there is in respect of these a balance of Ninety-three pounds ten shillings and sixpence still resting-owing by the defender: Further, as regards the other quantities of stock differences on which also are sued for in this action, Find that these shares were parts of larger purchases made on behalf of the pursuer himself, or for the general purposes of his business, and were not in implement of the alleged order to buy for the defender: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against, decern against the defender for the said sum of Ninety-three pounds ten shillings and sixpence, with interest thereon from the 7th day of March 1884 till paid: *Quoad ultra* assoilzie the defender from the conclusions of the action." . . .

Counsel for Pursuer (Respondent) — D.-F. Mackintosh, Q.C.—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for Defender (Appellant)—Jameson—Dickson. Agent—Alexander Gordon, S.S.C.

Friday, March 4.

FIRST DIVISION.

KEITH AND OTHERS *v.* SHEPHERD (SKINNER'S TRUSTEE).

Bankruptcy—Appeal by Creditors against Trustee—Deliverance—Title of Trustee to Maintain his own Deliverance.

Where a trustee has sustained a creditor's claim to a preferable ranking, it is for the creditor, and not for the trustee, to support the deliverance if it is appealed against, and the appeal must therefore be served upon such creditor as well as upon the trustee.

A trustee in a sequestration gave certain creditors a preferable ranking. The other creditors appealed against the deliverance to the Sheriff-Substitute, who ordered service of the note of appeal on the trustee; no service was ordered on the preferred creditors. The trustee appeared in support of his deliverance, which the Sheriff-Substitute recalled. Thereafter the trustee appealed to the Court of Session. The Court *held* that the preferred creditors were the proper parties to the process, that the trustee should retire from it altogether, and allowed them to be sisted to it on giving an undertaking to relieve the trustee of all past expenses incurred by him in the process.

The estate of James Skinner, farmer, Bethelnie, Aberdeenshire, was sequestrated on 22d February 1884, and George Shepherd was appointed trustee. Messrs M'Intosh and Caie, who were creditors on the estate, claimed to be ranked preferably for the sum of £1854, 13s. 8d., less £284, 17s. 9d. already paid to account, and the trustee admitted this claim to a preferable ranking. Alexander Keith and a number of other creditors on Skinner's estate appealed to the Sheriff-Substitute against this deliverance of the trustee, both in respect of its allowing a ranking and of its allowing a preferable ranking. The prayer of the note of appeal craved the Sheriff "to recal the said deliverance, and to ordain the trustee to reject the said claim for the amount admitted in said deliverance, and for a preferable ranking, and to find the appellants entitled to their expenses." It did not ask service on any party.

The Sheriff-Substitute (DOVE WILSON) ordered service on Shepherd, the trustee, and appointed parties to be heard. No service was ordered on M'Intosh and Caie, and none took place.

The trustee appeared in support of his own deliverance, maintaining it to be well founded; and on 6th December 1886, after considering a minute by him and answers for the appellants, the Sheriff-Substitute recalled the deliverance of the trustee and remitted to him to rank the claim of Messrs M'Intosh and Caie as an ordinary claim.

The trustee appealed to the Court of Session.

Objection to the competency of the appeal was taken by the respondents, the creditors, who had successfully appealed to the Sheriff.

They argued—The appeal by the trustee was incompetent. He had no interest, and he had no title. A trustee's duties were nowhere more clearly laid down than in 2 Bell's Comm. (M'Laren's ed.) p. 319. He ought to represent the general body of creditors, and not any individual creditor or class of creditors—*Mann* v. *Sinclair*, June 20, 1879, 6 R. 1078; *Corbet* v. *Waddell*, November 13, 1879, 7 R. 200; *Maxwell Witham* v. *Teenan's Trustee*, March 20, 1884, 11 R. 776. The trustee in bankruptcy was not entitled to prosecute on appeal, except as representing the whole creditors—*Forbes* v. *Manson*, 1851, 13 D. 1272. In all the cases cited for the trustee, the trustee represented the whole body of creditors. Here the appeal had been brought by the wrong man, and the proposal to sist the preferred creditors could not make it any better. Otherwise anyone might bring an appeal, and the right person might be brought in afterwards by a sist. That would be analogous to sisting a new pursuer, and a new pursuer could not be sisted except of consent—*Anderson* v. *Harboe*, December 12, 1871, 10 Macph. 217; *Morison* v. *Gowans*, November 1, 1873, 1 R. 116; *Hislop* v. *MacRitchie's Trustees*, December 17, 1879, 7 R. 384, and June 23, 1881, 8 R. (H. of L.) 95.

The trustee argued — If this appeal were bad there was no process, and the question whether the trustee had a title to bring the appeal depended on whether he had a title in the Court below. The appeal here was a process of review. If he had a right to appear in the Sheriff Court as a party to the suit, he had a right to carry out this further step. He had a title in the Inferior Court, for the sequestration statute contemplated that the trustee should defend his own deliverance. The principle that it was not the creditors but the trustee who should maintain his deliverance was shown in *Baird and Brown* v. *Stirrat's Trustee*, January 26, 1872, 10 Macph. 414; *Robertson* v. *Robertson's Trustee*, December 19, 1885, 13 R. 424; *Russell* v. *Taylor and Nicholson*, November 26, 1869, 8 Macph. 219; *Scottish Provincial Assurance Company* v. *Christie*, 1859, 21 D. 333; *Brown* v. *Whyte*, 1846, 8 D. 822. If the trustee was right as against the creditors who objected to the preference in

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 interested 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 compearing 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 absence 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-