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 preconceived 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.

This case arose out of the case of *Milne's Executors* v. *Aberdeen University*, reported *ante ut supra.*

The Universities (Scotland Act 1889 (52 and 53 Vict. cap. 55) enacts—Section 6—"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 the share appropriated to such University out of the annual grant hereinafter mentioned, and also including funds mortified for bursaries and other purposes. . . . (2) To review any decision of the Senatus Academicus on a matter within its competency which may be appealed against by a member of the Senatus or other member of the University having an interest in the decision, . . . and to take into consideration all representations and reports made to it by the Senatus Academicus and by the General Council. . . ." Section 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. . . ."

On 23rd May 1906 the University Court of Aberdeen University, who had, by interlocutor dated 16th May 1905 been found entitled to the balance of the residue of the estate of the late Alexander Milne of Aberdeen, "on condition that a scheme for the administration of the same as a bursary fund is submitted by them to and approved by the Court," presented a scheme for the administration of the said fund. The Senatus Academicus on 26th June were allowed to sist themselves as parties and lodged objections to the scheme.

The scheme, *inter alia*, provided—"III. The said bursaries shall be open to all matriculated students of the University of Aberdeen, whom the University Court, on report by the Senatus, considers to require pecuniary assistance to enable them to prosecute their studies at the University, and to be by their ability and diligence deserving of such assistance. IV. The bursaries on this foundation shall be awarded by the University Court on report and recommendation by the Senatus as to the needs and merits of the applicants. The Senatus shall be entitled, for the purpose of such report and recommendation, if they think fit, to submit any or all of the applicants to examination in such subject or subjects as they may prescribe."

The objections included, *inter alia*:—1. "Article III of the proposed scheme of administration of the 'Alexander Milne Bursary Fund,' is in the following terms— . . . [*supra*] . . . The Senatus Academicus have in the past conducted all applications for bursaries in the gift of the University of Aberdeen. Their inquiries are conducted verbally with a view to privacy. If the aforesaid provision were to be approved by the Court, a written report by the Senatus would require to be submitted to the University Court, which procedure would entail a greater degree of publicity. The University Court meets in public. The Senatus Academicus meets in private. The public press is invariably represented at the meetings of said Court. It would be an undoubted hardship on applicants for participation in said fund if their applications were submitted to discussion in public, and this would tend to discourage applicants from coming forward and thus defeat the wishes of the testator." 2. "The result of the foregoing provision in the event of its receiving the approval of the Court would be that after the Senatus had made full inquiry into the applications for bursaries under the said fund, and had satisfied themselves that certain applicants were proper persons to participate in the said fund, the University Court would have the power to institute and conduct further inquiries. They would be entitled to refuse to recognise the recommendations of the Senatus. The delay involved by such procedure would not be conducive to the practical working out of the scheme." 3. "The Senatus further object to the first sentence of Article IV of the said proposed scheme, which is in the following terms . . . [*supra*] . . . The power to appoint candidates to bursaries connected with or in the gift of the University has from time immemorial been exercised by the Senatus and not by the University Court. The Universities (Scotland) Acts of 1858 and 1889 confer no such power on the University Court. By section 7, sub-section 1, of the Universities (Scotland) Act 1889 the Senatus have power to regulate and superintend the teaching and discipline of the University. The power of appointment to bursaries falls within the scope of this provision. The General Report by the Commissioners under the Universities (Scotland) Act 1889, and relative ordinances by the Commissioners, contain no warrant for such change as that suggested in the proposed scheme, but on the contrary without exception leave the power of appointment in the hands of the Senatus. There is no precedent in the University of Aberdeen or any other Scottish University for withdrawing the power of appointment to bursaries from the Senatus and conferring it on the University Court. The Senatus have on all occasions exercised the power to appoint with due care and discretion. There is no necessity for making a precedent in this case adverse to rights of the Senatus."

The Senatus lodged an alternative scheme and moved for a proof as to the custom of appointing bursars in the University since 1889.

Argued for the University Court—The Senatus Academicus had no *locus standi* to entitle them to be heard. This was a matter of administration and management of revenue; to give effect to the objections would be to take away from the University Court their statutory power and to give it to the Senatus, who had been deprived of it by statute.

Argued for the Senatus—This was a matter of teaching and discipline. From time im-

memorial it had been the custom of the Senatus to appoint to bursaries, and this had not been changed by the Act of 1889. A proof on this point, if it were denied, should be allowed—Reference was made to Universities (Scotland) Act 1858 (21 and 22 Vict. cap. 83), sections 5, 12 (1) (6).

LORD JUSTICE-CLERK—I think it unnecessary to deal with the suggestion of Mr Brown that the Senatus Academicus has no *locus standi* here at all. In a case like this it is inexpedient that we should be bound by any strict rules as to *locus standi;* it is certainly right that the Senatus Academicus should be allowed to have an opportunity of appearing and stating their views. The case which the Senatus present against this scheme apparently is, that if the scheme is passed in the terms proposed there will be no security that the recommendations of the Senatus, which the scheme entitles the Senatus to make, will be given effect to by the University Court, because, it is said, the University Court will naturally favour students from Aberdeen since the majority of the members of the University Court belong to the town of Aberdeen. I think that this cannot be assumed for a moment. If there is to be any assumption in the matter, it would, I think, be the exactly contrary assumption. I assume that the University Court will always be composed of persons who will act conscientiously and from right motives in everything they do.

The practical question is whether the fourth clause, which provides that the bursaries shall be awarded by the University Court on the report and recommendation of the Senatus, shall be allowed to stand as part of the scheme. I think that it was admitted that the bursaries cannot be awarded by anyone else than the Court, in this sense at least, that the University Court being in possession of the fund the bursaries can be paid only with their sanction. But the suggestion is that while the administration of the bursary fund is vested in the University Court for the purposes of investment and other similar purposes, the actual appointment to the bursaries themselves belongs to the Senatus, the University Court being the mere hands of the Senatus in paying over the money to the bursars whom the Senatus have elected. It is said that the power to appoint to bursaries has from time immemorial been exercised by the Senatus, and that this practice has continued since the Act of 1889. As regards what happened before the Act of 1889, I think that we have nothing whatever to do with that. I think that it can throw no light whatever on the present question, because down to the Act of 1889 the whole funds of the University were—subject to the modifications introduced by the Act of 1858—in the hands of the Senatus. Since 1889—a very short time—I should have been very much surprised to find that there had been any outward change in the practice. I should expect to find that the University Court gave effect to the recommendations of the Senatus as a matter of course, unless in very exceptional circumstances, and if such exceptional circumstances did occur, I should expect to find that the University Court consulted with the Senatus in order to determine the best thing to be done. But I think that the whole matter is really settled by the Act of 1889, which is as clear as anything can be. The first sub-section of the sixth section of the Act gives the University Court power to "administer and manage the whole revenue and property of the University," including "funds mortified for bursaries." I think that that places the whole administration and management of bursary funds, including the power of appointment to bursaries, in the hands of the University Court. In these circumstances I think that this scheme has been very fairly presented with a view to carrying into effect the power which has been conferred on the University Court, by providing that the bursaries are to be awarded by the University Court on the recommendation of the persons best fitted to judge—there is no doubt of that—namely, the Senatus, and by giving the Senatus a perfectly free hand as to the selection of the persons whom they are to recommend to the University Court.

On the whole matter I am of opinion that we should approve of the scheme subject to the modifications suggested by Lord Stormonth Darling.

LORD KYLLACHY—Your Lordship has exactly expressed my views, and I have nothing to add.

LORD STORMONTH DARLING—I am of the same opinion. I should only desire to add that the claim of the Senatus is practically a claim to the absolute and uncontrolled patronage of these bursaries, and that it is founded on the alleged practice before 1889. But that is scarcely a matter for our consideration, for the whole relations of the University Court and the Senatus, *inter se,* were altered by the Act of that year. Under the scheme as proposed by the University Court I do not suppose that there will be any practical difference in the practice as it has been in the past. But it can hardly be maintained that, as a matter of right, the patronage of bursaries is covered by the power which the Act confers upon the Senatus "to regulate and superintend the teaching and discipline of the University;" and there is nothing else in the Act on which the Senatus can found their claim.

LORD LOW was absent.

The Court repelled the objections and approved of the scheme with certain modifications in detail.

Counsel for the University Court—A. R. Brown. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Senatus—Cooper, K.C.—Dallas. Agents—Forbes Dallas & Company, W.S.