacity the defender is not responsible."

The pursuer further averred—" (Cond. 4) On said charge being given the pursuer applied for and obtained a warrant sisting execution in terms of section 15 of the Small Debt Act of 1837. The case was reheard on 6th March 1905, when the Sheriff-Substitute dismissed the action on the ground that it had not been served on the pursuer and awarded him 6s. of expenses. (Cond. 5) The said decree in absence taken by defender was published in *Stubb's Gazette* and other similar publications

which are popularly known as 'Black Lists.' These publications contain records of bankruptcies, trust-deeds, cessios, and decrees taken in absence. The publication of a tradesman's name in said journals is highly injurious to him, and the pursuer's credit and trade reputation have been seriously prejudiced by the fact that his name appeared in said publications. (Cond. 6) For said publication and consequent injury the defender is responsible. Had said summons been served upon pursuer he would have paid said debt. By the defender's failure to have said summons served upon pursuer there was no process in said small debt action, and the proceedings therein were fundamentally null. The said decree in absence was thus obtained wrongously and illegally. For the injury caused to pursuer by said publication in said trade journals he is entitled to reparation."

In answer the defender stated—" (Ans. 6) Denied. The pursuer has sustained no injury whatever by the proceedings complained of. Before raising the said action against the pursuer the defender repeatedly endeavoured to recover the said account of £3, 19s. 4d. without resorting to legal proceedings. The pursuer, on three different occasions when requested for payment, asked for delay in the hope that he might be able to borrow some money from his brother. On the last of the said occasions the pursuer stated he had been unable to borrow the money from his brother, and that the defender could now do as he liked. Further, immediately the decree in absence was recalled a fresh summons for the said account of £3, 19s. 4d. was served, and although no exception was taken to the manner of service in this instance, no defence was put forward. The pursuer, or someone on his behalf, appeared in Court and consented to decree. The amount in the said decree is not yet paid."

The pursuer pleaded, *inter alia*—" (1) The defender having wrongously taken decree in absence against pursuer, and he having suffered damage through the publication of said decree in absence as condescended on, the defender is liable to the pursuer in reparation."

The defender pleaded, *inter alia*—" (1) No relevant case."

The issues proposed by the pursuer were as follows:—" (1) Whether on or about 6th February 1905 the defender wrongfully took decree in absence against the pursuer in the Small Debt Court, Glasgow, to the pursuer's loss, injury, and damage? (2) Whether on or about February 16th, 1905, the pursuer was wrongfully charged at the instance of the defender to pay the sums of £3, 19s. 4d. and 4s. 4d. of expenses, to the pursuer's loss, injury, and damage? Damages laid at £500 sterling."

On 6th June 1905, the Lord Ordinary (DUNDAS) pronounced this interlocutor:—" Disallows the second of said issues; approves of the first of said issues; appoints the same to be the issue for the trial of the cause."

*Opinion*.—" This action appears to me

to be of a very paltry and unsubstantial character. The defender's counsel urged that it ought to be dismissed *de plano* as irrelevant. I agree with him to this extent, that I consider that the second issue proposed by the pursuer should be disallowed. I find no relevant averment in support of it, because it is not alleged upon record that any damage resulted to the pursuer in consequence of the charge set forth in Cond. 3, nor (in spite of the challenge thrown out in the defender's answer) that the charge proceeded upon instructions given by the defender. But, as regards the first of the proposed issues, I am not prepared to hold that the pursuer's averments are so clearly irrelevant as to justify me in throwing out the action at this stage, and the cases referred to by the defender do not, in my judgment, warrant me in arriving at that result. I shall therefore allow the first, and disallow the second, of the issues proposed."

The defender reclaimed, and argued—This was a case where malice and want of probable cause ought to be put in issue. It was neither in issue nor on record, and the case was therefore irrelevant—*Davies & Company v. Brown & Lyell*, June 8, 1867, 5 Macph. 842, 4 S.L.R. 58; *Rhind v. Kemp & Company*, December 13, 1893, 21 R. 275, 31 S.L.R. 223. The pursuer had not averred that the defender had acted in knowledge of the facts averred, nor was it alleged that the defender had acted maliciously. The defender had done all he could be expected to do. He had acted on a regularly returned citation made by an official of court, and that was sufficient to excuse him. This was not a case falling within the category of *Beattie v. M'Lellan*, June 29, 1846, 8 D. 930, which was a case as to the proper use of diligence. The cases of *M'Robbie v. M'Lellan's Trustees*, January 31, 1891, 18 R. 470, 28 S.L.R. 322; and *Gibson & Company v. Anderson & Company*, February 23, 1897, 24 R. 556, 34 S.L.R. 435, were cases of breach of agreement. The appropriate remedy for the mistake which had happened here was that provided by the Small Debt Act—viz., a rehearing and recall of decree. That had been done. In order to support this action very pointed averments of malice would have been necessary. In the cases of *Rhind v. Kemp* and *Davies v. Brown and Lyell*, *cit. sup.*, malice was put in the issue. In the case of *Ormiston v. Redpath, Brown, & Company*, February 24, 1866, 4 Macph. 488, 1 S.L.R. 183, no issue at all was allowed.

Argued for respondent—The Lord Ordinary was right. The decree here was wrongfully taken, and damages had been sustained, for the publication in the "Black List" was the consequence of the decree—*Gibson & Company v. Anderson & Company*, *cit. sup.* [The LORD PRESIDENT referred to the case of *Wolthekker v. Northern Agricultural Company*, December 20, 1862, 1 Macph. 211.] The whole proceedings were bad, so that it was unnecessary to aver malice on record or to put it in the issue. The issue

allowed in *Gibson v. Anderson*, *cit. sup.*, was right. The present case was within the authority of *Beattie v. M'Lellan*, *cit. sup.* The case of *Ormiston v. Redpath, Brown, & Company*, *cit. sup.*, was not in point, for in this case there was no proper process. To take decree without citation was a legal wrong for which the defender was liable. In these circumstances the onus of proving malice ought not to be put on the pursuer—Graham Stewart on Diligence, 761, notes 1 and 2.

At advising—

LORD PRESIDENT—This is a reclaiming note against an interlocutor of Lord Dundas, in which he has disallowed the second issue asked for by the pursuer, but has approved the first. The circumstances which have given rise to the action are these. The pursuer, who is a grocer, seems to have owed the sum of £3, 19s. 4d. to the defender, who is a wholesale butter and egg merchant. He failed to pay the account, and an action was raised against him in the Small Debt Court. The summons in this action was taken round by a sheriff officer, who on that day had a good many small debt summonses to serve, and it appears that he served the wrong summons on the pursuer—the defender in the small debt action—giving him, in point of fact, a summons intended for someone else. It is said—but it is only a matter of averment and is not admitted—that within two hours the sheriff officer found out his mistake, and returned and served the right summons upon the pursuer. But however that may be, there is no doubt that he returned an execution of citation, and on that return of execution decree was taken in the undefended roll. The pursuer—the defender in the small debt action—then applied for a rehearing, producing the summons which was really intended for someone else, and telling the Sheriff that that was the summons which had been served upon him and in respect of which the execution of citation had been given; and the Sheriff there and then recalled the small debt decree and found him entitled to a small sum of expenses. Perhaps I should say that the defender states—though it is only a matter of averment—that another action for the same debt was at once raised against the pursuer, in which decree was obtained, but that the debt has not yet been paid.

In these circumstances this action has been raised against the pursuer in the small debt summons, and £500 are asked for as damages against him in respect of the decree in absence which was wrongfully taken as shown by the fact that the Sheriff recalled the decree, and for the charge that followed thereon. Nothing followed on the charge, for the decree was got out of the way by being recalled; and therefore I think the Lord Ordinary was quite right in disallowing the issue in respect of the charge, as no damage is averred to have resulted from it.

But the Lord Ordinary has allowed an issue on the taking of the decree in the

undefended roll, the issue being in these terms, whether “the defender wrongfully took decree in absence against the pursuer in the Small Debt Court, Glasgow, to the pursuer’s loss, injury, and damage.” I should point out that damage is relevantly averred with regard to this, for the pursuer says that the undefended roll in which his name appeared was printed in certain publications that publish these things, and that his credit has consequently suffered. I am of opinion that the issue that has been allowed here is not, in the circumstances of this case, the right one.

There have been many cases dealing with this matter, and there is a well-recognised distinction between issues allowed for misuse of the forms of process and those allowed for misuse of diligence. Everyone is perfectly entitled to have recourse to the forms of process, and the mere fact that in the end his action turns out to be wrong will not subject him to a claim for damages without the averment of something further. Everyone is entitled to have what the forms of process will give him, and if he obtains a decree which is eventually held to have been a wrong decree—as happens in every instance of the reversal of a Sheriff on appeal, or of a Lord Ordinary on a reclaiming note—that alone will not give rise to an action for damages. But it is otherwise with diligence, and if it be shown that diligence has been wrongfully used, that alone will amount to a legal wrong. When I say wrongly used, that gives rise to a further distinction which does not exist in the case now before us, but which was clearly pointed out by Lord Justice-Clerk Inglis in the case of *Wolthecker* (1 Macph. 211), where he showed the distinction between diligence that follows in the ordinary course of process—such as arrestments on the dependence—and diligence that can only be obtained on *ex parte* application and on the strength of *ex parte* statement—such as interim interdicts or *meditatione fugæ* warrants. In the latter case the mere want of success will show that the use of the diligence was wrongous, for it was employed *periculo petentis*, and was based on the truth of *ex parte* statement. But in the former case it is otherwise, though even there, if there is some flaw in the steps of process, and if, in spite of it, diligence is persisted in, it may amount to a wrongous use of it and give rise to an action for damages. But the unsuccessful use of diligence in the ordinary course of process is not necessarily a wrong on which damages will follow.

I have stated shortly the results of the decided cases on these matters, as I do not want to go through them at length, but I have examined them myself, and I think they follow the lines I have just laid down. So here the taking of decree in absence clearly falls within what I have called the misuse of the forms of process. I find that *Davies v. Brown & Lyell* (5 Macph. 842) is an illustration of an action for damages for taking decree in the undefended roll, and in that case an issue was only allowed on an insertion of malice. So, too, in the case

of *Rhind v. Kemp* (21 R. 275). Now these cases seem to me in point, for they are in the same category with this case. The only distinction is that in these cases the wrong consisted in decree being taken after the debt had been paid. But that is a distinction without a difference, for here the wrong alleged is that the pursuer was put in the undefended roll without any warrant for it, the execution of citation on which the decree was taken being in reality no execution at all. It can make no real difference whether the decree taken was unwarrantable on account of the debt being paid or on account of the defender not being duly cited.

The distinction between this class of case and those that arise through the wrongous use of diligence was shown to be quite in the mind of Lord President Inglis, than whom there can be no higher authority, in the case of *MacRobbie* (18 R. 470). That case was an instance of the wrongous use of diligence, but still the observations of the Lord President show that he had this class of case also clearly in view. *MacRobbie's* case was a claim for damages that arose out of an action for maills and duties, in which there were conclusions for expenses only in the event of the defenders appearing and offering opposition. Appearance was entered for the proprietor of the subjects, but only for the purpose of watching the case in his own interests, and no further step in the proceedings was taken by him. In spite of that, however, the pursuer's agent took decree for expenses against the proprietor, charged him in the extract decree, and threatened proceeding for *cessio*. Damages were sought for these wrongous actings, but your Lordships will observe that in that case diligence had actually been proceeded with. Lord President Inglis, after pointing out the circumstances under which the decree for expenses had been taken, says—"There cannot be a doubt that that was a very wrongful and improper proceeding, because the pursuer's agent had asked for something which was beyond the prayer of the petition, and which the present pursuer had no reason to apprehend would be asked for. The prayer of the petition, so far as regarded expenses, was only directed against those who might appear and offer opposition, which *MacRobbie* had not done, and accordingly a wrongful act was committed by the defender Carrick as agent for Peter M'Lellan's trustees." I pause to point out that that is absolutely *in pari casu* with the present case. There was no foundation for that decree because it was *ultra petita*, as here there was no foundation for the decree because there had been no valid execution of citation. The Lord President proceeds—"But this action is not brought to recover damages for that wrong, for which indeed no action would lie, but for the wrongful use of diligence." Now that is entirely in point, for when he says no action would lie he means on the bare statement of this kind of wrongful act, though an action might lie if there

were averments from which malice could be inferred.

I therefore think that the issue appropriate for the trial of this class of case is not the one that has been allowed here, but is an issue containing an insertion of malice. But malice cannot be put in issue unless there are averments of malice on record, and there are no such averments here, and indeed the facts set forth negative the idea of malice altogether. I therefore think that, for the reasons which the Lord Ordinary has given, the second issue should be disallowed, and, for the reasons which I have just stated, the first issue should be disallowed also, and the action dismissed.

LORD ADAM was absent.

LORD M'LAREN—It is a principle of our constitutional law that the courts are open to all His Majesty's subjects without restriction, and it is a consequence of that principle that no person who prosecutes a suit shall be liable in damages for the consequences of an innocent or inadvertent mistake.

In applying that principle there is no distinction that I can see between a decision in absence and a decision obtained where all parties are present in court, and I wish to say emphatically that the defender in a proceeding in absence is just as much under the protection of the judge as he would be if he were present, for if a decree is wrongly taken against him in his absence he can always be reponed.

In this case the mistake was that the sheriff officer served a wrong paper on the present pursuer. That was an innocent mistake so far as the defender was concerned, and falls within the principle that parties are not to be held liable for the consequences of errors committed in the course of legal proceedings.

Of course if the failure to serve the writ were the result of malevolent intention, or of design to impose upon the Court, it would be a different matter, but there is no such case here.

I agree with your Lordship in holding that there is a clear distinction between proceedings in court and proceedings out of court for the purpose of enforcing decrees. When we come to the stage of execution the functions of the judge are at an end, and the litigant must be answerable for the consequences of proceedings taken under his instructions. The case also stands clear of the rule that a party obtaining interim interdict on statements of fact which are afterwards found to be untrue is answerable for his representations. The present claim is not founded on representations but on negligence, and I agree that no issue ought to be granted, because the facts as stated by the pursuer exclude the supposition of malice or malevolent intention.

LORD KINNEAR—I am of the same opinion. I think the cases which have been quoted proceeding on liability for wrongous use of diligence afford no authority for the decision of this question, because in this case no diligence was done on the decree. Every

man has a right to call his debtor into Court and ask decree against him, and if he does so and follows out in good faith the ordinary forms of process he is not liable in damages, though he may be for costs, because he obtains a mistaken judgment in his favour. What is complained of here is that the defender obtained decree against the pursuer upon a mistaken ground. The defender is not liable in damages for that mistake any more than if he had obtained a mistaken decision upon the merits. The defender, no doubt, moved for decree in absence, and he was only entitled to do so if he proceeded on a formal and regular execution of citation showing that the defender had been called. Now, in making the motion, the defender did proceed on a regular return of execution from the sheriff officer, and I do not think that there was any duty on him to inquire further whether the sheriff officer had performed his duty rightly or not. The sheriff officer was not an agent or servant of his own selection, but the officer of the law appointed for the purpose of serving writs which the party interested can not effectually serve for himself. I think that in the circumstances he was warranted in proceeding to take a decree in absence.

I say this on the assumption that in doing so the defender acted in good faith. If he did not—if, knowing his summons had not been properly served, he nevertheless proceeded to ask for decree in absence—then that would be a totally different case. But if the pursuer in this action wished to have an issue on such a case as I have supposed, it was essential to aver malice on record. But not only has he abstained from averring malice, but he makes averments which exclude the possibility of malice, as he sets out the return of execution on which the defender acted, and does not suggest that he had any reason to distrust, or did in fact distrust, the truth and accuracy of that return, and that seems to imply that the defender's action was taken in good faith.

I therefore agree with your Lordships that there is no issuable matter in the case.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer and Respondent—Crabb Watt, K.C. — A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for Defender and Reclaimer—Orr, K.C.—J. Duncan Millar. Agents—Inglis, Orr, & Bruce, W.S.

Friday, November 17.

FIRST DIVISION.

[Lord Salvesen, Ordinary.]

BROWN v. MAGISTRATES OF  
KIRKCUDBRIGHT.

*Public Health—Burgh—Formation of Sewer—Power Conferred by Two Statutes with Different Procedure—Procedure—*

*Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), sec. 103—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 219.*

The Public Health (Scotland) Act 1897 confers powers on local authorities to construct sewers. The Burgh Police (Scotland) Act 1892 confers cognate powers. Objection having been taken to the proceedings of the local authority in a burgh with regard to the formation of a sewer in respect that it had not complied with the requirements of the latter statute. *Held* that the powers conferred by the Public Health Act were independent of those conferred by the Burgh Police Act, and consequently that it was sufficient for the local authority to have complied with the requirements of the former statute.

*Opinion (per Lord M'Laren)* that the safe course for the local authority was to follow the more recent statute.

*Public Health—Burgh—Sewer—Construction of Sewer through Private Property—Procedure—Notice to Owner—Report of Surveyor—Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), secs. 103 and 109.*

The Public Health (Scotland) Act 1897, sec. 103, enacts—"The local authority shall have power to construct within their district . . . such sewers as they may think necessary for keeping their district properly cleansed and drained . . . and may carry such sewers . . . after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ." Section 109 provides that in the event of the owner of premises refusing access "the local authority may, after written notice to such owner, . . . apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant. . . ."

The owners of a close, under which a local authority proposed to construct a sewer, having brought a suspension on the ground that the requirements of the Act had not been complied with, *held* that written notice given 16 days before application to the Sheriff for warrant to enter, together with a report by the burgh surveyor, a retired sea captain, in which he stated that for the scheme of drainage proposed, which he considered best for the district, it was necessary to carry the sewer through the close in question, was sufficient compliance with the requirements of the Act.

*Public Health—Burgh—Sheriff—Construction of Sewer through Private Ground—Discretion of Local Authority—Power of Sheriff to Order Inquiry if Course of Sewer be Necessary—Public Health (Scotland) Act 1897, sec. 109.*

The Public Health (Scotland) Act 1897, sec. 103, confers power on a local authority to carry sewers, "after reasonable notice in writing (if upon the re-