advocator himself. No blame could, in that view, attach to Love, the foreman of the tinsmiths, who had nothing to do with the construction of the apparatus, and had merely the charge of working it. As to M'Arthur, the foreman of the mechanics, he had, by this time, no charge of it at all. His place was in the other shop, and the fault attributed to him is, not that he failed in any duty of superintendence, but that he ultraneously went into the tinsmiths' shop, and, having ascended the triangle, put his foot on the cylinder to examine it, the consequence of which was the slipping either of one of the blocks from beneath the cylinder, or of the cylinder itself from off the blocks, so that the cylinder came down with a jerk, and, one of the screw bolts having given way, the other blocks were crushed or displaced by the fall of the cylinder, and Mathieson, who was below it at the time, was killed.

Now, it certainly cannot be assumed that the cylinder would have given way at that particular moment had M'Arthur not put his foot on it, and he ought undoubtedly, before doing so, to have warned Mathieson to remove from under it. Had he given this warning his anxiety about the apparatus would have been praiseworthy rather than blameable; for a link of the double chain had given way on the previous Saturday, and it is plain enough that there were misgivings among several of the workmen about the sufficiency of the apparatus, although they made no open complaint. But I cannot think that the advocator was entitled to rest contented with such a degree of strength and security in the apparatus as would be barely sufficient, if nothing occurred to cause any of the blocks to slip from under the cylinder, or the cylinder to slip from one of the blocks, either of which occurrences might happen at any moment, considering the nature of the blocking, the use of which he had sanctioned. Blair, one of the advocator's mechanics, says that when the advocator spoke to him about the accident, the day after it happened, "I said he had himself to blame for it, as I had told him, when making the previous heater, that the bolts were too weak." If either the bolts had been strong enough, or the blocking had been sufficient, the accident would not have occurred, notwithstanding of M'Arthur putting his foot on the cylinder. M'Arthur could hardly be expected to anticipate that the blocking would slip from under the cylinder, as it seems to have done, for Love, the foreman of the tinsmiths (who had no interest to misrepresent the matter, but rather the reverse), speaking to the moment immediately before the accident, says, "*I saw the blocks on my right canting inwards.*" It is plain to any one that if the cylinder had been resting on a solid basis—for instance upon tresses and cross beams of sufficient strength—a body like the cylinder, of two tons weight, could not have been moved in any degree by the simple act of a man putting his foot on it. If the advocator had directed that the workmen should never go under the cylinder, except when it was so supported, there would have been less room to attribute to him personal neglect in that matter, whatever might have been his responsibility for the faults of others. But, as I have already observed, he gave no direction on this subject, although he was quite aware of the careless manner in which the blocking was usually managed. Even if he had given such directions, I think he was not entitled to be so niggardly of the strength of the suspending apparatus as that it should be sufficient only when the cylinder was in a state of rest; and, upon the whole, I am of opinion that the deceased's death falls properly to be attributed, not to rashness on the part of M'Arthur, but to personal fault or negligence on the part of the advocator. As regards the amount of damages, I see no reason to disturb the assessment of the Sheriff, concurred in by the Lord Ordinary.

Weems appealed, but the House of Lords, on the 31st May 1861, dismissed the appeal, and adhered to the interlocutor of the Court below.

Friday, May 31.

DAVIES & CO., *v.* BROWN & LYELL.

Reparation—Decree in absence against a party who had, after the Summons, but before Decree, paid the debt. B. & L. brought an action against D. for a sum of money. D. paid the debt and a sum of expenses. Some days after, the agent of B. & L. took decree in absence against D. Held, in an action of damages at the instance of D. against B. & L., D. averring that the defenders had acted maliciously and without probable cause, (1) that D. was entitled to an issue, (2) (dub. Lord Curriehill) that the issue must contain malice and want of probable cause.

The pursuers of this action were S. P. Davies and Co., merchants and commission agents in Dundee, and Samuel Pingilly Davies, sole partner of the firm, and the defenders were Brown & Lyell, provision merchants there. Davies averred that on 6th September 1866 he bought a quantity of flour from the defenders at the price of £51. The price was not paid on delivery. Shortly after, Davies went from home in the course of business, and during his absence the defenders, on 19th Sept. 1866, brought an action against Davies & Co. in the Sheriff Court of Forfar for payment of the said price. Davies, on his return, called on the defenders on 28th Sept. and paid them £51 for the flour, and a sum of £2, 13s. 8d. for lawyer's expenses. Davies farther averred—Cond. 7—Notwithstanding the settlement of the defenders' claims against the pursuers, and of the said action and expenses thereof as aforesaid, the defenders, nearly a week afterwards, and on or about 3d October 1866, most wrongously, maliciously, and without probable cause, through their agents, Messrs Paul & Thain, solicitors, Dundee, made a motion in said action, before the Sheriff, in a court held by his Substitute, within the Court-room at Dundee, for decree in said action against the pursuers, S. P. Davies & Co., in terms of the conclusions of said summons. No notice whatever of this motion was sent to the pursuers by the defenders or their agents, and consequently no appearance was made for them in Court, and the Sheriff accordingly pronounced decree in absence against them, in term of the defenders' motion, and of the conclusions of the summons, finding that the present pursuers were due money to the present defenders, and adjudging payment thereof. The said decree wrongously, illegally, maliciously, and without probable cause, obtained by the present defenders against the present pursuers, was subscribed by the Sheriff-substitute presiding in the said Court, and entered upon the records thereof in the usual way. As the records of the Sheriff-court are public documents, and patent and open to the inspection of everybody, the said

decree, though surreptitiously obtained by the defenders against the pursuers, and false and illegal as the grounds and warrants of it were, was thus nevertheless published to the world as a true and valid decree against the pursuers. The defenders obtained the said decree wrongously and illegally, and nimiously, and oppressively, and maliciously, and without probable cause, and while they knew, in point of fact, that the debt sued for under the said action, as well as the expenses thereof, had been paid by the pursuer to them.

This decree, the pursuer averred, was published in various "Black Lists," whereby the mercantile credit of Davies & Co., was seriously injured. For the injury arising from these proceedings the pursuer now asked damages. He proposed the following issue:—

"Whether, on or about 3d October 1866, the defenders wrongfully moved for and obtained decree against the pursuers in an action depending before the Sheriff-Court of Forfarshire, for the sum of £51, and interest and expenses, after payment by the pursuers to the defenders of the sum of £51, concluded for in said action, with £2, 13s. 8d. of expenses—to the loss, injury, and damage of the pursuers?"

The defenders pleaded that the action was irrelevant, and that no issue should be granted. They pleaded that it was the duty of the pursuers, on paying the debt, to make some arrangement for having the action properly taken out of Court, and maintained that they were not responsible for any damage arising from publication of the decree in question, the pursuers' remedy in that case being against the parties by whom the "Lists" are printed and circulated.

The Lord Ordinary (BARCAPLE) reported the case, indicating his opinion that the pursuer was entitled to an issue, and that he was not bound, as was contended by the defenders, to insert in the issue malice and want of probable cause.

THOMS for Pursuer.

BERRY for Defenders.

The case of *Ormiston* v. *Redpath, Brown, & Co.*, 24th Feb. 1866, 4 Macph. 488, was referred to

LORD PRESIDENT—This case raises a question of some importance; the pursuer alleges that, being indebted in a sum of money to the defenders, which he was quite willing to pay, they raised an action against him in the Sheriff Court when he was absent; that on his return he went immediately to them and paid them the amount of the debt and also a sum of money for law expenses. The claim of the defenders on the contract was thus settled and discharged. He then avers, in article 7 of his condescendence [reads].

Now the first question is, whether that is a relevant and good ground of action. I am of opinion that it is. The allegation that this decree was obtained after the debt was paid, maliciously, and without probable cause, is, I think, a good ground of action, and I think it would be very hard if it were not so, if you consider for a moment the position of the parties. Undoubtedly the debt was paid, and just as certainly, according to the pursuer, the defenders had no claim of any kind against him. And yet, maliciously, for the purpose of gratifying their personal animosity, and without probable cause, *i.e.*, without any reason to suppose that they had a just claim, they instructed their agent to take decree. I think that was a legal wrong for which the pursuer is entitled to damages. Several objections were stated to this action. One of these was supported by a reference to English authorities, the objection being of this nature, that, standing this decree, the pursuer could not found a claim of damages. All I can say is, that these authorities appear to have no application to our practice, because we are not embarrassed by that technicality. If it were necessary to take that decree out of the way before raising an action to recover damages, that could easily be done by a reduction, or by a conclusion for reduction in this summons. But that is not necessary, and I am fortified by observing the opinion of the Court on the same ground of defence in the case of *Ormiston*. The argument there stated for the defender was that while the decree stood it was impossible to claim damages. But that was rejected by the Court. Therefore that difficulty is out of the case. But there is another question raised, not by the averments, but by the issue proposed. The issue is certainly most materially different from the averments. The pursuer proposes to ask [reads issue]. Now, for anything disclosed *ex facie* of that, the whole case of the pursuer might be this, that when the defenders took their decree against him for this sum, he had a perfectly good defence of payment, but the issue does not even disclose when payment was made, and that would bring the case under that of *Ormiston*. But the issue might be so amended as to show that the money had not been paid before the action was raised, but after, and not only for discharge of the debt but of the action. And that is the great feature of distinction between this case and that of *Ormiston*. But though that were put in, I should still object to the issue, because it does not undertake to prove malice and want of probable cause. I shall state the reasons why I think these qualities absolutely necessary. When an action is depending in court, and the defender is willing to settle by payment of the debt and expenses, what both have to do to carry that out, is, to take the action out of court in proper form. No doubt it is the duty of of the pursuer to give instructions to have the action taken out of court, but at the same time there is an interest in the defender to see that that is done, and he is negligent in his own interest if he does not see that that is done. I don't describe that as a duty, but it is his right and interest. Now can a party in that position say that his opponent has omitted to do so, and has negligently allowed his agent to go on as if the debt were unpaid? I think that would be very hard,—to make a party in that case liable for neglecting to instruct his agent. It must be shown that there was more than mere fault of negligence. Malice must be alleged, and not only malice, but it is necessary that the pursuer should negative the idea of the defenders having any reasonable cause. If the pursuer's allegations here are true, that will not be any serious burden on him, for I don't see what probable cause they could have; but to make the case relevant I think the the pursuer must aver malice and want of probable cause. The wrong, if it be maliciously done and without probable cause, is a legal wrong; but even a legal wrong is not necessarily a foundation for damages, unless done to the injury and damage of the pursuer. Now, certainly the mere pronouncing of a decree in absence in the Sheriff-court is not necessarily in itself attended with any great injury or damage. No doubt the records of court are open to the inspection of the public, and that may involve certain risks to the parties against whom the decree is taken. As to the averment that damage was caused by publication in the

Black Lists, what the defenders have to do with that I don't know. I hope the pursuer does not maintain this action in the vain hope of making the defenders answerable for that. The result will be to amend the issue, and sustain it as amended.

Lord Curriehill—I concur. I am also of opinion that the defenders are not directly liable for the publication in the Black Lists. All they are liable for is the publicity given by the decree being pronounced. But I have some difficulty in concurring as to the issue. The question is, whether it is necessary to insert malice and want of probable cause. I concur so far, that I think if one is put in the other ought to be put in too. My ground of difficulty is this. It is clear that every one is entitled to enforce a claim in a court of law, however groundless that claim may be, provided it be done without malice and want of probable cause. But it must be a judicial proceeding. My difficulty is, was this a proper judicial proceeding? I think the decree was an incompetent proceeding. As a judicial proceeding it was at an end, for, by payment of the debt and expenses, I hold that the debtor was in the same position as if he had got a discharge of the action. The *jus actionis* was at an end. There was no longer a depending process. It was the same as if the action had never been instituted. Now was it necessary to appear and defend in an action that was at an end? It is no excuse for the defenders to say that the pursuer was entitled to get possession of the summons and execution, and destroy them; no excuse that they did not deliver them up, but availed themselves of these being left in their hands to inflict this injury on the debtor. If the defenders are liable otherwise, they cannot be liberated because the debtor left these documents in their hands.

Lord Deas—I concur in thinking that there is a relevant ground of action here stated. The pursuer states that the summons here was executed on 21st September; that the debt, with expenses, was paid on 28th September; and that the action was nevertheless proceeded with, and decree taken on 3d October. And it is said that that was done maliciously and without probable cause. The averment of malice and want of probable cause is repeated three times in article 7 of the condescendence, and it occurs again in the 9th article. Now I have no doubt that there is there stated a relevant ground of action. I am not prepared to say that it would have been relevant if there had been no averment of malice and want of probable cause. If there had been no such averment, all that would have been stated would have been that on 28th September the debt had been paid to the defenders personally, and that on 3d October the agent of the defenders took decree in absence. It is not said that the defenders instructed their agent to take that decree. All that is said is, that, through their agent, they made a motion before the Sheriff for decree against the pursuers. The act of the agents is there stated as the act of the defenders. That is on the footing of the liability of the defenders for their agents. Therefore the averments of the pursuers are open on the face of them to the observation that, for anything they aver, the whole wrong consisted in the defenders forgetting or omitting to intimate to their agents that the case had been settled, and instructing them to let the action drop. That is the whole wrong set forth, taking out the element of malice and want of probable cause. Now I don't say, any more than your Lordship in the chair, that there was not a certain duty on the part of the defenders, on getting payment, to intimate this to their agents, so that the action might not be proceeded with. On the other hand, I concur in thinking that there was a duty incumbent on the pursuer to instruct his agent to appear, or to appear himself, and state that the case was at an end, and see that the action was taken out of Court. To say the least, it was as much the duty of the pursuer to do this as it was the duty of the defenders to instruct their agents not to proceed with the case. If it was a mere innocent omission on the part of the defenders,—if nothing followed on their part but the offer to have the decree recalled,—then I think there would be no reasonable ground for damages. The neglect of the defenders was, in this view, an innocent mistake—a decree was taken by an innocent omission—and something more would be wanted to give right to a party to insist in a claim of damages. The action was, in my opinion, a judicial proceeding throughout. It was competent in its commencement, and it remained a judicial proceeding to the end; with this difference only, that at first it was well-founded, and at the end it was ill-founded. But this did not change its nature. It is true that when the debt was paid the action became groundless, but not incompetent. A groundless action may be a competent action. We see a great many groundless actions brought which are not incompetent. I don't see the difference in principle between this case and that of *Ormiston*. There the debt was paid before the action was raised at all. Even a formal discharge of an action is not a stronger thing to make it not a judicial proceeding than, as was the case in *Ormiston*, where there was no action at all. It seems that the calling of a summons is not necessary in the Sheriff-court. This summons was regularly executed. Arrestments were used on the dependence; and a summons executed, even in a court which requires calling, is a depending action. This was a depending action at the time when the decree was taken. All that had occurred was that something made it wrong that decree should be taken. I therefore think that malice and want of probable cause should go into the issue. Probable cause is not properly applicable to this case. If decree was taken intentionally, there could be no probable cause either for that or omitting to instruct the agents not to take it. But I agree in thinking that the usual words had better be retained.

Lord Ardmillan concurred with the Lord President.

The following issue was adjusted:—

"It being admitted that the defenders, on 19th September 1866, raised an action against the pursuers in the Sheriff-court of Forfarshire, to recover a sum of £51, with interest and expenses, and that, on the 28th of the same month, the pursuers paid to the defenders the said sum of £51, with £2, 13s. 8d. of expenses.

"Whether on or about 3d October 1866 the defenders wrongfully, maliciously, and without probable cause, moved for and obtained decree against the pursuers in the said action, in terms of the conclusions of the summons, to the loss, injury, and damage of the pursuers?

"Damages £500 sterling."

Agent for Pursuers—J. M. Macqueen, S.S.C.
Agents for Defenders—Ferguson & Junner, W.S.