

criterion of what the running cost would be in normal conditions; and that there was no cause to complain of the origin and management of the company.

Argued for the petitioners—This was a case where it was “just and equitable” that a winding-up order should be pronounced. The company being commercially insolvent, there yet remained sufficient assets to return something to the shareholders—in *re European Life Assurance Society*, L.R. (1869), 9 Eq. 122; the objects of the company had failed—in *re Amalgamated Syndicate*, [1897] 2 Ch. 600; the patent could not be worked to advantage—in *re Coolgardie Consolidated Gold Mines (Limited)*, 1897, 76 L.T. 269. The vendors here controlled the company, making it useless to refer the matter to a meeting of shareholders and rendering this petition necessary—in *re The Varieties (Limited)*, [1893] 2 Ch. 235; compare also *Pirie v. Stewart*, June 28, 1904, 6 F. 847, 41 S.L.R. 685. At anyrate the petition should be continued and an inquiry ordered into the financial position of the company and the value of the patent.

Argued for the respondents—Inquiry would be as harmful as winding up, and winding up by the Court was out of the question, until at any rate the matter had been brought up at a meeting of shareholders, the proper forum for the settlement of the domestic differences of a company—in *re Langham Skating Rink Company*, 5 Ch.D. 669; *Symington v. Symington's Quarries (Limited)*, November 21, 1905, 8 F. 121 (*per* Lord President), p. 129, 43 S.L.R. 157.

LORD JUSTICE-CLERK—It seems to me quite out of the question to grant this petition as it stands. Mr Bartholomew asked us as an alternative to order an inquiry into the statements made in the petition. But it is for the company to take the first step and to ascertain the wishes of the members in the usual way. I can conceive of a case of such a petition as this being granted although a majority of the members were in favour of the company going on, because there might be circumstances in which we should hold that it was just and equitable that the company should be wound up, but that could only be after the domestic tribunal of the company has exercised its function, which here it has not yet done. It is not suggested that the company has taken any steps in the matter, and until it has we cannot think of interfering. Then it is suggested that this petition ought to be hung up pending the ascertainment of the wishes of the members. I must say that I sympathise with what Mr Lippe said as to the disastrous effect which that course would probably have on the prospects of the company. A new petition can be brought at any time. On the whole matter I think that this petition should be dismissed, and I move your Lordships accordingly.

LORD KYLLACHY—I am of the same same opinion. I make no attempt to lay down any general rule. I think it enough

to say that, having regard to the whole circumstances, we ought not, in my opinion, to entertain this petition.

LORD STORMONTH DARLING—I also concur, and would also refrain from laying down any general rule on the construction of clause 79 of the statute. I confine myself to saying that where a petition is presented under sub-section 5 of section 79—that is, the “just and equitable” head—it will require a very strong case on the part of the petitioner to induce this Court to interfere when the case contemplated in sub-section 2 of section 79 has not arisen.

That being the case here, Mr Bartholomew has, I think, failed to show that we would be justified in taking the case out of the jurisdiction of the “domestic tribunal” (as it has been called) which the statute contemplates.

LORD LOW—I am of the same opinion. It seems to me that in the circumstances it would not be just and equitable to order the winding up of the company.

The Court refused the prayer of the petition.

Counsel for the Petitioners—Bartholomew. Agent—Henry Robertson, S.S.C.

Counsel for the Respondents—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Wednesday, June 27.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

BROWN v. FRASER.

Reparation — Wrongous Information — Privilege — Malice — Probable Cause — Facts and Circumstances Inferring Malice — Whether Malice Necessarily Antecedent—Relevancy.

A, a plasterer, brought an action against B, a builder, for damages for false information having been given to the police leading to his arrest and trial for theft in the following circumstances:—B, in order that A might do certain plaster work for him, employed him to make according to a plan belonging to B five cornice moulds. These A made with his own zinc, but with B's wood as a backing. He did not, however, he averred, follow the plan, as it had been departed from and was worthless. B paid for making the moulds, but, as A averred, not for the zinc, of which B was aware. Having been dismissed by B, A, admittedly to cause inconvenience, removed the moulds and plan, and wrote falsely stating that he had burnt them, adding, “You are at liberty to give me in charge for theft if you fancy you have a case.”

B informed the police, but, as A averred, maliciously withheld the fact that the zinc was his. A was arrested

and tried for theft, but acquitted, and averred that the information was given in answer to the challenge in his letter or in retaliation for a small-debt summons which had been served at his instance.

Held that facts and circumstances inferring antecedent malice did not require to be averred, and that the action was not irrelevant, and an issue including malice and want of probable cause allowed.

James Brown, plasterer, Edinburgh, brought an action against James Smith Fraser, builder, in which he sought to recover damages suffered by him owing to the defender having given false information to the police leading to his having been arrested and tried for theft.

The nature and substance of the pursuer's averments sufficiently appear from the opinion of the Lord Ordinary (SALVESEN), who on 22nd May 1906 approved of an issue as amended, which included malice and want of probable cause.

Opinion.—"The pursuer in this case was apprehended and subsequently tried on a charge of theft, alleged to have been made against him by the defender. He was acquitted; and he now brings this action to recover damages against the defender in respect of the false information which led to the public exposure necessarily incident to such a trial. As the action is not one of slander but is laid entirely on the information given to the authorities, it is plain that malice and want of probable cause must go into the issue, and the contrary was not seriously contended by the pursuer's counsel.

"The defender argued that the action should be dismissed on the grounds (1) that there was no relevant averment of facts from which malice could be inferred; and (2) that the pursuer's own averments disclosed that the defender did not act without probable cause. If the defender is right in either of these propositions it follows that the action must be thrown out.

"The articles said to have been stolen consisted of five cornice moulds and a plan. These moulds had been made by the pursuer in order to enable him to do certain plaster work on the defender's employment, and the plan had been handed to him in order that he might make the moulds in accordance therewith. The pursuer says, however, that the plan was departed from and was treated as valueless. As regards the cornice moulds the pursuer avers that they were made by him at his own expense, of materials purchased by him out of his own funds. This statement is plainly inaccurate, because the account No. 7 of process (the genuineness of which was admitted) shows that the pursuer charged and was paid for the cost of making the zinc moulds. The 'horsing' or wooden backing of the zinc moulds seems also to have been made from materials belonging to the defender; but there remains the substantial averment—which is said to have been admitted by the defender in the evidence

which he gave at the trial in the police court—that the zinc, which formed the most valuable part of the moulds so far as the materials were concerned, was purchased by the pursuer out of his own funds. It is rather a nice question, in these circumstances, in whom was the property of the moulds, but I have little doubt that the defender on paying for the price of the zinc would in a civil action have been found entitled to them.

"While the pursuer was still using these moulds his employment was suddenly terminated by the defender. The pursuer resented his dismissal, and, as his own post-card shows, determined to put the defender to as much inconvenience as possible by removing the moulds. When he was written to by the defender to return them he admitted having removed them with that object, and falsely added, 'I cannot now return them, for I made firewood of them on Tuesday morning. You are at liberty to give me in charge for theft if you fancy you have a case. This I question.' The defender thereupon gave information to the police, which resulted in the pursuer's apprehension and trial on a charge of theft of the cornice moulds.

"I cannot but think that the pursuer's conduct was highly improper, and that the post-card which he wrote to his former employer was just the kind of communication which was likely to lead the latter to take extreme measures. But the question here is not with regard to the pursuer's conduct, but with regard to the defender's; and if the pursuer's version of the facts be accurate—as I must assume at this stage—I think the defender acted both maliciously and without probable cause. According to this version the defender knew that part of the materials of the cornice moulds had been paid for by the pursuer. He knew further that however unwarranted the removal of the moulds might be from a civil point of view, there was no question of theft in the ordinary sense; and the pursuer alleges that the information which he gave to the police was by way of retaliation to the small-debt summons with which he was served on the 6th of November at the pursuer's instance; or (what seems more likely on the defender's averment) in answer to the challenge contained in the pursuer's post-card. At all events there is, I think, room for the view that the information was given not in the *bona fide* belief that a crime had been committed against the defender, but for the double purpose of punishing the pursuer and of recovering through the action of the police authorities the possession of property the right to which would have been properly dealt with in a civil proceeding. The pursuer says further that the defender maliciously withheld from the police the fact that portions of the moulds were the pursuer's property; and that after he had given his explanation of the matter it was disregarded by the authorities because of the insistence by the defender in the charge of theft. On these averments I think there is at least room for the view that the defender acted mali-

ciously and without probable cause; and I am unable to support the contention of the defender's counsel that the mere fact that the prosecution was proceeded with by the authorities, after the pursuer's explanation had been obtained, is sufficient proof that the defender acted with probable cause. The case appears to me closely to resemble that of *Denholm v. Thomson*, October 22, 1880, 8 R. 31, 18 S.L.R. 11, in which the Second Division, after a proof, held that sufficient had been established to entitle the pursuer to damages.

"I have not overlooked the fact—which was much pressed in argument—that there was no dispute as to the property of the plan being in the defender, and that it had been improperly removed by the pursuer. There is nothing, however, in the pursuer's averments to suggest that it was feloniously removed—which indeed would be out of the question if it were (as he says) valueless, and had been so treated by both parties. It was not included in the requests which the defender made for the return of the articles removed, and I cannot but think that it plays a very subordinate part in the story. I have therefore come to the conclusion that I cannot refuse the pursuer an issue; and I shall approve of the issue lodged, with the insertion at the proper place of the words 'maliciously and without probable cause.'

The defender reclaimed, and argued—(1) There was no averment of facts and circumstances from which malice could be inferred. In order to show malice, facts and circumstances extrinsic from and antecedent to the matter in question must be averred and proved—*Campbell v. Cochrane*, December 7, 1905, 8 F. 205, 43 S.L.R. 221. (2) The pursuer's own averments showed that the defender in giving information to the police did not act without probable cause.

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK—The facts stated by the pursuer do not indicate any very substantial case. I should be surprised if a jury were to give him any sum by way of damages which were worth fighting for. But the question for us is whether the action is irrelevant. I do not think it is. Mr Anderson refers to the rule that facts and circumstances inferring malice must be averred in a case of this kind, and he says that the facts and circumstances averred must be independent of the incidents which gave rise to the action, and must show antecedent ill-will on the part of the defender. That may be so in many cases, as, for example, in cases arising with regard to characters given to servants. But when the case arises out of the pursuer having been accused or handed over to the police on a criminal charge, I cannot understand how it can be laid down as a general rule that it is necessary in every case that facts independent of the act complained of and its surrounding circumstances should be averred showing antecedent malice on the part of the defender. It would be very undesirable if that were so, as in cases of

handing over to the police the whole matter may arise in a moment without any previous acquaintance between the parties, and the malice alleged may arise only at the time of the pursuer being accused. In such a case, according to Mr Anderson's argument, however unfounded and without reasonable ground the accusation may have been, and however recklessly it may have been made, there could be no action against the accuser, because the pursuer could not aver pre-conceived malice and state facts to support the averment. I do not think that is the law. I am therefore for adhering to the interlocutor reclaimed against.

LORD KYLLACHY and LORD LOW concurred.

LORD STORMONTH DARLING was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—
Crabb Watt, K.C.—C. A. Macpherson.
Agent—Charles Garrow, Solicitor.

Counsel for the Defender (Reclaimer)—
G. Watt, K.C.—D. Anderson. Agent—
W. J. Graham, Solicitor.

Saturday, June 30.

SECOND DIVISION.

ABERDEEN UNIVERSITY COURT v.
ABERDEEN UNIVERSITY SENATUS
ACADEMICUS.

(See ante *Milne's Executors v. Aberdeen University*, May 16, 1905, 42 S.L.R. 533, and 7 F. 642).

Bursary — University — Power to Award Bursaries — University Court — Senatus Academicus — Universities (Scotland) Act 1889 (52 and 53 Vict. cap. 55), secs. 6 (1) (2) and 7 (1).

The Universities (Scotland) Act 1889, section 6, provides—"The University Court, in addition to the powers conferred upon it by the Universities (Scotland) Act 1858, shall . . . have power (1) to administer and manage the whole revenue and property of the University . . . including funds mortified for bursaries and other purposes." Sec. 7—"The Senatus Academicus shall continue to possess and exercise the powers hitherto possessed by it, so far as they are not modified or altered by the Universities (Scotland) Act 1858, or by this Act, and shall have power (1) to regulate and superintend the teaching and discipline of the University. . . ."

The University Court of a University having presented a scheme for the administration of a bursary fund, held that while it was right that the views of the Senatus Academicus should be heard in the adjustment of the scheme, the power of appointment to bursaries lay by statute in the hands of the University Court.