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 dissmissed 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

clear that it was understood by both parties that the transfer included one-half of Kidd's trustees' five shares.

"There can be no doubt that the books of A. G. Handyside & Co. were subsequently kept in conformity with Mr Handyside's view of the matter. At the preceding balance, on 15th January 1880, there stood at the debit of the joint-adventure account a balance of £813, 5s. 2d., being the price of the shares and interest. This account was closed in January 1881 by a credit entry of a like amount, while each of the partners was debited with a sum of £406, 12s. 7d., and the profits arising on the shares were on four several occasions thereafter, down to February 1883, placed in the books to the credit of the individual partners, while no account of these profits was sent to Kidd's trustees, although a statement of the profits arising on three other shares held by them was periodically sent.

"The 'Danube' adventure was brought to an end by the sale of that vessel in August 1882, the price being payable in August 1883. The sum now sued for, £571, 2s. 6d., does not appear in any account in Handyside & Co.'s books prior to the dissolution of the firm in January 1883, but is one-half of the profits (including a share of the price of the vessel) which would be due to the pursuers Kidd's trustees on the footing that five shares had all along belonged to them, and that there was no valid transfer of the shares to Mr Handyside in February 1881. If that be so, I do not understand that any question is raised as to the sum sued for being the amount due.

"The pursuers deny that Kidd's trustees ever authorised or consented to the sale of the shares to Mr Handyside.

"Mrs Kidd, who was a *sine qua non*, and Mr Kidd, who were two of the four trustees then acting, deny that they ever knew or heard of the transaction, and I see no reason to disbelieve them. Mr Eunson, who took charge of the trust matters, is now dead, but there is no evidence to show that he knew anything about it, while Mr Aitken, the fourth trustee, also denies it. It is no doubt true that in the inventory of Mr Kidd's estate given up for confirmation in November 1880, the amount of Mr Kidd's interest in the 'Danube' was stated to be three shares, being shares which he held in his own name, and that the same was stated to be the amount of his trustees' interest in a circular sent to the trustees by Messrs Handyside & Co. on 26th April 1882 with respect to a proposal to convert that into shares in a limited company, and was approved of by them without observation, but I do not think that any inference that might be drawn from these facts to the effect that the trustees knew that the five shares in question were no longer their property can prevail against the distinct evidence of the trustees that they did not know of or authorise the sale to Mr Handyside. In these circumstances, accordingly, I do not think that it is proved that Mr Aitken had any authority to transfer Kidd's trustees' shares to his partner Mr Handyside, and therefore I think that the trustees were entitled to challenge the sale when it came to their knowledge. I think, therefore, that the rights of parties must be dealt with as if no such transfer had taken place, and that A. G. Handyside & Co. and the individual partners are bound in terms of their letter of 8th October 1879 to credit or pay Kidd's trustees with half of the nett proceeds of the ten shares.

"The firm of A. G. Handyside & Co. was dissolved in January 1883. Mr Aitken, one of the partners, has paid one-half of the share of the proceeds of the 'Danube' due by the firm, and I think Mr Handyside, the other partner, is bound to pay the other half. It cannot be disputed that Mr Handyside knew that the transfer of the five shares to him was intended to include one-half of Mr Kidd's share or interest in the joint adventure, and that he is now in possession of the profits or proceeds effeiring to that one-half share or interest.

"I do not think that it is necessary or desirable to determine in this action whether the account given by Mr Handyside as to what took place between him and Mr Aitken at the time of the transfer of the shares, and the object of that transfer, is proved, because I do not think that, assuming it to be proved, it would be a relevant defence to the action, seeing that in my view, Mr Aitken had no authority from the trustees to act as he is said to have done. It is obvious, on the other hand, that serious questions may possibly arise between Mr Handyside and Mr Aitken out of that transaction, which are not raised in this action, and which it is not advisable to prejudge."

The Lord Ordinary pronounced this interlocutor:—"Decerns in terms of the conclusions of the action, but under reservation of the claims, if any, of the defender Alexander George Handyside against the defender Thomas Aitken in the premises."

The defenders reclaimed, and argued that the form of judgment was wrong, for no action could lie against Handyside unless breach of trust were established against Aitken. If that were established, Aitken was the party against whom to proceed. The letter was not a document of trust, but prescribed only the method of management of the ship. The only title was the bill of sale. Aitken was therefore vested in ten undistinguishable shares, of which he conveyed five to his partner. He never divested himself of his other five. The conveyance as against his own shares was good, whether good against the trust or not.

Argued for pursuers and respondents—Handyside knew that he was purchasing trust-property. The letter was an acknowledgment of trust.

Authority for pursuers and respondents—*Aberdeen Railway Company* v. *Blaikie Brothers*, 1 Macph. 461.

The Court, without delivering opinions, adhered to the judgment of the Lord Ordinary.

Counsel for Pursuers (Respondents)—Pearson—Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders (Reclaimers)—Trayner—Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.