Saturday, November 26.

SECOND DIVISION.

[Lord Lee, Ordinary.

MACAULAY *v.* SCHOOL BOARD OF NORTH UIST AND OTHERS.

(*Ante, Macaulay* v. *Macdonald*, 24 S.L.R. 551.)

Reparation—Criminal Prosecution—Relevancy—School Board—Malice.

A person was convicted of failure to educate his children, upon a complaint presented by the compulsory officer appointed by a school board, and, failing to pay the fine imposed, was imprisoned for three days. The conviction and sentence having been subsequently quashed by the Court of Justiciary in respect of irregularity in the procedure, he brought an action of damages against the school board. *Held* that as the school board had acted in the discharge of their duty, the pursuer must put in issue malice and want of probable cause, and that as there were no facts and circumstances averred on record from which malice could be inferred the action was irrelevant. Action *dismissed.*

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), sec. 70, provides that the school board may summon before them any parent who fails to perform the duty of providing elementary education for his child or children, and if he shall fail to appear, or to satisfy the board that he has not failed in such duty without reasonable excuse, and if he shall not undertake to perform such duty, "it shall be lawful to and shall be the duty of the school board to certify in writing that he has been, without reasonable excuse, failing to discharge the duty of providing elementary education for his child or children, and on such certificate being transmitted to the procurator-fiscal of the county, or district of the county, in which the parent resides, or other person appointed by the school board, he shall prosecute such parent before the sheriff of the county for such failure of duty as is in the certificate specified, and on conviction the parent shall be liable to a penalty not exceeding twenty shillings, or to imprisonment not exceeding fourteen days," &c.

The Education (Scotland) Act 1883 (46 and 47 Vict. cap. 56), sec. 9, provides—"If the parent of any child, without reasonable excuse, neglects to provide efficient elementary education as aforesaid for his child, or fails to secure the regular attendance of his child at some public or inspected school, it shall be lawful for the school board, after due warning to the parent of such child, to complain to a court of summary jurisdiction, and such court may, if satisfied of the truth of such complaint, order that the child do attend some public or inspected school willing to receive him and named in the order. . . . An order under this section is in this Act referred to as an attendance order." And by section 10 it is enacted—"Where an attendance order is not complied with without reasonable excuse, a court of summary jurisdiction, on complaint made by the school board, may, if it think fit, impose a penalty not exceeding twenty shillings, with expenses, or of imprisonment not exceeding fourteen days."

Archibald Macaulay, crofter, Illeray, North Uist, was prosecuted in the Sheriff Court at Lochmaddy by Archibald Macdonald, the compulsory officer appointed by the School Board of North Uist, for failure to educate his children. The Sheriff-Substitute (WEBSTER) convicted the accused of the offence charged, and he was imprisoned for three days, having failed to pay the fine imposed. Upon 3d June 1887 the High Court of Justiciary suspended the conviction and sentence, on the ground that no certificate under section 70 of the Act of 1872 had been produced, and that the attendance order produced was not sufficient as it did not apply to the children named in the complaint.

Macaulay then raised this action of damages against Archibald Macdonald, the School Board officer, Donald Dott, clerk to the School Board, and the School Board and the individual members thereof.

The pursuer averred—"(Cond. 6) The foresaid proceedings were grossly unjust, illegal, and oppressive, and were entered upon recklessly and in utter disregard of criminal procedure and the provisions of the Education Acts, and were malicious and without probable cause. (Cond. 8) The proceedings which are complained of were authorised by the said School Board, and the illegal prosecution and imprisonment of the pursuer were due to, and the consequence of, the instructions which they incompetently issued. They did not give the pursuer due warning in terms of said section (sec. 9 of the Act of 1883); they did not present a complaint to the Sheriff and obtain the 'attendance order' as a condition precedent to instituting the foresaid proceedings, nor did they inquire whether the pursuer had any reasonable excuse for the non-attendance of his children at school before instituting said proceedings. Further, no formal minute of authority was produced to the Sheriff, nor any evidence to show that the Board authorised said proceedings, and no written evidence was produced to show that the foresaid provisions of the statute had been complied with by the Board. The said complaint was signed and served by the defender Archibald Macdonald, who also acted as nominal prosecutor and witness. (Cond. 9) Further, the pursuer avers that the defender Dott was actuated by malice towards him, and instigated the foresaid proceedings maliciously and without probable cause. He prepared the said complaint, instructed the defender Archibald Macdonald to serve it, appeared at the trial, and acted partly as prosecutor and partly as Sheriff-clerk Depute. At the conclusion of the trial, the defender Dott procured the conviction, and in Court desired Police-Constable Colin Macdonald, residing in Lochmaddy, an officer of Court, to incarcerate the pursuer upon it. The said Colin Macdonald refused, and the defender Dott thereupon handed the conviction to the defender Archibald Macdonald, with instructions immediately to incarcerate the pursuer, which was forthwith done."

The pursuer pleaded—"(1) The pursuer having been injured in his feelings, reputation, and character by the defenders' said illegal and unwarrantable proceedings, he is entitled to

reparation and *solatium* as libelled. (2) The defenders having in the foresaid circumstances acted maliciously and without probable cause, and the pursuer having suffered injury thereby as set forth, is entitled to decree as libelled."

The defenders pleaded, *inter alia*—"No relevant case."

The Lord Ordinary (LEE) on 16th November 1887 assoilzied the defenders from the conclusions of the action, so far as directed against them personally, and approved of the following issue for the trial of the cause:—"Whether on or about the 22d day of April 1887 the defenders, the School Board of the parish of North Uist, wrongfully and illegally caused the pursuer to be tried and convicted before the Sheriff Court at Lochmaddy as a person who had contravened the Education (Scotland) Acts 1872 to 1883, by having without reasonable excuse failed to discharge the duty of providing efficient elementary education for Flora and Jessie Macaulay, two of his children, and having failed to secure the regular attendance of said children at school after receiving due warning of said failure, and to be adjudged therefor to forfeit and pay the sum of five shillings of penalty, and in default of immediate payment, to be imprisoned in the prison of Lochmaddy for the period of three days, and subsequently to be imprisoned under said sentence for the said period, to the loss, injury, and damage of the pursuer?—Damages laid at £500."

"*Opinions.*—In the course of the discussion upon the issues it was intimated by the defenders' counsel that the action was not insisted in against the defenders individually, except in the case of Dott, the clerk to the School Board; and I am of opinion that the pursuer's allegation (Cond. 8) being that 'the proceedings complained of were authorised by the Board,' the action cannot be maintained against the individual defenders personally. It is not alleged that it was *ultra vires* of the School Board to institute such proceedings.

"With regard to the case of the defender Dott, it was contended that the allegations in Cond. 9, as to his having 'instigated' the proceedings, were sufficient, if proved, to make him answerable personally for them. My opinion is that this contention cannot be sustained. In the absence of any suggestion that Dott, as clerk to the Board, wilfully misled the Board, or failed to bring the matter fully before them, I think that there is no relevant case of wrong on his part as an individual. No doubt it is said that he acted maliciously and without probable cause. But it is not said that he exceeded his authority, and there is no sufficient averment that he was actuated by private malice.

"As to the issue against the School Board, it was maintained, on the authority of *Rae* v. *Linton*, 2 R. 669, that the pursuer must undertake in the issue to prove malice and want of probable cause. To sustain this contention would be to deny the pursuer all remedy for the wrong complained of, unless he can prove malice on the part of the corporation. My opinion is that the law gives the pursuer a claim for reparation against the School Board if he proves that the imprisonment which he suffered was wrongful and illegal, and was caused by a mistake for which the School Board is responsible. His case on record is that the sentence and imprisonment were caused by the Board wrongfully praying for in the complaint which they authorised to be instituted, and wrongfully taking from the Sheriff, and enforcing, a sentence inflicting a penalty, and, in default of immediate payment, adjudging him to be imprisoned for three days. The mistake of the Board, according to the pursuer's allegations, was that they failed to take the preliminary steps necessary to justify a prosecution for penalties or imprisonment. They have not certified, and it did not appear that they were in a position to certify, in terms of sec. 70 of the Education Act, that the pursuer had been grossly, and without reasonable excuse, failing to discharge the duty of providing elementary education for his children. This may have arisen from inadvertence. If their statements are correct, they would have been entitled to grant such a certificate in respect of the pursuer's failure to appear when summoned before him, as they say he was, to give explanation. But it was essential to justice, in a case involving imprisonment, that the preliminary steps should be taken. They do not appear to have been taken, and if, as alleged, they were not taken, the pursuer is entitled to an opportunity of showing, whether there was malice or not, that his sentence was wrongful, and that the mistake did him an injury, for which he is entitled to reparation.

"I think that the decision in *Rae* v. *Linton* is not applicable to such a case; and that the case of *Bell* v. *Black & Morrison*, 3 Macph. 1026, and the observations of the Lord Chancellor in the case of *Pringle* v. *Bremner*, 5 Macph. (H.L.) 55, support the pursuer's contention that the words 'wrongfully and illegally' are sufficient."

The defenders reclaimed, and argued—It was necessary to put into the issue malice and want of probable cause—*Rae* v. *Linton*, March 20, 1875, 2 R. 669. The defenders had made a mistake in bringing the pursuer before the Sheriff to be fined without producing a certificate, and without having obtained a sufficient attendance order. But that was merely a mistake in procedure for which the defenders could not be held liable. They were a statutory body performing a public duty, and the case was therefore one of privilege. There was no relevant averment of malice—*Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057; *Macaulay* v. *Macdonald*, June 3, 1887, 24 S.L.R. 551.

The respondent acquiesced in the Lord Ordinary's judgment in regard to the defenders Dott. As regarded the School Board, he argued—A wrong had been done here to the pursuer, and there must be a remedy. The School Board had begun the proceedings against him under the Act of 1883. Under that Act it was necessary to get an attendance order, and to show that the parent had refused to obey this order, before a conviction could be obtained. This preliminary was necessary to inform the parent that he had failed in his duty, and was for the protection of the public—*Macaulay* v. *Macdonald*, June 3, 1887, 24 S.L.R. 551. It was enough to state that the action had been wrongful and illegal. A corporation could not be held to be guilty of malice—*Bell* v. *Black & Morrison*, June 28, 1865, 3 Macph. 1026.

At advising—

LORD CRAIGHILL—This is a case of some inter-

est and importance, both to the individuals concerned and to the public. The questions are—First, whether there is issuable matter set forth upon this record? and second, if there is issuable matter, whether the issue approved of by the Lord Ordinary should be adopted?

The pursuer in the action is Archibald Macaulay, against whom a complaint was brought by the School Board of North Uist in the Sheriff Court at Lochmaddy, on the ground that he had for more than a month failed to send his children to school, as was his duty under the Education Acts, and so, in the view of the School Board, rendered it necessary that they should present a complaint against him. The Act of 1872, section 70, authorises such a complaint on condition that a written certificate be granted by the School Board that the defaulting parent has failed in his duty of providing elementary education for his children. This condition was not observed in the present case. Another form of complaint is competent under the Act of 1883, under which, when parents are neglecting their duty, the School Board may ask the Sheriff to grant an attendance order. It seems that there is a form of complaint in use whereby the Sheriff is craved to find the person complained of liable to a penalty or to imprisonment, or to pronounce an attendance order. That seems to be a very dangerous form of complaint, as it may be used, as it was here, as the means of getting a sentence of imprisonment while neglecting all the previous steps which were necessary. The complaint was in fact framed under this Act, but what was done was, that a sentence of fine and imprisonment was pronounced, which was competent only after an attendance order had been obtained, although there was no proper attendance order. Judgment was obtained and put in execution, and unfortunately the present pursuer spent the three days in gaol, but the conviction was afterwards quashed.

No doubt a wrong was here committed, but I do not think that although there was a wrong the remedy which is sought in this case must necessarily follow. What I think is overlooked by the pursuer in this case is, that the School Board were doing their duty under the statute. That duty was to proceed against defaulting parents, and the pursuer must have known that they were acting in conformity with that duty. It does not follow that because a fault has been committed the School Board are to be found liable in damages. Can it be said that this is just the same case as if anyone without a warrant, on the plea that he was acting in the public interest, had complained to the Sheriff and got the pursuer imprisoned? I think not. This is a privileged case, because the School Board were doing their duty in bringing this complaint against the pursuer, although there was an error in the way it was carried through.

If that be so, then no mere allegation of malice in the record will be sufficient to infer malice against the School Board. I think if the case is to be made relevant at all the pursuer must aver facts and circumstances from which a jury might infer malice. But there is no such averment here. That being so, there is no issuable matter in the record, and I do not think we should allow an issue in the case.

Lord Rutherfurd Clark—This is a question of some nicety. The School Board of North Uist instituted certain proceedings under the Education Acts of 1872 to 1883, in which they obtained a conviction against the pursuer of the present action. These proceedings turned out to be irregular, and were quashed by the Court of Justiciary. The question is, whether by reason of that irregularity the pursuer is entitled to recover damages from the School Board when the only thing that is alleged against the Board is that in the exercise of what they believed to be their public duty they obtained this irregular conviction? If a statute puts a power into any man's hand, and that man uses the power, he must, in the general case, take care that his use of the power is in exact accordance with the provisions of the statute; if it is not, he may be liable in damages for the misuse of the statutory power, and if there had been no other element in the case than this, the present action might probably have been held to be relevant. But I am disposed to think that a public body like this School Board, acting in the exercise of what they believe to be their statutory powers, are not to be held liable in damages merely because certain proceedings which they carried out—not the least in their own interest, but entirely in the interest of the public—turn out to be irregular. I rather think that is the safer conclusion, and I am inclined to adopt it. I therefore think that the issue as it stands cannot be maintained.

But it is said that there is a case of malice on record against the defenders. I have doubts whether malice can be alleged against a public board of this kind. I doubt whether a school board can be malicious. But assuming that it can—and I rather think that I must so assume, looking to the way in which the case was presented at the bar—it seems to me that this record is irrelevant. I am not one of those who lay great stress on the necessity for having specific averments of malice in cases of this kind, but if it be the duty of the pursuer of an action such as this to set forth in detail the grounds on which he says the malice of the defender is to be inferred—and there is a considerable body of authority to that effect—I think it is out of the question to say that there is anything in this record to show that the defenders acted maliciously. I therefore agree in thinking that the action should be dismissed.

Lord Justice-Clerk—I concur entirely with the opinions expressed by your Lordships. In the first place, the School Board, either as a board or the members of it individually, were acting solely for the public interest, and if they acted in good faith, then they are not responsible for technical errors made in the course of procedure. Although it is said here that the School Board adopted a method of procedure for which there was no ground in the circumstances, and that they mixed up two different forms of complaint under two different statutes, nothing is said against their acting in good faith and as public officials.

As regards the allegation of malice, I do not go into the question whether there can be malice on the part of a public body such as a school board. But in the circumstances of this case there is nothing that would lead anyone to say that the application to the Sheriff was not made in good faith.

Lord Young was absent.

The Court disallowed the issue, and dismissed the action.

Counsel for the Reclaimers—Graham Murray—Boyd. Agents—Tods, Murray, & Jameson, W.S.

Counsel for the Respondents—A. J. Young—Gunn. Agents—Whigham & Cowan, S.S.C.

Wednesday, November 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

W. E. & A. J. ANNAN *v.* MARSHALL.

Bankruptcy — Composition Contract — Cautioner — Condition on which Cautioner to Pay Composition.

The creditors of an insolvent person acceded, with three exceptions, to a composition contract, on condition that a person named should become cautioner. This person agreed to become cautioner. The composition was to be paid in two instalments, at two and four months. The cautioner, after the expiry of the two months within which the first instalment became due, sent to a firm of law-agents a cheque to enable them to pay the first instalment, receiving back a letter in these terms:—"The sum handed to us is paid on condition all the creditors named in the list signed by most of them accept the composition on or before the 10th inst., and that we give no preference to any creditor." The law-agents, after obtaining the accession of the three creditors who had not at first acceded, paid the first instalment, before the 10th, to all the creditors except C, who had originally acceded, but who, three days after the first instalment was due, had written to his debtor intimating that owing to the delay he declined to accept payment except in full. The cautioner thereupon stopped payment of the cheque on the ground that the condition upon which it was sent had not been fulfilled, as C had not accepted the composition. *Held* that the cautioner was liable to the law-agents for the amount of the first instalment paid by them, in respect (1) that C was not entitled to resile from the contract, and (2) that the condition of payment in the letter above quoted was the acceptance of the offer of composition by all the creditors by the 10th inst., which the agents had in fact obtained by that date.

In January 1885 the affairs of John Rankine, fruit and vegetable dealer in Glasgow, became embarrassed, his liabilities amounting to about £635, his assets being £183. A meeting of his creditors, of whom there were nineteen, was convened on 21st January 1885, and an offer was submitted to them to pay a composition of 5s. per £ by two instalments at two and four months. Sixteen out of the nineteen signed a written acceptance of this offer by which they agreed "to accept 5s. per £ on our respective claims, payable in two instalments of 2s. 6d. each in two and four months (21st March and 21st May), provided James Marshall, Virginia Street, Glasgow, becomes cautioner for the same within one week." Amongst the signatures was that of William Cairns, whose debt amounted to £43.

On 27th January Marshall wrote to W. E. & A. J. Annan, writers in Glasgow, who were negotiating the matter for some of the creditors, and agreed that "failing punctual payment of the said John Rankine of the said instalments, or any part thereof, I will pay the amount remaining unpaid on being required to do so."

On 24th March Cairns wrote to Rankine as follows—"As your composition has not been paid when it became due, I will now decline to accept it, and must ask you for an immediate settlement of my account *in full*."

On 2d April Marshall, Rankine's cautioner, sent to Messrs W. E. & A. J. Annan a cheque for £75 to enable them to pay the creditors the first instalment of the composition which was due. He received back from Messrs W. E. & A. J. Annan the following letter dated 2d April—"Dear sir,—You have to-day handed us your cheque for £75 to enable us to settle the first instalment of the composition of 5s. per £ agreed to be accepted by John Rankine's creditors, the other instalment being payable on 21st May next. The sum handed us is paid on the condition that all the creditors named in the list signed by most of them accept the composition on or before the 10th inst., and that we give no preference to any creditor." On 2d April the Messrs Annan called a meeting of the creditors in order to get the accession of the three creditors who had not signed the acceptance of 21st January. This accession was ultimately obtained before 10th April. In reliance on the cheque being honoured, the Messrs Annan paid the first instalment of the composition to, and obtained receipts from, all the creditors with the exception of Cairns, who wrote to them on 3d April intimating that he "had now resolved not to accept the composition."

On 10th April Marshall countermanded the cheque, and this action was raised by the Messrs Annan for payment of the amount of the cheque, viz., £75, or alternatively for the sum of £70, 16s. 4d., which was the sum they had paid the creditors as the first instalment of the composition. In defence Marshall maintained that he had only handed the cheque to the pursuers on the distinct understanding and condition that it was not to be used unless all the creditors accepted payment of the composition on or before 10th April, and that no preference should be granted, all as expressed in the letter of 2d April; that Cairns had declined to accept, and further, that notwithstanding the knowledge of these facts and in breach of the conditions of their instructions from the defender and without his authority, the pursuers had paid away the sums to the creditors.

The pursuers pleaded—"The pursuers being the onerous holders of said cheque granted by the defender, and the same not having been paid, decree should be granted as craved. And (additional plea)—The pursuers having so far fulfilled the purpose for which the said cheque was handed them, and being prepared to fulfil the same entirely, are entitled to decree as craved."