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ON THE PUBLICATION KNOWN AMONG TRADERS

AS

The Black List,

MORE PARTICULARLY WITH REFERENCE TO IRISH JUDGMENTS.

BY

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Read before the Dublin Statistical Society,

27th April, 1860.

DUBLIN:
HODGES, SMITH, AND CO., 104, GRAFTON-STREET.

1860.

R. D. WEBB, PRINTER, 177, GREAT BRUNSWICK STREET, DUBLIN.

THE BLACK LIST.

The subject to which I invite the consideration of the Society is one of considerable interest and importance, and has of late attracted no small share of attention. It is, I think, peculiarly a question for the opinion of the community at large, whether the publications to which I refer shall be continued or suppressed; and that opinion may, it appears to me, well be elicited by a discussion of the case in all its bearings, so that no hasty conclusion shall be formed upon erroneous or insufficient premises. For such a discussion this Society possesses peculiar advantages, and therefore I bring the matter under your notice. It is a question upon which it is desirable to elicit public opinion, inasmuch as if these Publications are sanctioned by the existing laws, it may need the aid of the Legislature to prevent their being continued, should such suppression be deemed expedient, and the general desire of the community will in that view doubtless have a very important effect. Every member of society is liable to be affected either beneficially or injuriously by these Publications; it is, therefore, of moment to each of us to consider whether it is for the advantage of society at large that the knowledge thereby circulated should be promulgated, or whether the exigencies of ~~society~~ do not rather require that access to records which, though apparently implying pecuniary necessity, do not, in truth, deserve that interpretation, shall be confined to those who are directly interested in investigating the particular cases in which they are themselves concerned.

It has long been the practice to publish lists of Bankrupts and Insolvents; and obviously it is of essential importance to the trading community to possess the information thus afforded, and to be enabled to regulate their dealings accordingly; but it is only comparatively recently that to the lists of Bankrupts and Insolvents have been added lists of persons against whom Judgments have been entered, or Bills of Sale registered. This is now done in several sheets

published at various intervals. In the private list published as a supplement to Perry's Bankrupt and Insolvent Weekly Gazette are contained lists of "warrants of attorney filed," "bills of sale, filed under the statute 17 and 18 Vic., c. 36;" "County Court judgments," "Irish judgments," and "extracts from the Scotch Registers on Protests and Bills of Exchange." (In Scotland, when a man signs a bill of exchange as accepter, drawer, or indorser, the law holds that he consents to judgment passing against him when the bill becomes due, on production to the Court by the holder of a Notarial instrument of protest, certifying presentment of the bill and nonpayment.) The sheet called the "Mercantile Test" supplies similar information. It does not contain the County Court judgments.

These lists and others of a like character are published in London. In Ireland a sheet is published of Judgments entered and registered, and of Bills of Sale. A prospectus was lately circulated of a "Registry Journal of Ireland," more comprehensive in its nature, but whether it has been published I have not been able to ascertain. Commonly all are known as "Black Lists."

Now all these Publications have for their object the laudable purpose of enabling the trader to know to whom he may safely give credit, and who are in circumstances rendering more caution requisite, and it cannot be denied that such information must be so far of service to the commercial world. The most important mercantile transactions are based upon credit, and the fluctuations of the public funds afford a familiar instance of its extreme susceptibility to external influences, even when conducted on the largest scale. Of course the more that is known of the private affairs of those with whom we deal, the less we are required to risk in entrusting them with our property. If Judgments in Ireland entered against individuals were true guides to their solvency, and tests of their credit, I should not be disposed to object to their being published. It is because this is not the case that I think the publication, in so far as Judgments are concerned, of questionable justice and prudence. The argument against the publication of Judgments is stronger than against Bills of Sale, though as to the latter many instances have been told me of the mischief resulting from the practice. In Ireland a Judgment is the common form of security given upon various occasions, without in any way indicating the solvency or otherwise of the party by whom it is given. In cases of family settlement

most usually a portion of the arrangement is effected by means of a bond with warrant of attorney for confessing judgment, the conditions of the bond probably not arising for many years. Again, when in various cases a principal is required to find sureties, a bond and warrant is likewise the customary form adopted. So far from the Judgment against the sureties being an indication of indebtedness, it is the very reverse, and represents their solvency; yet in the registry, in all the cases I have named, the Judgment appears as a debt of record, equally as if recovered in a hostile suit, and against a party unable to meet his creditors. In these cases, too, the legal form of making the penalty of the bond double the amount of the sum to be secured, causes the Judgment to appear twice as great as the debt is in fact.

But, after all, it may be said, what harm does this publishing of Judgments do the solvent man, while it puts traders on their guard against those who are not so? In the first place, it does tend to injure the general credit of the solvent, to be placed in the same category with the needy and distressed; and as the list makes no distinction, and merely records the fact that Judgments have been registered against certain individuals, without entering into particulars (for which, indeed, no materials are at present available), it throws a suspicion over all whose names appear on the list. This is no idle or imaginary grievance. I have spoken to many solicitors on the subject, and they have almost unanimously condemned the practice, and many have told me of cases within their own knowledge of injurious consequences having resulted. One gentleman of high standing in the profession writes to me as follows :—

"As you are making enquiry into the working of the 'Black List,' I beg to bring under your notice an instance of the injury it effects to men in trade, which came under my own observation.

"A gentleman doing a large trade as a miller, in which he had been most successful, and in the course of which he had, within the last few years, laid out upwards £10,000 on his mill concerns, made an arrangement with the Bank for an overdrawn account to the extent of £4,000, to secure which he gave a mortgage on his mill and machinery, &c. This mortgage had, as a matter of business, to be registered as a Bill of Sale. In a few days after it was executed, the gentleman came here in the greatest state of distress and excitement, when he told me that, in consequence of the mortgage appearing in

that list, his credit was completely stopped ; that a cargo of corn he had purchased was refused delivery to him, until he had lodged the cash for the amount, £2,000, in the Bank of Ireland. This he was in a position to do at once, and if it was otherwise he might have been ruined. Now I know that man was perfectly solvent, and so far from the mortgage to the Bank being disadvantageous to others dealing with him, it was beneficial to them, as it enabled him to go into the market and pay cash instead of getting corn on credit. That mortgage was not to secure an old debt, but to enable him to carry on his business more independently. When *bona fide* judgments appear against persons in trade, in ninty-nine cases out of one hundred those persons are all but insolvent, and the damage is done before their creditors become aware of it by means of this list. As another instance of the impropriety of those lists, I may mention I had this morning a letter from a gentleman of large fortune, and Deputy-lieutenant of his County, in which he says, making enquiry about a loan, 'Shall I be shown up in the Black Lists?' "

This letter, it will be observed, relates to a Bill of Sale. Another solicitor told me of the case of a client of his who made arrangements for obtaining a sum of money to pay off some small debts, but the party who was about to lend, seeing a Judgment in the Black List against the borrower, refused to complete the arrangement, although the Judgment so recorded was one of the very debts about to be paid. Again, within the last few days, a client required from his solicitor (who informed me of the fact) a loan upon landed security. On its being suggested that a bond and warrant of attorney would be the readiest mode of carrying the transaction into effect, he declined, saying that he was engaged in trade, it would be ruin to him to have the Judgment published, and he must, therefore, endeavour to raise the money by means of a bill of exchange. This case illustrates a further evil resulting from the practice, namely, that it drives borrowers to take advantage of bill discounters, and pay, of course, a much higher rate of interest than they would otherwise be called upon for.

I find, further, that the Incorporated Society of Attorneys and Solicitors has memorialed the Lord Chancellor and Chief Justices to put a stop to the practice, stating "The circulation of such lists has been found productive of considerable injury ; not only to fair and honest traders but to other parties not engaged in trade, whose

names may appear therein as having judgments or other incumbrances against them, but which, if explained, would not be injurious to their credit; and many parties not in business are deterred from becoming security for their friends owing to the lists in question."

It is a maxim of law as well as morals not to injure one man to serve another, and it seems hardly consistent with this to mix up the solvent and the distressed in a common category, and expose the former to the distrust resulting from such an association.

There is, moreover, a sentiment entitled to be respected, namely, the reluctance we naturally feel to have our private affairs divulged to a number of persons who are in nowise interested therein. The registration of Judgments was provided as a security to the purchaser of land, that he might be able to discover, by a search in a public office, what incumbrances affected the land he desired to purchase. This was a transaction interesting only to the parties concerned, and the law did not contemplate the registry being published to other parties. No doubt the Black Lists are sold to subscribers only, and have various directions attached, that they are to be treated as confidential. But with public Chambers of Commerce in all our chief towns, the secrecy thus attempted cannot be very closely kept. The same argument that would justify the publication of the Black Lists would seem to support the publication of the Income Tax Returns, and, in fact, of all dealings between man and man. All the information thus afforded would, doubtless, tend to diminish the risk of trade, but would at the same time check the freedom of social intercourse, and render each man a spy upon his neighbour.

The question then arises, what does the law say as to the Black Lists. Are they legal or not? The question of the legality of the publication of the Register of Bills Protested in Scotland has been the subject of legal decision, in favour of the publication. Our Scotch neighbours are not disposed to submit quietly to an injury to their pockets, and accordingly a trader in Scotland brought the question before the Scotch courts to prevent the publication, and he succeeded; but on appeal to the House of Lords the decision was reversed. I do not think the principle is the same as to the Scotch Protests and Irish Judgments. The former represent *bona fide* debts due by the party against whom they are entered. In the case of Irish judgments, this, as I have shown, is by no means necessarily the case; at the same time the decision is a very important one upon

the general question, and I think it worth while citing at some length.

HOUSE OF LORDS.*

February 10th, 1848.

WILLIAM FLEMING and others ... ... *Appellants.*
WILLIAM HOOD NEWTON ... ... *Respondent.*

THIS was an appeal against a decree of the Court of Session, by which suspension and interdict had been granted against the appellants, under the following circumstances. The appellants were the Directors of the Scottish Mercantile Society, and the printer to that Society. The Society had been formed of merchants and traders, and its object was declared to be "to concentrate and bring together from time to time a body of information for the exclusive use of the members, relating to the mercantile credit of the trading community, with the view of diminishing the hazards to which mercantile men were exposed." The third rule of the Society was to the following effect:—"The secretary shall collect from the general records of protests, hornings, and other records of diligences kept for Scotland at Edinburgh, the names and designations of debtors in trade, and otherwise appearing in these records. The secretary shall likewise excerpt from the *Edinburgh Gazette* the names and descriptions of sequestered bankrupts, and all notices of applications for *cessio bonorum*. . The whole information so collected shall be printed and forwarded monthly or oftener, as the general Committee of Directors shall think proper, to each member of the Society respectively." The fifth rule declares, that "the information contained in the printed record, so forwarded to members, shall be confined to themselves for business purposes, and no member shall communicate or use such information for other purposes, under the penalty of deprivation of membership." The Society printed the information thus obtained in a book called "The Scottish Mercantile Society's Record." This book was known among the trading community as "The Black List."

The respondent had dishonored two promissory notes for £48 and £100, and Andrew Miller, the payee of the same, had had them duly protested, and the protests duly registered according to the laws of Scotland. This registry was established by various acts of parliament, which enacted that "such register shall be patent to all the lieges." Fees were provided for searching and taking minutes. The Society had in the usual manner taken a copy of the register in which the protests for non-payment of the respondent's bills had appeared, and his name was about to be published together with those of other persons in the Society's book, which was a mere copy of the registers, when he applied to the Court of Session for an interim interdict to prevent the publication. The case came before Lord Robertson, Lord-ordinary, when his lordship granted the *interim*

* Reported I. H. L. C., 363.

interdict, and ordered the case to be reported for the opinions of the Lords of the second division of the Court of Session. The other judges were consulted and six of them, the Lord President, and Lords Fullarton, Cunningham, Ivory Wood, and Robertson, thought the interdict ought to be granted ; Lords Jeffrey, Mackenzie, and Murray were of a different opinion. When the judges of the second division decided the case, the Lord Justice Clerk and Lord Moncrieff concurred in opinion with the majority of the consulted judges. Lord Cockburn agreed with the minority, and Lord Medwyn declined giving an opinion. Under these circumstances the court decreed for the respondent. The present appeal was entered against this decree.

The Lord Chancellor (Cottenham), after expressing doubts as to the jurisdiction of the court below to grant the interdict as interfering with the jurisdiction of juries over libel, proceeds : "I do not pursue this question further, because, assuming the jurisdiction of the court to be as extensive as it claimed, I think that in this particular case it has been improperly exercised.

"Bills and notes dishonoured are by certain acts of parliament to be registered. From the register the appellants are in the practice of publishing lists, copies, or excerpts, and the object of the interdict is to restrain the appellants from printing in such lists the name of the respondent, *i. e.* he, admitting the facts that the two notes in question have been dishonored by him, prays that the fact may not be published. He himself, by the application for the interdict, not only admits the fact, but gives to that fact a greater degree of publicity than would have attended it if his name had been inserted in the list.

"If the publication interdicted had been a narrative or statement injurious to the party complaining, and which he had a right to prevent, the observation might not apply ; but in this particular case, the jurisdiction by interdict being to prevent a wrong, we find it exercised in a case in which it could not possibly have any such effect. *I found my opinion upon this, that the publication of the fact purposed to be inserted in the appellants' lists has been made by the act of parliament in certain registers, the contents of which are public property and the publication of them authorized..*

"The Act of 1681, ch. 20, enacts, that foreign bills shall be registerable in the books of Council and Session, 'to the effect that it may have the authority of the judge for the process to issue in like and in the same manner as upon registered bonds, and decrees of registration proceeding upon consent of parties.' Subsequent acts extended these provisions to inland bills and promissory notes. The result of them all is to give this registration the effect of a decree or judgment of the Court of Session. It is equivalent to what in this country we call a judgment upon a warrant of attorney. In neither case does the court interfere, but in both, as in cases of judgment by default and decreet in absence, the party having a right to the authority of the court to confirm his claim obtains the judgment as of course. Whether that judgment is obtained by authority of parliament, or by the consent of parties, or by the practice of the court, appears to me to be immaterial. It is for all purposes a judgment of the court unti altered or reversed, and entitled to all the attributes of any judgment after the longest and most contested litigations.

"This, indeed, is not in dispute. The Lord Justice Clerk says in his judgment—'I hold the register to be a proper record of court, as much as the actual book of procedure now on the table, and entered up from day to day by the

clerks. The party appears with his protest and asks the court for a certain decree upon it, which decree is not obtained by deliverance which leaves the court, but by an entry in the book of court.'

"Is it then unlawful to state or publish the direct judgment of courts of justice? If their proceedings are public, so must be the result of such proceedings, namely, the judgment. For although the steps preliminary to the judgment are not transacted in open court (the whole being incontestible in that stage), yet the whole is supposed to be the result of regular proceedings in court. The register is, therefore, in its nature public, but it is especially made so for purposes distinct from the object of giving effect to the right of the party. So Lord Bankton states in the passage referred to, 4. 4. 18.

"The Act of Registration of 1696, provides that the register under the clerk-register's keeping 'shall be patent to all the lieges.' This includes the books of council and session in which the entry of protests is kept.

"The 55th Geo. III. c. 70, regulates the keeping of registers of deeds and instruments of protest; section 27 of the 1 and 2 Geo. IV. c. 38, provides for making indexes to certain and divers registers, and amongst others, to adjudications recorded in the books of council and session, for the purpose of easy reference, and that they may be made accessible to the public. It appears that in fact no index was made of the register of protests, but by the table of fees, a different fee is payable for searches where there is and where there is not an index, so that the contents of all the registers, whether with indexes or not, are open to the public on payment of a certain fee.

"So far are the proceedings of the court from being considered shut against the public, that by the 1 and 2 Vic. c. 118, s. 22, it is provided that the minute book of the Court of Session, Teind Court, the record of edictal citations, the weekly calling list of causes, and the weekly printed roll of outer house and tried causes, shall be printed by the respective keepers thereof, and shall be sold to the public at the lowest rate which will repay the necessary expense of printing the same.

"From these references it appears to me clear that the legislature has thought that the public at large ought to be able to have recourse to the register, and of all the public the appellants have the highest interest in the knowledge of its contents. They are engaged in mercantile affairs, in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search this register is not disputed, and that they might communicate to each other what they had found there is equally certain. What they have done is only doing this by a common agent, and giving the information by means of printing. No doubt if the matter be a libel, this is a publication of it, but the transaction disproves any malice, and shows a legitimate object for the act done."

It will be observed that the decision of the House of Lords rested very much on the Scotch statute which enacted that the register should be "patent to all the lieges." In considering the bearing which this decision has upon the publication of Judgments in Ireland, it becomes requisite to examine the mode in which they are entered in the offices of the Law Courts and in the General

Office for Registration of Judgments. First, as to the offices of the Law Courts. In the office of each Court is kept a book in which is entered the particulars of every judgment recovered. Previously to the statute 7 and 8 Vic., c. 90, these books were kept in the name of the defendant—that is, the alphabetical arrangement adopted in them was to place the defendant's name first. This was to facilitate searches, that a purchaser might be enabled to ascertain with readiness the particulars of every judgment entered against the person of whose land he was purchaser. These searches when requisite were made by the officers of the court, and special assistants were provided to make them. The only direction as to the making these judgment books open to the public is contained in the schedule to the Act 7 and 8 Vic., c. 107 (which is enacted to be taken as part of the act), declaring the duties of the Record Assistant to be, "To have the care and custody of the judgment rolls of the court, and of the books of record containing entries of judgments, satisfactions, and assignments, and all matters relating thereto; to enter upon the roll the abstracts of satisfactions and assignments; to compile and number the rolls in correspondence with the entries relating thereto, so that they may be easy of reference, *and to produce the same for public information within the hours fixed by the Master*, to aid the Master in making searches, and to do all such acts as properly belong to his office."

When the statute was prepared, it was intended the searches should continue to be made in the offices of the Law Courts, and officers were especially provided to make them; but in the same Session of Parliament was passed the statute 7 and 8 Vic., c. 90, by which a new Office was created, in which all Judgments were directed to be registered, so that a purchaser might have only one place to search instead of three, and searches in the Law Court Offices were expressly prohibited. By the 17th section of this statute it is enacted, "That from and after the 1st November, 1845, no search shall be made for any of the matters authorised to be registered under this act, except at the Office to be established under the provisions of this act." The 11th section enacts, "That all persons shall be at liberty to search all the books which are to be kept under the provisions of this Act, for the charge of one shilling, and no more, whether some only or all the books shall be searched, and no multiplication of books is to increase the fee." Strangers

are not, however, authorised to make copies or extracts from the books; on the contrary, the statute contains special enactments providing for searches to be given under the hand of the Registrar of Judgments, upon a stamped requisition, a form for which is furnished by the Statute. In consequence of this Act, a new mode was adopted for keeping the Judgment books in the offices of the Law Courts. Instead of being kept as theretofore in the name of the defendant, they were thenceforth kept in the name of the plaintiff, so that a party could only learn the particulars of the judgments appearing against the defendant at the suit of one plaintiff. Shortly after the passing of the Act, a motion was made to the Court of Exchequer for permission to search for warrants and judgments affecting an individual. (The case was ex-parte Bagot, 8, I. L. R., 295, November 25, 1845.) After some discussion, the Court refused the motion, the Chief Baron saying, "The words of the Act are very strong—that no search shall be made except at the Office to be established under it. The Legislature have taken away the officers and machinery for making searches here. If this be not the construction intended to be put upon this act by the Legislature, they must provide a remedy." I have ascertained the practice in the Courts of Queen's Bench and Exchequer to be in accordance with this decision. A stranger is not permitted to search the judgment books. In the Common Pleas a contrary practice prevails, and the public are allowed unrestricted access to the books. I conceive the direction that the "officer is to produce the book for the information of the public," must be understood as subject to such regulations as public interest requires, and cannot be held to contravene the express prohibition against search contained in the 7th and 8th Vic., c. 90.

It therefore appears to me that, so far as the Law Court offices are concerned, there is no statutable impediment to the Judges making such regulations respecting the right to examine and search the judgment books as they may think fit. There is a clause in the Law Court Regulation Act, 1st and 2nd George IV., c. 53, of importance, should the Judges think fit to extend the prohibition to Bills of Sale, under which are comprised all assurances of personal chattels, and in relation to one of which the transaction occurred mentioned in the letter I have read to the society. By the 24th section it is enacted that "It shall not be lawful for any officer of

the said several Courts to cause, or direct, or knowingly to permit, any copy of any pleading, affidavit, order, judgment, or other thing belonging to the respective offices, or any part thereof, to be made in any other place, or by any other person, than in the proper office of such officer, and by a writing clerk employed by such officer in such office." A penalty of £20 is imposed upon any officer acting contrary to this enactment for every offence. Though the Act for Registration of Bills of Sale contains directions for permission to search the register, it also provides that copies of extracts therefrom are to be provided by the officers of the court; and if the Judges are of opinion that the principle of the Lord Chancellor's judgment in the case of Fleming *v.* Newton has not decided the question as to Irish judgments and Bills of Sale, and that it is expedient to comply with the memorial of the attorneys and solicitors, it will be probably sufficient to direct the provisions of the statute against copies being made by strangers to be enforced, as I apprehend the publication of the register would hardly be worth the cost of the copies.

Upon inquiry as to the practice in the General Office for Registration of Judgments, I find that a search is not permitted unless upon a requisition duly filled up according to the statute, and on a shilling stamp. A separate requisition is required for each name searched against. Thus, unless the party desirous of searching is previously acquainted with some of the particulars of the party against whom he searches, he cannot fill up the requisition or make the search, and a general search in the office to ascertain against what parties judgments have been registered is for this reason obviously impossible. This necessary previous information then can only be obtained in the offices of the law courts, which, as I have already suggested, are, as to the right to make copies or extracts, without which searches can be of no value for purposes of publication, *quite under the control of the Judges.* Even as it is, if the office regulations of the Law Court Offices and the Judgment Office *are enforced,* I am at a loss to know how the information is obtained, except, perhaps, as to the Court of Common Pleas.

I have thus placed before the Society such information as I have been able to collect upon the subject. It seems to me to be a question, as I stated at the outset, for the decision of the community at large, if the Publication is for their advantage or the contrary. That there are benefits likely to result from its continuance appears pro-

bable, as tending to give increased security to trade. That, on the other hand, evil to individuals may result, I think I have shown. As in many questions of social import, the result to ascertain is in which way the balance preponderates. My own opinion is against the expediency of publishing—at all events, Irish judgments—as being not true tests of insolvency, being liable to result in private injury, to put a stop to the adoption of a security which has many and peculiar advantages, and driving the honest trader to have recourse to the lesser security of bills of exchange at high interest.

It is worth the consideration of the trading community, whether in the end they may not be injured by the very efforts thus made to protect them. A solicitor has told me of a case in which he knows of four Judgments that are not registered, from reluctance to expose the debtor to the risk of the Black List, and this practice will be likely to increase. The protection intended by the law will then be lost, and a less considerate creditor may obtain advantage of his fellows. The practice of resorting to bills of exchange and of not registering judgments will manifestly tend to render more insecure than ever the dealings of traders, and this result, should it arise, will be the consequence of an over-zealous anxiety for their protection.

It has been suggested that Judgments entered should be published by the authority of the Court as part of its daily procedure, and that thus the suspicion attached to the circulation of lists marked "confidential," and desired to be kept secret would be removed. This, in my opinion, would be an improvement on the present practice. If judgments are to be published, let it be done officially and above board ; and further, could some means be devised of distinguishing those given as collateral security or to secure the performance of the conditions of a bond, from judgments recovered in hostile suits—a great portion of the existing objections would be removed.

If public opinion should condemn the existing practice, it will be for the Judges to say if the law enables them to suppress it, or so to regulate it as that it shall no longer act injuriously. Should it not be within their power, the Legislature must provide a remedy. The idea of checking the publication as within the law of libel is quite out of the question. No one imagines the respectable and honorable men by whom I know some of the lists are compiled, to be actuated by any motive save that of serving the interests of the trading

community; and I believe the proprietors of those publications are fully sensible of the importance of having the legal and economic views of the subject discussed, so that their exertions to increase the security of trade shall rest upon the firm basis of enlightened public opinion.
