

the Court below, they could not follow him to the Higher Court to the effect of having his real contradictor sisted. That objection should have been taken in the Sheriff Court; but there they chose the trustee as their proper contradictor.

A minute was put in for Messrs M'Intosh and Caie craving that they should be sisted to the process.

At advising—

LORD PRESIDENT—In this case an objection has been taken to the competency which requires very careful consideration. The claim of the creditors M'Intosh and Caie in this sequestration was for a sum of £1854, 13s. 8d., less amount paid, and for that claim these creditors claimed a preference, and that preference was sustained and given effect to by a deliverance of the trustee. The other creditors—the unsecured creditors—appealed against the deliverance of the trustee to the Sheriff-Substitute, and the Sheriff-Substitute pronounced this interlocutor:—“Having considered the foregoing note of appeal, appoints a copy thereof, and of this deliverance, to be served upon the therein designed George Shepherd; and appoints parties or their procurators to be heard thereon before the Sheriff-Substitute;” and he fixed a diet. In the prayer of the note of appeal there is nothing said about service at all, and we are told that it is a common practice to take a first deliverance in such terms as I have just read. Now, that may be a convenient and proper practice in ordinary circumstances, because the deliverance may operate the rejection of a claim of preference or of a claim altogether. But even then it may be requisite that some further service should be ordered. But where the party interested is not the trustee, but a creditor who has got a preference, I think such service is quite inadequate. The party interested in maintaining the deliverance is the party who has got a preference. The trustee is not the proper person to maintain his own deliverance when it is against the general body of creditors. The proper office of the trustee as regards claims of preference is to cut them down as far as possible. If there are good grounds for the preference, and the trustee has sustained it, and issued his deliverance, I think it is the duty of the creditor and not of the trustee himself to defend it. The difficulty here has arisen purely from the Sheriff-Substitute or Sheriff-Clerk not having adverted to the fact that the creditor was, and the trustee was not, the proper person to support the trustee's deliverance. I think the creditor was the only proper contradictor in the appeal. But the case went on without the creditor making any appearance; there were only the appellants and the trustee in Court, and the result was that the deliverance of the trustee was recalled by the Sheriff-Substitute, who considered that there was no ground for a preference. It is against that judgment that the appeal is here, and the trustee is the only appellant. Now, I am of opinion that the trustee should not have been the appellant. But it is a different thing to say that any appeal is incompetent. There is, however, another reason why I think the trustee should not be here. If it is allowable for the trustee to litigate as to this claim, it must be at the expense of the trust-estate. Now, the trust-estate is inter-

ested entirely on the opposite side; and, accordingly, to make it pay the expenses of a litigation, in which, if successful, the creditors would injure themselves, cannot be entertained. The question is whether in these circumstances it is competent to sist the preferred creditors. I think they may be sisted if they will relieve the estate and trustee of all the expenses, and take upon themselves the full character of appellants. The trustee must stand aside. The minute put in is a minute craving merely that M'Intosh and Caie be sisted to the process; but it must contain more than that. It must contain an undertaking to relieve the trustee of all the past expenses incurred by him in the cause.

LORDS MURE, SHAND, and ADAM concurred.

The Court, the minute for M'Intosh and Caie having been amended so as to state that they had undertaken to relieve the trustee of all expenses incurred by him in the cause, and craved to be sisted as parties to the appeal in the proceedings in his room, pronounced this interlocutor:—

“Sist Daniel Mackintosh and Charles Caie as parties to the appeal in room of the appellant, the trustee on the sequestrated estate of James Skinner, in terms of the minute for them as now amended, and appoint the cause to be put to the summar roll for discussion on the merits.”

Thereafter on 9th March, M'Intosh and Caie not being satisfied with the record as made up by the trustee, the Court pronounced this interlocutor:—

“Of consent recal the interlocutor of the Sheriff-Substitute . . . appealed against; remit to the Sheriff to allow the comparing appellants to lodge a minute, and the respondents to answer the same, and to proceed further as shall be just.”

Counsel for Trustee—D. F. Mackintosh, Q.C.—Kennedy. Agent—William Officer, S.S.C.

Counsel for Respondents—Balfour, Q.C.—Ure. Agent—Alex. Morison, S.S.C.

Saturday, March 5.

FIRST DIVISION.

[Sheriff of the Lothians
and Peebles.

ANDREWS v. DRUMMOND & GRAHAM.

Reparation—Slander—Injury to Credit by Insertion of Name in List of Persons of Bad Credit—Innuendo.

An accountant in the conduct of a trade protection agency published a list of names of persons against whom decrees in absenee had been obtained, prefixed to which was a “caution” to the effect while it was possible the list contained names of persons to whom credit might in certain circumstances be given, there was risk in doing so without inquiry. *Held*, in an action of damages for slander at the instance of a person against whom a de-

erree in absence had passed, and whose name appeared in the list, that the publication of the list and caution constituted a slander upon him for which he was entitled to nominal damages.

In the early part of 1885 Messrs Drummond & Graham, accountants, Edinburgh, instituted an agency called "The Shopkeepers' Mutual Protection Agency." With the view of attracting subscribers they issued a prospectus which set out that—"In consequence of the abolition of imprisonment for debt, the Wages Arrestment Act, the effect of the law of hypothec, and the facilities afforded the unscrupulous by the Married Women's Property Act, it is admitted on all hands that to give credit means simply to be cheated by a large and growing section of apparently respectable people. How to counteract this evil is a problem of the greatest importance to every person giving credit; existing trade protection offices—useful enough to wholesale houses—fail to cope successfully with it.

"This agency has been established with a view to remedy this state of matters by affording the opportunity of organisation on mutual principles to all classes of shopkeepers. It is intended to be a medium for interchange of information by enabling the trading classes to communicate one to another their knowledge of doubtful and habit and repute bad payers, and thus effectually to *boycott* them.

"The full advantages of the agency will be readily seen in the following departments—[Here followed a list of the departments, one of which was called the "Directory." In the prospectus as first framed, and to some extent circulated, the passages as to the "Directory" ran thus]:—

"THE 'DIRECTORY.'

"A book is issued to subscribers containing upwards of one thousand names and addresses of people against whom decree in absence has been obtained; the arrangement is alphabetical, and it is believed that it will prove as valuable as it is easy of reference. This will be supplemented at intervals by a 'Cyclostyle' list of current information."

The prospectus then proceeded to describe the different departments of the agency, which included a defaulters' register, a department for status inquiries, and a department for the recovery of debts. Afterwards Messrs Drummond & Graham published a revised prospectus couched in terms similar to those of the original prospectus except in the paragraph regarding "The Directory," which ran as follows:—"Books are issued at intervals containing names and addresses of people against whom decree in absence is obtained from time to time. It must be clearly understood that there is not the least intention on the part of the agency to insinuate or imply that the parties mentioned are unworthy of credit, the information is given as a matter of fact and without prejudice; however, in cases where credit is given or likely to be extended to parties therein named the advantage of the enquiry department is obvious."

In one of these lists of names of persons against whom decree in absence had been obtained the name of James Andrews, solicitor, appeared. He raised an action in the Sheriff Court at Edinburgh in which he prayed the Court "to ordain the defenders to produce a list of the subscribers

or members of 'The Shopkeepers' Mutual Protection Agency,' conducted or carried on by them; at least to give the names and addresses of those to whom they furnished the list of those alleged to be in debt, and who refuse or are unable to pay their debts, from whom debts are irrecoverable, and who are unworthy of credit, or one or more of them, containing the pursuer's name; to ordain the defenders to collect and produce in process the whole of the lists furnished by them as aforesaid; to ordain said lists to be destroyed; to interdict the defenders from printing, lithographing, fac-similegraphing, writing, or in any wise putting on paper and publishing, distributing, or exhibiting any lists containing the pursuer's name; and to grant interim interdict; to grant a decree against the above-named defenders ordaining them to pay to the pursuer the sum of £500." He averred that the insertion of his name in the defenders' list inferred that he was one of the class of persons described in the opening paragraphs of the prospectus, *i.e.*, unscrupulous in the contraction of debt, a doubtful and habit and repute bad payer, to give credit to whom was to be cheated—unworthy of credit altogether, or at least until his credit had been established by inquiry. He averred further that he was a practising solicitor, and that as there were 700 or 800 subscribers to the defenders' agency, drawn mainly from the class amongst whom he practised, he had suffered great injury by having been slandered falsely and maliciously, and without probable cause.

The defenders averred that they were privileged; that their agency was a private medium of information; that they stated in their prospectus that they had no intention of insinuating that the parties mentioned in their lists were unworthy of credit; and that in point of fact decree in absence had been obtained against the pursuer on 18th June 1884 for £6, 7s. 3d., and on 10th June 1885 for £8, 2s. 11d., which had not yet been paid.

On 10th February 1886 the Sheriff-Substitute (RUTHERFORD) dismissed the action on the ground that the pursuer's averments were irrelevant.

"*Note.*—On the part of the pursuer it was admitted at the bar that two decrees in absence had been obtained against him in the Small-Debt Court on the 18th of June 1884 and 10th June 1885 respectively, for the sums stated in the defenders' answer to Condescendence, art. 3; and on the other hand it was conceded by the defenders that the pursuer is the person named James Andrews, referred to in the list of names as of North St David Street, where it appears that the pursuer resided for some time prior to Whitsunday 1884, when he removed to St Andrew Square; and the Sheriff-Substitute has ascertained, from examination of the Small-Debt Court book of causes, that in the decree in absence obtained against him on 18th June 1884 he is designed as residing in North St David Street. It was also admitted by the defenders, and indeed could hardly be disputed, that the circulation of the list in question among their subscribers was tantamount to publication of its contents. In these circumstances the question comes to be, whether the defenders' publication of the list containing the pursuer's name was or was not libellous; and the Sheriff-Substitute is unable to distinguish the case in principle from

that of *Fleming v. Newton*, 1848, 6 Bell's App. 175, where the House of Lords, reversing the judgment of a majority of the Judges of the Court of Session, refused interdict against the publication of a list taken from the register of protests known as the 'Black List,' containing the names of persons whose bills had been protested for non-payment, on the ground that such a publication was not libellous in circumstances which did not infer malice. In delivering judgment the Lord Chancellor (Lord Cottenham), after referring to statutes and authorities to show that the register of protests is accessible to the public like the proceedings of a court of justice, observed—'From these references it appears to me that the Legislature have thought that the public at large ought to have recourse to this register, and of all the public the defendants have the highest interest in the knowledge of its contents. They are engaged in mercantile affairs, in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the register is not disputed, and that they might communicate to each other what they had found there is equally certain, but what they have done is only doing this by a common agent, and giving the information by means of printing. No doubt if the matter be a libel this is a publication of it, but the transaction disproves any malice, and shows a legitimate object for the act done.' It appears to the Sheriff-Substitute that these remarks are applicable to the present case, where the thing published is the fact that decrees in absence have been obtained against the pursuer and others in a court of justice (the Small-Debt Court), the purpose of the publication being precisely the same as in the case cited, viz., to communicate information to tradesmen which might induce them, before giving credit to the persons in question, to make some inquiry as to their position. Of course the fact that decree in absence has been obtained against a man in the Small-Debt Court does not necessarily infer that he is in bad credit any more than the fact that he is the acceptor of a bill protested for non-payment. It is true that in the present instance the defenders are not exactly in the same position as the defenders in the case of *Fleming v. Newton*, where the information was collected and published for a society of mercantile men by their paid agent, while here the list in question is printed by the defenders with a view to their own profit, and circulated among a set of subscribers. But the Sheriff-Substitute does not think that that is a material distinction between the two cases. The same observation would apply to the reports of cases in the public journals, to the law reports, and to such publications as *Stubbs' Weekly Gazette*, in which the pursuer's name was printed apparently without objection on his part, along with those of other persons against whom decrees had been granted in absence in the Small-Debt Court.

"The pursuer, however, alleges that by the publication of the defenders' list he has been 'falsely and maliciously slandered, and without a probable cause, and he has been thereby greatly injured in his feelings, reputation, and credit, as well as in his business as a solicitor,' &c. This statement, the Sheriff-Substitute thinks,

would be manifestly insufficient without some distinct averment upon record of the grounds from which malice is to be inferred, and the pursuer alleges that 'said list is intended to represent, and does represent, that those whose names are in it are unscrupulous in the contraction of debt, are doubtful, and habit and repute bad payers, to whom to give credit is to be cheated, and that while ordinary trade protection offices fail to cope successfully with such parties, that established by the defenders is bound to do so, and 'thus effectually to boycott' the parties whose names are in said list.

"Consistently with the decision in the case of *Fleming v. Newton*, the Sheriff-Substitute does not think that the mere publication of the fact of decree having been along with the other persons named in the defenders' list, could be held to imply that the defenders' intention and motive were what the pursuer represents them to have been.

"The pursuer, however, maintains that the statement in the second article of the condescendence (quoted above) sets forth the inference naturally to be deduced from the terms of a prospectus issued by the defenders with the view of obtaining subscriptions. The prospectus states that in consequence of the abolition of imprisonment for debt the Wages Arrestment Act, the effect of the law of hypothec, and the facilities afforded the unscrupulous by the Married Women's Property Act, it is admitted on all hands that to give credit simply means to be cheated by a large and growing section of apparently respectable people. How to counteract this evil is a problem of the greatest importance to every person giving credit. Ordinary trade protection offices—useful enough to wholesale houses—fail to cope successfully with it. "This agency is established with a view to remedy this state of matters by affording the opportunity of organisation on mutual principles to all classes of shopkeepers. It is a private medium for interchange of information, enabling the trading classes to communicate one to another their knowledge of doubtful and habit and repute bad payers, and thus effectually to boycott them.' It appears to the Sheriff-Substitute that this passage in the prospectus does not refer to the defenders' list, or, as it is termed in the prospectus, the 'directory,' but that it is descriptive of the objects of the defenders' agency, which includes several departments—a defaulters' register, a department for status inquiries, and another for the recovery of debts. No doubt the list or 'directory' is also a department of the agency, but it is nothing more than a list of the names and addresses of persons against whom decree has been taken in absence, and the copy of the prospectus sets forth that 'it must be clearly understood that there is not the least intention on the part of the agency to insinuate or imply that the parties mentioned (*i.e.*, in the list) are unworthy of credit. The information is given as a matter of fact, and without prejudice; however, in cases where credit is given, or likely to be extended to persons therein named, the advantage of the inquiry department is obvious.'

"In these circumstances the Sheriff-Substitute is of opinion that the pursuer's averments are not relevant or sufficient to infer liability for damages on the part of the defenders, and he

has therefore dismissed the action. In conclusion he has merely to observe, with reference to the pursuer's complaint that the defenders' list contains the names of only some of the persons against whom, according to *Stubbs' Weekly Gazette*, decrees in absence were obtained on 10th June 1885; that this circumstance is accounted for by the fact that the defenders' list, although it bears the date 1885, was printed prior to the month of June in that year. The Sheriff-Substitute has ascertained by examination of the small-debt book of causes that the list contains the names of all the persons, including the pursuer, residing in Edinburgh and its immediate vicinity, against whom decree in absence was pronounced on the 18th of June 1884."

The pursuer appealed, and on 6th April 1886 the Sheriff (CARLTON) dismissed the appeal.

The pursuer appealed.

When the case came before their Lordships of the First Division the pursuer moved for leave to amend his record by averring that the "list of names" in which his name appeared had prefixed to it a leaflet, prominently printed, in these terms, viz.:—

"Caution.

"It must be clearly understood that the information contained in this is intended solely for the personal use of the subscriber, and is under no circumstances to be shown or divulged to a third party, and the subscriber will be held entirely responsible for the breach or non-observance of such understanding. It is possible that there are names contained in this list of people to whom credit under certain circumstances might be given, but it is recommended that use be made of the inquiry department of the agency before the entailing the risk."

The amendment further stated—"Thesaid list is not and does not purport to be an abstract or copy of any judicial or public record, and beyond names and addresses no information is given. While circulating the said list, or in connection with it, and for the purpose of increasing its circulation, the defenders issued an explanatory prospectus, a copy of which is produced and referred to for its terms. The prospectus and leaflet prefixed to the said list were intended or calculated to convey to the public the representation above stated, or a material part thereof, to the prejudice of the pursuer. The defenders are not agents employed by a society of traders for mutual protection, but are parties who in issuing the said list and prospectus are seeking to increase their own private business." He also added a statement that before the list was published the first decree in absence had been obtempered, and that the second decree had not been obtained at the date at which the list was issued.

The Court allowed the record to be amended, and allowed a proof.

From the proof it appeared that there were about 1000 Edinburgh subscribers to the agency, and some out of Edinburgh; that the list contained the names and addresses of parties against whom decree of absence had passed in Edinburgh, Leith, and Corstorphine; that the names of wholesale houses and companies were omitted; and that neither the person at whose instance a decree was obtained, nor the sum in it, nor the date of it, were inserted in the list. It appeared further that a decree in absence for £6, 7s. 3d.

had passed against the pursuer on 18th June 1884, but that he had paid the account almost immediately afterwards, and that another decree of 10th June 1885 had passed against him and was still unpaid because he had not funds to meet the account.

On their Lordships resuming consideration of the case the pursuer argued that this was a libellous publication. The opening sentences of the prospectus pointed to the persons whose names were inserted in the list, and accordingly they were held out to be unscrupulous persons who, seeming to be respectable, cheated shopkeepers, and were habit and repute bad payers. Further, these lists were selected lists, and therefore they were not the transcript of a public or judicial record. It was therefore a relevant ground of damage that the prospectus and caution stated with regard to selected parties that there was great unlikelihood that they would pay their debts. Besides, at the date of the first publication Andrews had paid the account for which the decree in absence had passed. The second decree was subsequent to the publication. Thus the plea of *veritas* fell to the ground. "Stubbs" was the transcript of the judicial record, and was contemporaneous. This list possessed neither of these qualities—*M'Nally v. Oldham*, January 22, 1863, 8 Law Times (N.S.) 604.

The defenders argued—There were various departments in the business, and this was to be kept in view in reading the prospectus. The application of the introductory paragraph in the prospectus was not to be limited to the "directory." If the information was well-founded in fact the defender could not be guilty of slander, for slander implied two elements—(1) That the statement be false, and (2) that it be calumnious. Here the statement was true, and looking to the pursuer's position it could not be said to be calumnious. It was impossible to say that the caution did not truly apply to such a case as this.

At advising—

LORD PRESIDENT—This action was brought in the Sheriff Court of Mid-Lothian by the appellant, and the case was decided against him by the Sheriff-Substitute, on the ground that his statements showed no ground of action, and were therefore irrelevant. The Sheriff-Principal concurred in this decision. As the pursuer's case was stated in the Sheriff Court I would have been disposed to agree with the Sheriff-Substitute, but when the case was brought to the Court of Session the record was amended by a minute which has altered the complexion of the case a good deal. The defenders are a firm of accountants who have set up an agency, which they call the Shopkeepers' Mutual Protection Agency, and which is intended to furnish information to shopkeepers, and protect them against customers who were not likely to pay their accounts. The object is quite a legitimate one, and if prosecuted in a legal manner nobody could disapprove of it. The pursuer has founded a good deal on the prospectus of the company, but we have little to do with the prospectus here. The only thing he could directly complain of was that his name had been published and inserted in a printed list. Now, the prospectus discloses quite distinctly

what that list is intended to represent, and therefore for the purpose of ascertaining what the lists are intended to represent reference may be made quite legitimately to the prospectus. The pursuer has founded upon the opening statement of the prospectus, which sets out that shopkeepers are very apt to be imposed upon by apparently respectable people who do not pay their accounts, and by whom shopkeepers are cheated to a great extent. That may be perfectly true or the reverse. It was not alleged against the pursuer that he answered the description of the persons mentioned in the opening part of the prospectus. With regard to the lists in which the pursuer's name did appear, the complaint is this:—Under the head of the directory there is this statement—"The book is issued to subscribers, containing upwards of one thousand names and addresses of people against whom decree in absence has been obtained; the arrangement is alphabetical, and it is believed that it will prove as valuable as it is easy of reference. This will be supplemented by a 'cyclostyle' list of current information." Then, turning to the list, I find the pursuer's name there amongst those against whom decree in absence has been obtained. But that is true, and if the matter had gone no further than that, of course the defenders would at once plead justification, if, indeed, it would be necessary to plead anything of the kind, because the mere statement that a decree was obtained in a court of justice open to the public against a particular defender is not a thing that required any justification at all. It is a public fact which anybody is entitled to state. Therefore the list, as it appears to me, with the occurrence of the pursuer's name in it, would be of no avail if it were not that the list was accompanied by a note which was entitled "Caution," and which was bound up or pasted into the pamphlet which contained the list. This caution, which was not set out in record in the Inferior Court, and was not founded on there, has now been made a part of the record. We must see whether that caution and the statement therein contained, taken in conjunction with the list and the occurrence of the pursuer's name in the list, amount to slander against him. The first paragraph of the caution appears to me to be of no consequence, but the second is in these terms—"It is possible that there are names contained in this list of people to whom credit under certain circumstances might be given, but it is recommended that use be made of the inquiry department of the agency before entailing the risk." An innuendo has been put upon this by the pursuer which I think it will not bear. The innuendo, as stated by the pursuer, goes a great deal too far. It appears to me that the true meaning of the second paragraph of the caution is this—first, that there are some of the persons named in the list who may upon inquiry be found to be worthy of credit, notwithstanding that decree in absence has been issued against them; second, that the remainder of the parties whose names are on the list, being the majority, are unworthy of credit; and third, that as regarded the whole of the persons who are named in the list there is a risk in dealing with them. If that be the true meaning of the paragraph it certainly contains something that in my opinion does amount to slander as against any party whose

name is on that list, because it manifestly means the third thing I have mentioned, that he is a party who cannot be dealt with by a shopkeeper without the shopkeeper running a risk. The caution contains an insinuation that the pursuer is a party in such bad credit that either he is unworthy of credit at all, or if he be worthy of credit some inquiry and examination into his circumstances is necessary to justify such an opinion. That is undoubtedly a reflection upon the credit of the persons whose names were on the list. Had the list been alone without this caution I do not think that would be a slander, but when it is accompanied by the statement in the second paragraph of the caution it appears to me there is enough to amount to slander. At the same time I am bound to say I think it is very mild slander, and as no real damage of any kind has been proved to have resulted from it, so far as the pursuer is concerned, I am really not disposed to recommend any very large amount of damages. I think that any damage or inconvenience that the pursuer may be supposed to have sustained will be fully represented by the sum of £5, and if your Lordships agree with me the only other question that remains for consideration is the question of expenses. If the pursuer is to have £5 of damages it would seem to follow that he should have expenses, but then we must take into account that when this case came originally before us it certainly could not be entertained as a good action of damages, the record being entirely irrelevant. In these circumstances I propose that we should disallow the pursuer his expenses in the Inferior Court, but award him expenses in this Court.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. It seems to me that if people will carry on a business of this kind, in which they profess to deal with the credit of others who are engaged either in daily business or in the course of their ordinary occupation in life they must be very careful they do not go beyond what the law strictly allows. The law does allow the publication of the fact that decrees have gone out in a Court against members of the public, and it is quite legitimate to publish that fact. I must say I think it would be fairer, when such publication is being made, that it should not be in general terms, but there should be a specification of the amount of the decree referred to, so as to give parties some means of knowing what the decree means, and protect defenders against the supposition that matters are very much worse than they really are. In the present case I think there is enough in the caution to warrant the demand for damages, because the defenders have gone beyond what was either reasonable or lawful.

LORD ADAM concurred.

The Court found that the defenders had slandered the pursuer, and found him entitled to £5 as damages, finding him entitled to expenses in the Court of Session.

Counsel for Pursuer (Appellant)—A. J. Young—Gardner. Agent—R. Broatch, L.A.

Counsel for Defenders (Respondent)—Strachan—Watt. Agents—Clark & Macdonald, S.S.C.