On 21st February 1911 the Lord Ordinary (CULLEN) conjoined the action at the instance of D. & W. Henderson with that at the instance of Lawrence David Henderson, and on 10th June 1911 pronounced this interlocutor—"In the action at the instance of the pursuer Lawrence David Henderson against the defenders D. & W. Henderson and others, assoilzies the said defenders from the conclusions of the action, and decerns: In the action at the instance of the pursuers D. & W. Henderson and others against the said defender Lawrence David Henderson, decerns against the said defender Lawrence David Henderson, in terms of the conclusions of the action at the instance of the said pursuers D. & W. Henderson and others."

L. D. Henderson presented a reclaiming note against this interlocutor, but in boxing the reclaiming note he only appended prints of the closed record in the action at his instance, and did not append prints of the closed record in the action at the instance of D. & W. Henderson.

When the cause appeared in Single Bills, on the motion of counsel for L. D. Henderson, that it be sent to the roll, counsel for D. & W. Henderson objected to the competency of the reclaiming note.

Argued for the respondents—The reclaiming note was incompetent, for the provisions of the Court of Session Act 1825 (Judicature Act) (6 Geo. IV, cap. 120), sec. 18, and of the Act of Sederunt of 11th July 1828, had not been complied with, and these provisions, or at least those of the statute, were not directory but imperative—*M'Evoy* v. *Braes' Trustees*, January 16, 1891, 18 R. 417, 28 S.L.R. 276; *Wallace* v. *Braid*, February 16, 1899, 1 F. 575, 36 S.L.R. 419; *Blackwood* v. *Summers, Oxenford, & Co.*, May 19, 1899, 1 F. 868, 36 S.L.R. 651; *M'Lachlan* v. *Nelson & Company, Limited*, January 12, 1904, 6 F. 338, 41 S.L.R. 213.

Argued for the reclaimer—Section 18 of the Court of Session Act 1825 was merely directory and not imperative—*Hutchison* v. *Hutchison*, 1908 S.C. 1001, 45 S.L.R. 783; *Burroughes & Watts, Limited* v. *Watson*, 1910 S.C. 727, 47 S.L.R. 638. The mistake was excusable in the circumstances. Alternatively the reclaimer should be allowed to reclaim under the Administration of Justice and Appeals (Scotland) Act 1808 (48 Geo. III, cap. 151), sec. 16—*Tough* v. *Macdonald*, November 24, 1904, 7 F. 324, 42 S.L.R. 180.

At advising—

LORD PRESIDENT—In this case the decisions quoted to us were indubitably conflicting, and accordingly we have reconsidered the whole matter along with the Second Division.

The decision of the Court is that it is within our power to permit prints to be lodged if in our view it was for some excusable cause that they were not lodged at the proper time. We think that in this case there was an excusable cause, looking to the confusion between the two records brought about by the conjoining of the actions, and accordingly we shall send the note to the roll, but we wish it to be distinctly understood that this does not mean that there is to be any relaxation of the rules as to printing and lodging and boxing and so on, and that persons must not think they will be allowed to get their cases to the roll unless there is really a very good cause shown.

LORD JOHNSTON and LORD MACKENZIE concurred.

LORD KINNEAR was absent.

The Court repelled the objection to the competency and appointed the cause to be put on the roll.

Counsel for the Reclaimer—D. P. Fleming. Agents—Hume, M'Gregor, & Company, S.S.C.

Counsel for the Respondents—C. H. Brown. Agents—Webster, Will, & Company, W.S.

Friday, November 24.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

BARR *v.* THE MUSSELBURGH MERCHANTS' ASSOCIATION.

Reparation—Slander—Privilege—Trade Slander—Trade Association—Black List.

A trade association circulated among its members a list which had no heading, and which contained only the names and addresses of certain persons in its district. In an action of damages for slander against the association, at the instance of a person entered on the list, the pursuer averred that it was understood by members of the association that the list was composed of the names of persons who were unworthy of business credit, and that it was known as the "black list." *Held* (1) that the case was relevant, but (2) that the defenders were privileged.

Mackintosh v. *Dun*, [1908] A.C. 390, *distinguished.*

John Barr, china merchant, Musselburgh, *pursuer*, brought an action against the Musselburgh Merchants' Association and the members of committee thereof as representing the association, *defenders*, for payment of £100 as damages for slander contained in a leaflet issued by the association to their members.

The pursuer averred—"(Cond. 2) The defenders' association has for a considerable number of years annually printed, published, and circulated, or caused to be printed, published, and circulated, to and among the traders in Musselburgh and district a list of names and addresses of persons in Musselburgh and district. *The said list is prepared and published by the defenders for the purpose of setting forth the names of persons who* are unworthy

of business credit and whom it would be unsafe for traders to deal with. *It is understood by the members of the association that the list is composed of the names of persons who are unworthy of business credit and with whom it would be unsafe to deal. The list is known and referred to as the Black List.* In particular, the said defenders on or about the year 1909 printed, published, and circulated, or caused to be so printed, published, and circulated, among said traders a list of such names and addresses, and in each of said lists the defenders wrongfully and maliciously and without probable cause included the name and address of the pursuer, and published and circulated said lists with pursuer's name included therein. By so including the name and address of the pursuer in their said list for the said year before mentioned, and publishing and circulating the same as aforesaid, the defenders have repeatedly and persistently, falsely and maliciously, and without probable cause, represented to the traders and business community of Musselburgh and district that pursuer is a person who will not or does not pay his debts, that he is absolutely unworthy of business credit, that he is unsafe or untrustworthy in his dealings, and that all transactions with him should be for cash payments, and not left to be dealt with according to the usual course of trade. Further, by wrongfully and maliciously including pursuer's name in said list the defenders intended to represent, as they falsely and maliciously did represent, to the traders and business community of Musselburgh and district that the pursuer is untrustworthy and a person with whom it is not wise to do business upon the ordinary terms of credit; that the trading community required to be frequently warned against him; and that the pursuer was a person whose financial position was so bad as to render it unsafe for traders to have business relations with him. The said representations so made by the defenders of and concerning the pursuer were false and calumnious and unfounded in fact. They were made maliciously and recklessly by the defenders, who could, had they taken the trouble to inquire, have discovered they were groundless." [The portion printed in italics was added by amendment in the Inner House.]

Defenders admitted (ans. 2) that the list contained the names and addresses of persons resident in the locality whose names had appeared in the various publications issued in Scotland known as "black lists."

The defenders pleaded — "(3) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, and the action should be dismissed, with expenses. (5) The list issued by the defenders' association having been so issued without malice and in discharge of a duty to the members of the association, and being for their benefit, defenders should be assoilzied from the conclusions of the summons."

The Sheriff-Substitute (GUY) allowed a proof, but the Sheriff (MACONOCHIE) recalled the interlocutor of the Sheriff-Substitute and dismissed the action as irrelevant.

The pursuers appealed, and argued — In publishing pursuer's name in their lists defenders had committed an actionable wrong—*Quinn* v. *Leathem*, [1901] A.C. 495. The fact that the lists had no heading and were not *ex facie* defamatory did not matter if they were in fact understood to be lists of persons unworthy of business credit—*Morrison* v. *Ritchie & Company*, March 12, 1902, 4 F. 645, 39 S.L.R. 432. The lists in question were mere general enunciations, and to be justified they ought to contain the particulars of each case—*Crabbe & Robertson* v. *Stubbs Limited*, July 4, 1895, 22 R. 860, *per* Lord M'Laren, p. 864, 32 S.L.R. 650. (2) The defenders were not privileged in issuing the lists, since they were circulated, not for the benefit of the public, but from motives of self-interest—*Mackintosh* v. *Dun*, [1908] A.C. 390. The law as stated in *Quinn* v. *Leathem* (*cit. sup.*) was that to injure a man in his trade without justification was an actionable wrong. To aver malice in such circumstances was not necessary—*South Wales Miners' Federation* v. *Glamorgan Coal Company*, [1905] A.C. 239. In any event pursuer had averred facts and circumstances which inferred malice.

Argued for the defenders—(1) If pursuer had an action at all it must be for slander, and therefore *Quinn* v. *Leathem* (*cit. sup.*) did not apply. But pursuer had made no relevant averment of slander—*M'Laren* v. *Robertson*, January 4, 1859, 21 D. 183. There was no relevant averment of falsehood or any special attack on pursuer's business, as there was in *Bayne & Thomson* v. *Stubbs Limited*, January 29, 1901, 3 F. 408, 38 S.L.R. 308. It was not a libel to say that it was not safe to do business with a person on the ordinary terms of credit. (2) In any event the occasion was privileged, and there was no relevant averment of malice—*Bayne & Thomson* v. *Stubbs Limited* (*cit. sup.*). There was a difference between a company selling information to subscribers for profit as in *Mackintosh* v. *Dun* (*cit. sup.*) and a private association like the present, which only communicated information to its own members—*Fleming* v. *Newton*, February 17, 1848, 6 Bell's App. 175; *Keith* v. *Lauder*, December 23, 1905, 8 F. 356, 43 S.L.R. 230; *Jackson* v. *Kemp*, February 13, 1900 (O.H.), 7 S.L.T. 391; *Waller* v. *Loch*, 1881, 7 Q.B.D. 619; Cooper on Defamation (2nd ed.), p. 170.

At advising—

LORD DUNDAS—The pursuer, who designs himself as a china merchant, residing and carrying on business in Musselburgh, sues the defenders, an association of traders calling themselves "The Musselburgh Merchants' Association," for damages "for injuries sustained by him through the defenders having issued to their members a four-page leaflet or 'black list' containing the names and addresses of people in Musselburgh and vicinity who were there-

in represented as unworthy of credit, which leaflet or 'black list' maliciously, wrongfully, and without probable cause, included the name and address of pursuer, meaning thereby that he was unable to pay his debts and was a person unworthy of credit, whereby pursuer has suffered in his feelings and reputation." Certain persons named as the "office-bearers representing the said association" are called as defenders; but the pursuer's counsel explained that this was done merely to obviate any objection to the association being cited solely in its own name, and not with the intention of asking or obtaining degree against these defenders as individuals. I greatly doubt whether this explanation justifies the pursuer's crave for "decree against the defenders conjunctly and severally"; but in the view which I take of the case it is unnecessary to say more upon this point. The Sheriff-Substitute allowed a proof, but the Sheriff recalled the interlocutor and dismissed the action as irrelevant. The pursuer appealed, and at our bar his counsel asked and obtained leave to amend his record. His averments now disclose, in my opinion, a relevant case, apart from the question of privilege, which I shall presently deal with; and it is unnecessary to consider whether or not I should have been prepared to assent to the learned Sheriff's view in regard to the averments as they stood before him. The pursuer alleges that the defenders' association caused to be prepared and circulated among its members a list of names and addresses of persons in Musselburgh district. "The said list is prepared and published by the defenders for the purpose of setting forth the names of persons who are unworthy of business credit and whom it would be unsafe for traders to deal with. It is understood by members of the association that the list is composed of the names of persons who are unworthy of business credit, and with whom it would be unsafe to deal. The list is known and referred to as the 'Black List.'" The pursuer states that the defenders wrongfully, maliciously, and without probable cause included his name in their black list, to his loss, injury, and damage. It seems to me that the case thus summarised would, if no questions of privilege and malice were involved, be relevant. I may add, however, that it would to my mind be relevant only as an action of slander of the pursuer in regard to his trade or employment; and I decline to follow Mr MacRobert in his ingenious effort to bring the case within the category to which such decisions as *Allen* v. *Flood* ([1898] A.C. 1) and *Quinn* v. *Leathem* ([1901] A.C. 495) belong.

But a further difficulty lies in the pursuer's way. We have to consider whether, even on his own showing, the matter of privilege does not arise; and if it does, whether he has averred (as he would be bound to do) malice on the part of the defenders. This point, which is evidently intended to be raised by the defenders' fifth plea-in-law, does not seem to have been argued in the Courts below, though the Sheriff-Substitute alludes in his note to "malice and privilege as these may be disclosed in the proof." The record on both sides is very meagre (as regards essentials) and ill drawn. But I gather from it, and from the admitted conditions of the argument at our bar, that the defenders are not a company trading as such for profit, but merely a private association of traders who, at their own expense and for the protection of their mutual trading interests, cause to be prepared and circulated annually among their members, but to no one who is not a member, a list of names such as that which is produced and includes the name of the pursuer. The list has no heading, nor anything to indicate with what object it has been put together, but for the purpose of the present argument we may assume the pursuer's account of that matter to be correct.

It was not, I think, disputed, and at all events I am prepared to hold, that an association of traders for the protection of its members' interests by the mutual interchange of information as to the financial stability of persons with whom they may be called upon to trade is not in itself illegal (see, *e.g.*, *Keith* v. *Lauder*, 1905, 8 F. 360). Such an association seems to me to stand on an essentially different footing from that of a company formed for the purpose of acquiring and publishing for profit information as to the pecuniary circumstances of persons in whose solvency (or the reverse) subscribers may be interested. Information so communicated is given at the peril of the company which has chosen to engage in a risky and hazardous commercial enterprise; and their statements, if in fact false, though made in *bona fide*, will not be held privileged. But privilege does, I think, extend to the case of information of a similar sort circulated among the members of an association like the present for the protection of their mutual trade interests, unless the information is not only false in fact but has been obtained and circulated maliciously, or with such recklessness as to its truth or falsehood as the law holds to be equivalent to malice. The law on this matter and the distinction I have indicated are well set out in a recent and authoritative decision of the Privy Council (*Macintosh* v. *Dun*, [1908] A.C. 390), where the opinion of the Committee (consisting of Lord Loreburn, L.C., Lords Ashbourne, Macnaghten, Robertson, Atkinson, and Collins) was delivered by Lord Macnaghten. The defendants there carried on an extensive business as a trade protective society under the name of "The Mercantile Agency," which consisted in obtaining information with reference to the commercial standing and position of persons in New South Wales and elsewhere, and in communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiry on their part; and they issued to their subscribers forms upon which to fill in the substance of their requests for information. The defendants were sued for damages for libel in respect

of certain statements made by them about the plaintiff in response to a request for information by a subscriber. The High Court of Australia entered judgment for the defendants. The Privy Council reversed that decision. The only question raised by the appeal was whether or not the occasion on which the libels (as they were admitted to be) were published was a privileged occasion. Lord Macnaghten's opinion was in the negative. It is important to observe the grounds of his judgment. He first pointed out that the defendants were to be regarded as volunteers in supplying the information, and that their motive in so doing was not a sense of duty, but a matter of business. "Their motive is self-interest. They carry on their trade just as other traders do, in the hope and expectation of making a profit." His Lordship then considered whether it is in the interest of the community and the welfare of society that "the protection which the law throws around communications made in legitimate self-defence, or from a *bona fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people," and gives answer in the negative, because "it is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law." It seems to me that the present defenders' position places them on the safe or favoured side of the line thus drawn by Lord Macnaghten. The information complained of was circulated by them among their members "in legitimate self-defence"; they are not "persons who trade for profit in the characters of other people." I think *Macintosh* v. *Dun* affords a clear and authoritative rule for the decision of questions like this. It may be noted that Lord Macnaghten's opinion was delivered after the citation of a great mass of decisions. His Lordship relied upon a well-known passage, "frequently cited, and always with approval," from the opinion of Lord Wensleydale (then Parke, B.) in *Toogood* v. *Spyring*, 1836, 1 C. M. & R. 181, at p. 193, which I shall quote at length, as I believe it to be a correct statement of Scots (as of English) law—"The law considers such publication (*i.e.* of statements false in fact and injurious to the character of another) as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits." Parke, B., added, a little later—"If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed) the simple fact that there has been some casual bystander cannot alter the nature of the transaction." In *Whiteley* v. *Adams*, 1863, 15 C.B. (N.S.) 392, at p. 414, Erle, C.J., to whose opinion Lord Macnaghten refers, in explaining the circumstances which warrant a judge in holding an occasion to be privileged, includes a communication honestly made "on the ground of an interest in the party making or receiving it"; and goes on to state the underlying principle of the matter (at p. 418) to be "that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest."

I see no reason to doubt that the principles of law laid down or approved in *Macintosh* v. *Dun* are applicable in Scotland as well as in England; and I think it may be deduced from these that the law does, in the general interests of society, extend the protection of privilege to communications made in *bona fide* (though erroneously) about a third person, where the parties making and receiving it have a legitimate business interest in the communication. The conclusion thus reached seems also to fall within the limits of the doctrine laid down by the First Division in *Macdonald* v. *M'Coll*, 1901, 3 F. 1082. Accordingly it appears to me that when this Association circulated the leaflet complained of amongst its members, the communication was privileged, because every one of the members had a legitimate interest in its contents, and that they were entitled to obtain and share these, so long as the matter was gone about honestly and without malice. We were referred during the discussion to *Bayne & Thomson* v. *Stubbs Limited*, 1901, 3 F. 408, where Lord Moncreiff appears to have reserved his opinion as to a question such as we are now dealing with. I am not sure that some of the views expressed by the learned Judges might not, if a similar case arose, be subject to reconsideration in the light of the later and authoritative decision in *Macintosh* v. *Dun*; but it is sufficient to observe that, in any view, *Bayne & Thomson* v. *Stubbs Limited* forms no obstacle to the disposal of the present question in the sense I have indicated.

If my view is correct there seems to be an end of the matter, for though the word "maliciously" is occasionally used by the pursuer, I cannot find in his record anything that amounts to a sufficient averment of malice on the part of the defenders. I accordingly agree with the learned Sheriff in holding — though not upon the same grounds—that the action is irrelevant, and must be dismissed.

LORD SALVESEN — I agree in Lord Dundas's opinion and have little to add. The pursuer's record as now amended is, I think, plainly relevant, and I would have held it to be so even in its original form. The mere fact that the list of names

which the defenders circulate amongst their members does not contain any heading is, in my opinion, immaterial if it in fact conveys to the members receiving it the information that the persons named are unworthy of business credit. The defenders themselves admit that the list contains the names which appear in the various publications issued in Scotland known as "black lists"—that is to say, it is a list of persons against whom decrees in absence have been obtained or against whom judicial proceedings have been taken which suggest that such persons are in embarrassed circumstances. Indeed, such a list might be the more damaging to a particular person included in it because of no reason being given why he was so included. Had the case therefore stopped there I should have been inclined, differing from the Sheriff, to have allowed inquiry.

There is, however, another ground on which the same result as the Sheriff arrived at may be reached. The complaint in the initial writ is that the list was issued by the defenders to their members, and it appears that these members are all traders in Musselburgh, who have formed an association for their own protection in dealing with possible customers. Each of them has a legitimate trade interest in knowing the persons with whom owing to their past history it might reasonably be inferred that they incur more than the average risk in supplying them with goods on credit. Now I think that if one trader in Musselburgh communicates to another, in good faith, information which he has received with regard to a possible customer of both, bearing on such customer's credit, that such a communication is privileged; and it makes no difference that the information is systematically obtained by an official of the association on the instructions of the members for their guidance in their business dealings. The cases referred to by Lord Dundas quite bear out this proposition. It is probably true that a communication of this kind is not made in the discharge of either a public or a private duty, but it is made by the association in the conduct of its own affairs in cases where the interests of each and every member is concerned. These are substantially the words used by Parke, B., in *Toogood's* case, and they are in terms applicable to the present. It would have been a different matter if a statement had been published in some newspaper or to members of the public who were not members of the association. On these short grounds I concur in the judgment proposed.

LORD JUSTICE-CLERK—I am of the same opinion. It is quite true that the absence of a heading from the printed list in question might not be enough if it could be alleged that the list had been got up from malicious motives and intent, but I agree with Lord Salvesen that the issuing of such a list among a number of traders, one to the other, stands in no different position from a communication by one individual trader to another. Now I cannot doubt that if one trader comes to another with *bona fide* information as to the solvency of a third party, there will be no liability attaching to such a communication unless it be shown that the informant was actuated by specific malice. I have no difficulty in concurring in the views which Lord Dundas has stated with such accuracy and completeness.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff.

Counsel for Pursuer and Appellant—MacRobert—Jamieson. Agent—G. Meston Leys, Solicitor.

Counsel for Defenders and Respondents—Morison, K.C.—Mercer. Agent—Alex. Mitchell, Solicitor.

Tuesday, November 28.

SECOND DIVISION.

REID *v.* FREDERICK JOHNSTON & COMPANY.

Process—Proof—Diligence for Recovery of Documents—Reparation—Slander Contained in Newspaper Report—Paragraphs in Previous Issues of Paper Inferring Malice—Recovery of (*a*) *Notes from which Paragraphs Printed,* (*b*) *Communications between Defenders and Local Correspondents,* (*c*) *Letters by Members of Public.*

In an action of damages against newspaper proprietors for a slander alleged to be contained in a report in the paper of a political meeting, the pursuer, who averred malice and founded on paragraphs and letters referring to him published in previous issues of the paper, moved for a diligence to recover (1) manuscript notes or reports from which the paragraphs were printed; (2) correspondence relating to the subject-matter of the paragraphs between the defenders and (*a*) their local correspondents and (*b*) members of the public; (3) (*a*) shorthand or other notes made by the defenders' reporters or correspondents, and (*b*) written reports supplied to the defenders of the proceedings at the meeting; and (4) correspondence between the defenders and their local correspondents referring to the publication of the matters complained of on record.

The Court, in consideration of the detailed averments of malice, *granted* the diligence.

The Rev. Alan Reid, Parish Minister of Slamannan, raised an action against Frederick Johnston & Company, proprietors of the *Falkirk Herald and Midland Counties Journal*, concluding for damages for slander alleged to be contained in a report published in the defenders' newspaper on 14th December 1910,