

member who has paid up his instalments, and then there would be a writing upon which the claimant could proceed by means of the diligence of the law to complete a formal title. There is nothing of that kind here.

LORD MURE and LORD CRAIGHILL concurred.

The Court refused the appeal and rejected the claim.

Counsel for Appellant (Claimant)—R. V. Campbell. Agent—A. Morison, S.S.C.

Counsel for Respondent (Objector)—Readman. Agent—J. & F. Anderson, W.S.

COURT OF SESSION.

Tuesday, November 4.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

COLLIER v. JOHN RITCHIE & COMPANY.

Process—Bankrupt—Caution for Expenses—Slander—Mora.

Where the pursuer of an action of damages for slander was bankrupt, and the action was not raised for two years after the slander complained of, without any good reason being stated for the delay, the Court refused to allow him to proceed with his action without finding caution for expenses.

James Collier, formerly tenant of Dunecht Sawmill, Aberdeenshire, thereafter residing at Daldowie Lodge, Broomhouse, near Glasgow, on 23d April 1884 raised the present action against John Ritchie & Co., printers and publishers of the *Scotsman* newspaper, concluding for £500 in name of reparation, damages, and solatium in the following circumstances:—In the *Scotsman* of Monday, February 27, 1882, in an article headed "The Dunecht Mystery—Arrests in Aberdeen," the following paragraph appeared:—"Aberdeen, Sunday Night—Inspector Cran left here for Dunecht on Saturday to arrest a man named Collier, but the latter could not be found."

The pursuer averred that the statements published in the said paragraph were absolutely false, and were calumnious of and injurious to him, and that he was thus represented not only of being suspected of a crime but of absconding to escape the consequences. He further averred that no such warrant was issued at that time, and that he was at home at the Dunecht Sawmill at the time in question. The statements made in the *Scotsman* were copied into, among others, the *Aberdeen Evening Express*, and were very injurious to him in his business. Important and valuable contracts were, he alleged, in consequence thereof, taken from him, and upon 7th August 1882 he was compelled to execute a trust-deed for behoof of his creditors, and his profitable business was destroyed. He was also obliged to seek employment elsewhere.

The defenders, while admitting the publication

of the paragraph of 27th February 1882, explained that the information was supplied to them by the Central News Association of London, that it was published by them in good faith, and in pursuance of their business to keep the public informed of what was being done by the authorities in the case.

The pursuer had written through his agent to the defenders upon the said 27th February, intimating on the authority of the procurator-fiscal that no warrant against him had ever been applied for, and requesting the defenders to withdraw the paragraph and to pay him twenty guineas in reparation. A statement on which the defenders relied as a contradiction of the statement reported upon the 27th February was inserted in the *Scotsman* of the following day but no money compensation was made. The defenders averred that the pursuer at the time accepted the statement in the issue of 27th February as a complete and sufficient contradiction, and that no attempt was made to reopen the matter till January 1884, when a new demand was made.

The defenders also alleged that upon 27th July 1882 the pursuer was arrested in Glasgow on a charge of having been concerned in the removal of the body of the late Earl of Crawford and Balcarres from the family vault at Dunecht House, that he was taken to Aberdeen, where he emitted a declaration, and was thereafter liberated.

The pursuer pleaded, *inter alia*, that he was entitled to the sum concluded for, as the statements of the defenders were false and calumnious.

The defenders pleaded, *inter alia*—" (2) The pursuer having been divested of his estate by his subsisting trust-deed of 7th August 1882, he is not entitled to pursue this action, or at least not without finding caution for expenses." They also pleaded that the pursuer was barred by the contradiction which they had published the following day, and by his waiver thereupon and for two years thereafter of all claims against them.

The Lord Ordinary appointed intimation of the process to the pursuer's trustee, and he having failed to sist himself, sustained the defenders' second plea above quoted, and ordained the pursuer to find caution for expenses within fourteen days. The time was thereafter prorogated for six days, and the pursuer having failed to find caution in that time, the Lord Ordinary, on 19th July, in respect of the pursuer's failure to find caution, dismissed the action.

The pursuer reclaimed, and argued, that after the opinions expressed in *Clarke v. Muller*, January 16, 1884, 11 R. 418, the question of caution in a case like the present was one for the discretion of the Court. Here the circumstances were special—the paragraph which was libellous was admitted, it had been the cause of the pursuer's bankruptcy, and the defenders on that account were barred from pleading the bankruptcy which they themselves had caused as necessitating the pursuer's finding caution. The pursuer's true position was like that of a defender, as his *prima facie* case had been admitted by the defenders.

Authority—*M'Alister v. Swinburne & Company*, November 7, 1873, 1 R. 166.

Argued for defenders—The pursuer was barred by *mora*. No demand had been made for two years. In such a case the Court would not be inclined to grant the pursuer any indulgence.

The Court called upon the pursuer to explain the cause of the delay in bringing the action. No satisfactory explanation was offered.

At advising—

LORD PRESIDENT—After giving this matter my most careful consideration I am disposed to agree with the course which the Lord Ordinary has taken. He has appointed the pursuer to find caution as a condition of his being allowed to proceed with the action of damages in respect of his bankruptcy, and that order not having been fulfilled, he has by the interlocutor of 19th July dismissed the action. All the circumstances of the case are rather favourable to the pursuer being allowed to proceed without finding caution except one, but that one, I think, is sufficient to turn the balance against him. The slander complained of was published upon the 27th February 1882, and this action was not raised until the month of April last. That delay is entirely unexplained. We have asked for an explanation from the pursuer's counsel, but he has not been able to give any. Upon that ground—and that ground alone—I think the Lord Ordinary has done right in dismissing the action in respect of no caution.

LORDS MURE and SHAND concurred.

Counsel for Pursuer—Gardner. Agent—J. A. Trevelyan Sturrock, S.S.C.

Counsel for Defenders—R. V. Campbell. Agents—Henderson & Clark, W.S.

Tuesday, November 4.

SECOND DIVISION.

[Lord Adam, Ordinary.]

KIDD AND ANOTHER (KIDD'S TRUSTEES) v.
HANDYSIDE & COMPANY AND OTHERS.

Ship—Accounting by Co-owners—Trust.

K. bought on joint-account of H. & Co. and himself ten shares of a ship, H. & Co. advancing the price, and the shares being conveyed to A., one of the two partners of H. & Co., who held them in trust for K. and H. & Co. K. died, and after his death A., who was one of his trustees, conveyed five of the shares to H., the other partner of H. & Co., the transfer being intended to include one-half of the five shares belonging to K's trustees. In a subsequent action by K's trustees, in which they claimed to be entitled to profits on the footing that five shares had all along belonged to them, H. maintained that the five shares had been conveyed to him as an individual at the desire of the trustees, because K's trust estate could not pay the price of them. *Held* that, assuming this to be the true account of the transaction, it was not a relevant answer to the claim of the trustees, because it was not proved that A. had authority from his co-trustees to make such a conveyance of the shares.

This was an action at the instance of David Kidd and Thomas Aitken, the surviving trustees and executors acting under the trust-disposition and settlement executed by the deceased John Kidd,

merchant in Leith, dated 23d April and recorded in the Books of Council and Session 14th May 1880, against A. G. Handyside & Co., merchants and shipowners in Leith, and Alexander George Handyside, as a partner of the said firm of A. G. Handyside & Co. and as an individual, and also against the said Thomas Aitken, the other partner of the said firm, as such partner and as an individual, for any interest he might have, concluding for payment of £571, 2s. 6d. as one-half the profits of five shares of the ship "Danube" earned between September 1879 and August 1882.

The defence to the action was that the shares in question were the property of the defender Handyside as an individual.

The following were the facts of the case as narrated by the Lord Ordinary:—"In September 1879 the late Mr Kidd purchased 10-64th shares of the steamship 'Danube' on behalf of himself and the defenders A. G. Handyside & Co. The arrangement between the parties is set forth in a letter addressed by the latter to Mr Kidd, of date 8th October 1879, which is in the following terms:—"According to our verbal agreement, it is, we understand that the 10-64th shares of s.s. "Danube," lately purchased from Mr C. W. Anderson for eight hundred pounds, advanced by us, are on joint account, we debiting the shares with 5 per cent. on outlay, and crediting you with half of the nett proceeds."

"Of the same date Mr Kidd executed a bill of sale of the shares in favour of Mr Aitken, which was registered on the 9th of October. Mr Aitken and the defender Mr Handyside were sole partners of the firm of A. G. Handyside & Co., whose firm were to manage the 'Danube.' It appears to me, therefore, that Mr Aitken held these shares in trust both for Mr Kidd and for A. G. Handyside & Co., who had advanced the price.

"Mr Kidd died on the 29th April 1880. He appointed his widow, Mrs Kidd, the late Mr Eunson, and the pursuers, Mr Kidd, his brother, and Mr Aitken, his trustees and executors. They all accepted, but Mrs Kidd resigned on 10th August 1881, and Mr Eunson died on 2d September 1881.

"On 28th February 1881 Mr Aitken executed a bill of sale of five of the ten shares in favour of Mr Handyside, which was registered on the 4th of March following.

"The parties are at issue as to the reason why this bill of sale was executed by Mr Aitken.

"Mr Handyside alleges that Mr Aitken informed him, shortly after Mr Kidd's death, that his trustees had not money to pay the price of the shares which had been advanced by A. G. Handyside & Co., and that they wished them taken over by Mr Aitken and himself; that he agreed to this, and that hence the bill of sale came to be executed by Mr Aitken—he, Mr Handyside, believing that Mr Aitken, who was then, and is still, one of the trustees, had authority from the trustees for acting as he did.

"Mr Aitken, on the other hand, says that it was executed, not with the view of in any way affecting the rights or beneficial interest of Kidd's trustees in the shares in question, but because he thought it was just to Mr Handyside that as he had advanced half the money he should have half the property.

"Whatever is the truth of the matter, it is