

LORD KINNEAR.—I quite agree with your Lordships, and should only desire to add that I do not consider that either anything that has been said or the decision which your Lordships propose to pronounce is in any way inconsistent with the decision in the cases of *Prentice* and *Symington*. I entirely assent to the principle of these decisions, and see no reason whatever for doubting their soundness. But then the principle really is that where a domestic tribunal is established for the determination of disputes between a member of a friendly society and the society itself, the consequent exclusion of the jurisdiction of the courts of the country does not apply to any question which is in substance a dispute between a person claiming to be a member against the denial of the friendly society itself that he is a member. Where the substance of the question is whether the litigant opposed to the society has or has not the rights of a member, it has been decided that the privative jurisdiction of the domestic tribunal is not invoked, and that upon the principle which is quite clearly and forcibly expressed by the Lord President in the latter of the two cases—that a society cannot at one and the same time assert that a person litigating with them is not a member of the society, and at the same time that he is a member and that he is bound by the domestic tribunal which decides only disputes between members and between members and the society. Now, I think it might possibly have been maintained, as indeed it was with great clearness by Mr Christie, that the present case fell within that principle if the only resolution complained of were the resolution that the pursuer had ceased to be a member, because what we are asked ultimately to find on consideration of all the conclusions of the summons is that the resolution by which he was held to have ceased to be a member was invalid, and that he is a member; and that that may resolve into a dispute between him and the Society as to whether he was or was not a member. But then the last resolution is the direct consequence, and it is not disputed—at least I heard no suggestion that it was anything but the necessary consequence, according to the rules, of all the previous resolutions; and therefore the medium through which we are asked to come to the conclusion that the pursuer is still a member is simply that the decisions of the domestic tribunal upon the dispute between him and the Society which he raised first before the tribunal of first instance, and afterwards before the statutory court of appeal, while he was a member, were wrongly decided upon the merits. That is the necessary and only medium through which we are asked to reach the conclusion that the pursuer is still a member of the Society. No doubt it was said that these decisions were *ultra vires*, but upon the explanation which was given in the course of a clear argument by Mr Christie as to what the substantive grounds upon which the plea of *ultra vires* was rested were, it was per-

fectly clear that what was intended was that the decisions were upon their merits erroneous, because the two domestic tribunals before which the question came in succession had wrongly construed and misapplied the rules of their Society. But then that was just the question which was before them as a court of arbitration, and it is of no consequence whether the arbiter has decided rightly or wrongly if he has given a decision upon the question which has been submitted to him for decision by the parties before him; and that the various committees who decided this question were deciding the question put before them by the pursuer himself, and no other question, is as plain as words can make it upon the pursuer's condescendence. I am therefore very clearly of opinion that the cases of *Symington* and *Prentice* do not apply, and that the question is exactly where the Lord Ordinary has put it—in the first place, that there was a court of arbitration instituted by statute and the rules of the Society, and in the next place that the pursuer himself having submitted the question in dispute to these domestic tribunals, the jurisdiction of this Court is therefore excluded. As to the question whether the Society had treated the pursuer harshly or unreasonably or not I desire to express no opinion. I daresay this is a question upon which a good deal might be said upon both sides. I have heard some statements on one side only. The decision of the Court is that it is not before us, and I am unwilling to express any opinion upon a question we cannot decide.

The Court adhered.

Counsel for the Reclaimers—Salvesen, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—C. D. Murray. Agents—Drummond & Reid, W.S.

Thursday, February 25.

## FIRST DIVISION.

GRAY v. WYLLIE.

*Process—Proof—Diligence—Action of Damages for Slander—Alleged Injury to Pursuer's Business—Defender's Right to Recover Pursuer's Business Books and Income-Tax Receipts—Transfer of Business to Company—Recovery of Books of Company.*

In an action of damages for slander the pursuer averred that he had suffered injury to his business by reason of slanderous statements alleged to have been made by the defender regarding the pursuer's business character and his mode of conducting business. The pursuer's business was sold to a limited liability company between the date of the alleged slander and the date of the raising of the action.

Held that the defender (1) was entitled to recover by diligence the business books of the pursuer so far as showing "the profits of the pursuer's business," but (2) was not entitled to recover (a) the pursuer's "private books," or (b) his income-tax returns, or (c) the business books of the company to which the pursuer had sold his business.

Charles Gray, grain merchant, Maxwelltown, Dumfries, brought an action against James Wyllie, grain merchant, Loreburn Park, Dumfries, for £3000 sterling as damages for alleged slander.

The pursuer and defender were rivals in business and competed with others in buying and selling grain in Dumfries and neighbourhood, and elsewhere.

The pursuer averred—“(Cond. 2) The defender has for some time been in the habit of making and circulating certain false, malicious, and slanderous statements regarding the pursuer, which were intended to injure him, and did injure him, in his character, reputation, and business. (Cond. 3) The pursuer believes and avers that the defender has systematically slandered him to a large number of persons, his trade customers and others, with a view to destroying his business and acquiring it for himself.”

The pursuer further set forth the slanderous statements made by the defender to several persons named, and, *inter alios*, to Walter Edgar, and averred—“(Cond. 4) The said Walter Edgar was influenced by the defender's statements, believing them to be true, and would not thereafter trust pursuer in business. (Cond. 7) The pursuer believes and avers that the aforesaid statements upon which he has condescended are only instances in the scheme of malicious slander which the defender conceived and carried out for the purpose of destroying the pursuer's character and business. . . . The said statements . . . have greatly injured the pursuer in his feelings, reputation, character, and business credit.”

The statements complained of were innuendoed as meaning that the pursuer did not pay his debts and was dishonest in business and that it was unsafe to have business dealings with him.

Until the month of April 1903 the pursuer carried on business under his own name, and on or about the 13th of said month he transferred his business to the South of Scotland Milling Company, Limited, Dumfries, and became their principal shareholder and managing director.

After issues had been approved for the trial of the cause, and after notice of trial at the sittings had been given—the effect of which was to remove the process to the Inner House—the defender before the trial moved for a diligence to recover, *inter alia* “(1) The whole business books of the pursuer, including bank books and letter books for the period from January 1, 1900, down to the date of the raising of the present action, that excerpts may be taken therefrom at the sight of the commissioner of all entries therein showing or tending

to show (a) the profits of the pursuer's business during the said period, and (b) the nature and extent of the pursuer's business transactions and his business standing with 'certain persons named,' all customers of the pursuer mentioned on record, or any of said parties. (2) The private books of the pursuer, including letter books, order books, diaries, and note books, during said period, that excerpts may be taken therefrom at the sight of the commissioner of all entries therein relating to the matters mentioned in article 1 hereof. (3) The whole business books, including letter books, of the South of Scotland Milling Company, Limited, Dumfries, for the period from April 1, 1903, down to the present date, that excerpts may be taken therefrom at the sight of the commissioner of all entries therein showing or tending to show (a) the profits of the business of said company during said period, and (b) the nature and extent of said company's transactions with the parties mentioned in article 1 hereof, or any of them. . . . (5) The income-tax returns made and receipts for income-tax paid by the pursuer for the years 1900-1, 1900-2, 1902-3, and by said company for the years 1902-3, 1903-4.”

The following cases were cited:—*Johnston v. Caledonian Railway Company*, December 22, 1892, 20 R. 222, 30 S.L.R. 222; *Christie v. Craik*, July 20, 1900, 2 F. 1287, 37 S.L.R. 503; *Macdonald v. Hedderwick & Sons*, May 16, 1901, 3 F. 674, 38 S.L.R. 455.

LORD ADAM—I am of opinion that article 1 of this specification should be allowed. Under sub-head (a) of article 1 the defender asks for the business books of the pursuer so far as showing “the profits of the pursuer's business.” I am far from thinking that in every case of slander, when one person is said to have slandered another, and the allegation is that the pursuer has suffered damage in character and reputation, the defender will be entitled to recover the pursuer's business books. But this is not a case of that kind at all. The slander alleged directly refers to the pursuer's business character and his mode of conducting his business, and the direct result of the slander is alleged to have been loss of business. This is a special case, differing from ordinary actions of slander. Looking to the authorities of *Christie*, *Johnston*, and *Macdonald*, I think the defender is entitled to recover what he asks under article 1 (a). If that is so as to the general call under sub-head (a), then there can be no objection to granting the specifications regarding the transactions with the persons specified in sub-head (b).

As to article 2, I do not quite know what is meant by “private books.” If they are books relating to the pursuer's business, then they will fall under article 1. If not, then I think the defender should not have them. Therefore article 2 will go out.

With regard to article 3, I do not see how the defender can be entitled to fol-

low the transactions into the hands of the limited company. We are told that the pursuer's business was sold to a limited company in 1903. I do not think the defender is entitled to see what the profits of the limited company were. It is not the same business. We must strike out the whole of article 3.

I am disposed to think that in this case the defender is not entitled to the income-tax returns. These returns are just returns of income generally, and not specially of profits arising from business.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

Counsel for Pursuer — Shaw, K.C. — Dewar. Agent—Alexander Ramsay, S.S.C.

Counsel for Defender—Jameson, K.C.—C. D. Murray. Agents—Bonar, Hunter, & Johnstone, W.S.

Friday February 26.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

### WOOLLEY & SON v. MORRISON.

*Interdict—Interdict against Sale of Liquors in Marked Bottles—Trade Name.*

A firm of beer bottlers, W. & Son, sought to have B. interdicted from selling beer which was not bottled by them in bottles which had "W. & Son" embossed on them. The complainers averred that they had their name put upon the bottles used by them, *inter alia*, as a trade description and to inform the public, and that the public so understood that the contents were bottled by them. After a proof, interdict refused (*affirming* judgment of Lord Kyllachy).

This was an action of suspension and interdict at the instance of Charles Woolley & Son, beer bottlers and aerated water manufacturers, 49 Elm Row, Edinburgh, against William Morrison, wholesale bottler, 2 King's Road, Portobello, in which the complainers sought to have the respondent interdicted "from selling or exposing for sale, or from having in his possession for sale or for any purpose of trade, beer, ales, stout or aerated waters, or any other alcoholic or non-alcoholic drinks, not bottled or manufactured by the complainers contained in bottles which bear the name of the complainers either impressed, embossed, engraved, sand-blasted, moulded, or otherwise marked thereon."

The complainers averred—" (Stat. 2). The quality or condition in which bottled beer, ales, or stout is sold depend upon the care and skill of the bottler. (Stat. 3). The complainers for the purposes of their business own a large number of bottles upon which

their name is marked. The name is in most instances moulded on to the bottle in the process of manufacture. The bottles are purchased by the complainers for use in their own business exclusively, and the name upon them, besides assisting the owners to retrieve their property, is put upon the bottles as a trade name or trade description to inform the public, and the public so understand, that the contents are beer, ales, or stout bottled by the complainers, or aerated waters of the complainers' manufacture. There is a contract between wholesale bottlers in Edinburgh and district, whereby they have formed themselves into an association called The Edinburgh and District Aerated Water Manufacturers Defence Association, Limited, and having its registered office at 57 York Place, Edinburgh. The members of the said association are by the terms of their said contract permitted to lift each others' beer, ale, stout, and aerated water bottles, from which they select those branded or marked with their own name. They then send those which do not belong to them to the bottle exchange or clearing house of their said association, in order that those may then be sent to their respective owners. The said contract is based on the expectation that each bottler will receive back the whole of his own bottles through the medium of the bottle exchange. The respondent is not a member of the bottle exchange, and has never received authority to lift or use the complainers' named bottles. (Stat. 4). The respondent has in the past been using for beer, ales, stout, or aerated waters of his own bottling or manufacture bottles belonging to the complainers and bearing the complainers' name, and the respondent may continue the practice to the detriment of the complainers' business."

The respondent pleaded—" (2). The complainers' statements being unfounded in fact, the note should be refused, with expenses. (5). *Esto* that there has been use by the respondent of the complainers' marked bottles, such use having been accidental, unintentional, and *bona fide*, and attended by no prejudice to the complainers or the public, suspension and interdict should be refused."

After a proof the Lord Ordinary (KYL-LACHY) on 21st November 1903 refused the prayer of the note.

*Opinion.*—" The question in this case, as presented at the discussion, is a question not as to unlawful appropriation of the complainers' property or as to infringement of the complainers' trade mark. The facts, as they have come out may suggest such questions. But they are not raised in this action, nor does the proof contain materials for their decision.

"The complainers' case as presented is rested on a different ground, viz., that the respondent being, like the complainers, a bottler of beer and ale, he (the respondent) has bottled and put into the market beer contained in bottles embossed with the complainers' name, and has thereby, as complainers say, represented that the beer