to the fact, there having been in point of fact a decree *in foro* taken against them.

Now, I observe on that statement that it is possible that a statement that a decree was taken in absence may have a different effect on the minds of those to whom it is addressed from a statement that a decree was taken *in foro*, which is not in itself an injurious statement. For the latter statement means only that judgment has been given against one of the parties on a controverted question; and the former may be supposed to mean that the defender was unable or unwilling to pay a just debt, without being able to bring forward any reason for his failure to pay. But then the statement that the decree against the pursuer was one in absence was combined with the previous averment to which I have referred, and with the subsequent averment, that the avowed purpose of the pursuers in publishing the "Black List" is to give information to tradesmen as to bankrupts, insolvents, and defaulters in payment of their just debts and obligations. If all these things are proved satisfactorily to the jury, and the statement that the decree in absence passed against the pursuer is also proved to have been made and to be false, it seems a fair question for the jury whether such an inference can be drawn as the pursuer suggests to his injury.

It is not a question of law, but of the fair meaning which business men would give to the defenders' statements.

I therefore agree with your Lordships that there is issuable matter, but that the pursuer must put in issue not only the fact of publication, but also by an innuendo the injurious meaning of which he complains.

The LORD PRESIDENT was absent.

The Court varied the issue as proposed, and approved of the issue as so varied.

Counsel for the Pursuers—G. Watt—W. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defenders—Sol.-Gen. Shaw, Q.C.—M'Lennan. Agent—Robert Broatch, L. A.

Friday, July 5.

SECOND DIVISION.

[Sheriff Court at Airdrie.

THOMSON *v.* WILSON'S TRUSTEES.

Sheriff — Jurisdiction — Trust — Trustee Resident in England.

A feuar brought an action of damages in the Sheriff Court of the county where his lands were situated, against two trustees, who were his superiors in the feu, on the grounds that the defenders had wrongfully leased the minerals below his lands, which belonged to him, to a mining company; that the company had encroached upon and worked his minerals; and, further, that their operations had brought down the surface. One of the defenders was domiciled and resided in England.

Held that the Sheriff had jurisdiction to try the case, as it arose directly out of the administration of a trust estate situated within the county.

Property—Superior and Vassal—Lease of Vassal's Minerals Wrongfully Granted by Superior—Damage Caused by Mineral Tenant's Operations—Process—Action by Vassal against Superior.

A vassal brought an action of damages against his superior on the ground that he had wrongfully granted a lease of minerals previously feued to the pursuer; that the tenant had encroached upon and worked these minerals; and, further, had brought down the surface of the pursuer's ground by his operations.

Held that the vassal was entitled to bring an action against the superior alone, and plea of "all parties not called" repelled.

John Thomson brought an action in the Sheriff Court of Lanarkshire, at Airdrie, against "William Walkinshaw, Hartley Grange, Winchfield, Hants, England, and John Fisher, accountant, Glasgow, trustees of the late John Wilson, junior, of Arden," in which he craved decree against "the above-named defenders" for payment of £1000.

The pursuer was the proprietor of the *dominium utile* of a small piece of ground, part of the lands of Braefoot, in the parish of Shotts and county of Lanark. The defenders, as trustees of the late John Wilson, junior, were the superiors of the pursuer's feu.

The pursuer averred—"(Cond. 3) The defenders, a number of years ago, leased to the Shotts Iron Company the Slateyband ironstone in the lands of Arden, including, it is believed, the said ironstone in and under the pursuer's feu, and received from the Shotts Iron Company payment of the lordship or value of said ironstone; but the defenders never had any right or title whatever to work, win, or carry away the ironstone or other minerals from or through the pursuer's said property, or to lease the same to the Shotts Iron Company, or to receive said payment. . . . (Cond. 4) In the year 1882, or at some other time to the pursuer unknown, and without his knowledge or consent, the Shotts Iron Company encroached upon and worked out the Slateyband ironstone or other minerals underlying part of the subjects above described and belonging to the pursuer. These operations, which, it is believed, were conducted on the 'longwall' system, otherwise total excavation of the mineral, without leaving any of it to support the surface and buildings thereon in said area, have caused 'sits' or subsidences of the surface, whereby serious and permanent injury and damage have been caused to the said property and buildings erected thereon. The ground intended by the pursuer for building upon has been rendered unfit for that purpose, while the dwelling-houses already erected upon the ground have been cracked or rent

from top to bottom in an irreparable manner, and rendered unsafe and uninhabitable, the tenants having had to be removed. . . . (Cond. 5) The pursuer has sustained actual loss and damage by said encroachment and operations to an extent not less than £600 sterling, while he claims as compensation for illegal seizure or compulsory ejectment from his property and birthplace, for loss of ground for building purposes, loss of rents since May last, value of minerals abstracted, &c., the modified sum of £400 sterling, in all £1000 sterling." . . .

The defenders stated in answer—"(Ans. 3) That by lease dated 24th May and 16th June 1870, Robert Aitken and Walter Mackenzie, accountants in Glasgow, the trustees of the deceased John Wilson, senior, of Dundyvan, the then superiors of the lands feued to pursuer, let to the Shotts Iron Company all and whole the seam or seams of ironstone known as the 'Slateyband,' within the boundaries coloured red on the plan appended to said lease, and signed as relative thereto, so far as belonging to the lessors, and might be found therein, in the lands of Arden, in the parish of New Monkland and county of Lanark, but under the declaration that the said boundaries were not warranted or guaranteed as correct. It was further provided by said lease that the lessees should be bound to satisfy all damages which might be caused to the surface of the ground, or buildings thereon, and which should be sustained by the lessees, their tenants, or others through the lessor's operations, whether above or below ground, all as said lease, which is hereby referred to, more fully bears. The Shotts Iron Company worked the minerals and paid the lessors lordships therefor as provided for in said lease. It is further explained that when the lease was granted the lessors overlooked the fact that the minerals in pursuer's feu-right had not been reserved, and in including said minerals—subject always to the terms of the lease—acted on a mistake. . . . (Ans. 4) Believed to be true that the Shotts Iron Company encroached upon and worked the 'Slateyband' ironstone underlying part of the subjects belonging to the pursuer. *Quoad ultra* denied. . . . (Ans. 5) The pursuer is called on to condescend on the nature of the damage and amount of minerals worked out, and it is averred that defenders cannot be made responsible for any sum beyond the royalties paid them by the Shotts Company, in respect of the ironstone removed from pursuer's feu." . . .

The pursuer pleaded—"(1) The granting by the defenders in said mining lease of permission to work or excavate under pursuer's feu, with the consequent encroachment and operations condescended on, being wrongful and illegal, the defenders are liable to the pursuer for the loss, damage, and injury he has thereby sustained."

The defenders pleaded—"(1) No jurisdiction. (2) No title to sue. (3) All parties not called. (4) The pursuer's statements are irrelevant."

Upon 26th February 1895 the Sheriff-Substitute (MAIR) sustained the first, third, and fourth pleas-in-law for the defenders, and dismissed the action.

The pursuer appealed, and argued—(1) Jurisdiction. The Sheriff-Substitute had sustained this plea of the defender, on the ground that one of the defenders was an Englishman, but the Sheriff Court Act 1876 gave power to execute, edictally or otherwise, a warrant against an Englishman. If power to cite an Englishman was given, there must be power in the Sheriff Court to try the case in which he was cited. This defender had been competently cited in an action relating to lands lying within the sheriffdom, and it had been decided that in such a case the Court had jurisdiction over him—*Culross Water Supply Committee* v. *Smith Sligo's Trustees*, November 6, 1891, 19 R. 58. Where there were more than one trustee or executor in the administration of an estate in Scotland, and one of them, or at least the managing trustee, resided within a sheriffdom, he could be competently cited in that Court—*Black* v. *Duncan*, December 18, 1827, 6 S. 261; *Kerr* v. *Halliday's Executors*, December 17, 1886, 14 R. 251. The effect of personal citation was explained in *Sinclair* v. *Smith*, July 17, 1860, 22 D. 1475. The contract between the Shotts Iron Company and the defender, from which the damage complained of arose, was carried out in Scotland. Even in the case of a *quasi* delict, it had been held that the Sheriff Court had jurisdiction over a person who did not reside within the sheriffdom—*Kermick* v. *Watson*, July 7, 1871, 9 Macph. 984. (2) All parties not called—The pursuer here called the only parties with whom he had any relation. They were the persons who gave the Shotts Company authority to act as they did, although wrongfully, and if they were joint delinquents, the pursuer could select which party he would sue. The case was properly brought against the defenders, because they were liable for the damage done to their feuar's property—*Governors of Stewart's Hospital* v. *Waddell*, July 2, 1890, 17 R. 1077, (3) Relevancy—The pursuer's averments as to damage were as specific as in the circumstances they could be expected to be.

The defenders argued—The Court of Session was the *commune forum* for all foreigners, *vide* Erskine, i. ii. 18. If, however, there was personal citation within the jurisdiction of the Sheriff, and either a delict or the execution of a contract to be considered, the Sheriff would probably, on the authorities, have jurisdiction; in this case, however, there was no personal citation. In the cases cited by the pursuer it was to be noticed that the persons cited were only resident in another county in Scotland, and not in a foreign country. In cases analogous to this the Court of Session had been held to be the proper tribunal—*Kennedy* v. *Kennedy*, December 9, 1884, 12 R. 275; *Ashburton* v. *Escombe*, December 13, 1892, 20 R. 187; *M'Gennis* v. *Rooney*, March 20, 1891, 18 R. 817; *Robertson's Trus-*

tees v. *Nicholson*, July 13, 1888, 15 R. 914. (2) All parties not called. The defenders were not the proper respondents in this action. They were sued as trustees, and could only be personally responsible for their own wrongdoing in their management of the trust-estate, not for that of third parties. It was not said that they were wrongdoers; it was the pursuer's case that the Shotts Iron Company had caused the damage; they therefore were the proper persons to answer for the alleged damage. (3) Relevancy. In any case, the pursuer ought to have made more specific allegations of what had been done and the damage caused.

At advising—

LORD TRAYNER—The Sheriff-Substitute has sustained three pleas maintained by the defenders and dismissed the action. The first of these pleas is the most important, namely, that the Sheriff has no jurisdiction. I have had some difficulty about that plea, but on consideration of the question and of the authorities bearing upon it have come to the opinion that the judgment of the Sheriff-Substitute is wrong, and that the plea ought to be repelled. The defenders are trustees under a Scotch trust, and are administering it in Scotland. The trust-estate, so far as we know, is all situated in the county of Lanark, and one of the defenders (there are but two) resides in that county. In these circumstances, and having regard to the opinions expressed in the case of *Halliday's Executors*, 14 R. 251, and by Lord Fraser (as Sheriff of Renfrew) in the case of *Watt* (Guthrie's Sheriff Court Cases, 241) I am of opinion that the Sheriff has jurisdiction in the present case, which is brought to sustain a claim arising directly out of the management and administration of the trust in Lanarkshire.

The plea to the relevancy of the action should also be repelled. The Sheriff-Substitute desiderates a specification of certain details which the pursuer from the nature of the case cannot possibly give, and details, which, if the case has any foundation at all, are already known to the defenders or their tenants. There is enough averred to cover the pursuer's demand.

As to the third plea of all parties not called, I think the pursuer was quite entitled to direct his action against the persons whom he thought liable for the damage he says he has sustained, and that he is not bound to call any other. He may not be able to establish liability against the present defenders, but that is no reason for holding that he is not entitled to have his case against them tried without calling other defenders against whom at present he advances no claim.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

LORD RUTHERFURD CLARK was absent.

The Court pronounced this interlocutor—"Sustain the appeal, and recal the interlocutor appealed against: Repel the 1st, 3rd, and 4th pleas-in-law for the defender, and remit the cause back to the Sheriff-Substitute to proceed therein as accords," &c.

Counsel for the Pursuer — Vary Campbell—Dewar. Agents—Drummond & Reid, S.S.C.

Counsel for the Defenders—Asher, Q.C. —Moncreiff. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, July 6.

SECOND DIVISION.

CAMPBELL, PETITIONER.

Parent and Child—Custody of Illegitimate Child.

A petition by a mother for the custody of her illegitimate pupil children, whom she had handed over five years previously to the care of a home for children, *refused*, the Court being of opinion that it was not in the interests of the children to deliver them to the petitioner.

Jane Campbell, weaver, residing at 1 New Buildings, Cambusbarron, presented a petition to the Court, in which she averred "that the petitioner in or about the month of October 1889, being in very destitute circumstances, was induced to place Maggie Ann Campbell and Susan Campbell, two of her children, in the Children's Home, Whinwell House, Stirling, and the said children were duly admitted into that institution by Miss Annie K. Croall, the matron. The petitioner is a mill-worker, and her object was to have the children temporarily taken care of until she was able to find work and provide a home for them. About six months after the date of the admission of the children to the said institution, the petitioner, having found work, was anxious to resume custody of her said children, and has frequently and urgently applied to Miss Annie K. Croall to deliver them to her, but she has refused to do so. The said children, Maggie Ann Campbell and Susan Campbell, were at the time of their admission into the home aged five and four years respectively, and they are both illegitimate." She prayed the Court "to find the petitioner entitled to the custody of her said children, and to decern and ordain the said Miss Annie K. Croall liable in expenses."

Miss Croall lodged answers, in which she averred that the two children were admitted into the Home at the pressing and reiterated request of the petitioner; that when admitted they were both sickly and starved little creatures in a deplorable condition of health; that no application had been made for their re-delivery by the mother till quite recently; that since 1890 no payment had been made by the petitioner to account of the board of her children, and that the petitioner had not visited