

the same. And it is further ordered that the said cause be remitted back to the Court of Session in Scotland, to review their judgment respecting the letters of suspension, and the conclusions of the declarator.

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v.
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For Appellants, *Wm. Adam, Ad. Gillies.*

For Respondents, *Edw. Law, Arch. Campbell, jun.*

JOHN MORTHLAND, Esq., Advocate, and } *Appellants ;*
JOHN JOHNSTON, Printer in Edinburgh, }
JOHN CADELL, Esq. of Cockenzie, - *Respondent.*

House of Lords, 26th June 1802.

DAMAGES FOR PRINTING AND PUBLISHING A LIBEL—VERITAS CONVICTI—RELEVANCY—PROCESS.—1. Held that a letter, addressed to a person in Edinburgh, giving an account of a riot and disturbance at Tranent, and reflecting on the respondent's conduct therein, as one of the Deputy-Lieutenants of the county, and which was brought to the Scots Chronicle, and published, was a libel, and £300 of damages awarded to the party. (2.) Held not relevant to charge one of the defenders, who was alleged to be editor, "as legal adviser or abettor of that paper, or as held, or believed and understood to be concerned in it." (3.) It was objected that here there had been no actual proof of the publication of the letter in the newspaper adduced. But this objection was repelled. (4.) The *veritas convictii* of what was stated in the libel pleaded, but the defence was not sustained. (5.) Objection was stated to the summons, on the ground that, three weeks after it was served, a new summons was raised and signeted, and to which, as was alleged, there was affixed the date of the first summons, and this, it was alleged, was done in order to remedy a defect in that summons. Held the objection not good.

This was an action of damages brought at the instance of the respondent, for a libel published in the Edinburgh newspaper called the Scots Chronicle, of which the appellants were alleged respectively to be the editor and publisher.

It appeared, that on the occasion of the passing of the militia act in 1797, for embodying a militia force in Scotland, the preparation of the lists of the persons liable to be ballotted was thereby devolved upon the schoolmasters and constables of the different parishes, subject to the correc-

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tion and review of the Lords Lieutenants of the counties, and their deputies. The respondent was a deputy-lieutenant. A hostile feeling seemed to have diffused itself among the minds of the people to this act, owing, as was stated, to artful and ill disposed persons poisoning their minds, by giving forth false and exaggerated accounts as to the destination of the militia. This disaffection had led to riots in several districts. And, subsequently to some of these, the Marquis of Tweeddale, as Lord Lieutenant of the county of Haddington, having directed his deputies, among whom the respondent was one, to hold a district meeting in the town of Tranent, upon the 29th of August 1797, for the purpose of correcting these lists, and having been informed that the people intended to oppose them, orders were given to provide a military force for the protection of the intended meeting.

It was stated by the respondent, that on their way to the inn in Tranent, where this meeting was to be held, they were grossly insulted by a very numerous assembly of men and women, who had been brought together in some measure by beating of a drum through the adjoining villages on the preceding evening. The respondent, in particular, was repeatedly threatened with personal violence; and one of the mob was heard to call out to him, that they would have his heart's blood. Notwithstanding, however, of these threatenings, they ordered the cavalry to retire from the place of meeting, and to take post at the extremity of the town.

The Deputies then proceeded to complete the correction of the lists of two of the parishes; several objections to the names upon which, were sustained, and the excuses of several persons accepted, after judicial examination.

The examination of the lists of the third parish had commenced, when a paper, it was alleged, of a most seditious and incendiary nature, threatening violence in case the magistrates proceeded further, was presented to the meeting. The bearer of this paper having been dismissed only with a reprimand, a general assault was immediately commenced by the mob, with stones and broken bottles, which were thrown with great violence through the windows into the room where the magistrates were assembled, and which obliged them to fly for refuge to different parts of the house. The cavalry, which was then called to assist the constables in protecting the door, having been repeatedly

driven back, and every endeavour made to dissuade the people from riot, the Riot Act was then read, and the mob duly warned of their danger, by the respondent himself, at the imminent peril of his life, it at length became necessary to give the cavalry orders to fire upon them. The consequence of which was, that several persons lost their lives. In a day or two afterwards, the following letter appeared in the Scots Chronicle newspaper :

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“ Letter from a Person at Tranent to his Wife in
 Edinburgh.”

“ Dear Wife.—This comes to acquaint you, that you need
 “ not weary for my return home, for my sister is to be
 “ buried this afternoon at 4 o’clock, and I cannot come away
 “ till I see her decently buried. I am sorry to inform you
 “ of the cruelties that were committed here yesterday.
 “ There were six persons shot dead on the spot, of which
 “ my sister was one, and she was shot within the door of a
 “ house in the town. The number of wounded is not yet
 “ ascertained ; but I am just now informed that fifteen dead
 “ corpses were this morning found in the corn fields, and it
 “ is not known how many more may be found when the
 “ corn is cut, as the Cinque Port cavalry patrolled through
 “ the fields and high roads to the distance of a mile or two
 “ round Tranent, and fired upon with pistols, and cut with
 “ their swords, all and sundry that they met. Several
 “ decent people were killed at that distance, who were
 “ about their lawful business, and totally unconcerned with
 “ what was going on in the town. I am informed that this
 “ was unprovoked on the part of the people ; for they as-
 “ sembled peaceably by public intimation from the Lord
 “ Lieutenant and his Deputies, to state their objections, if
 “ they had any, to the roll ; but when they presented their
 “ petitions and certificates, they were totally rejected, espe-
 “ cially by Mr. Cadell, who told the people he would re-
 “ ceive none of them, as they were determined to enforce
 “ the act ; and as the people insisted to be heard, he, with
 “ his own hands, pushed them from the door ; upon which
 “ some boys and women threw several stones at the win-
 “ dows. The assistance of the cavalry was immediately
 “ called for, and ordered to charge sword in hand ; and
 “ then followed the bloody business above related. But
 “ my hand can scarcely hold the pen longer to give you any

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“ further details. — I am, your loving Husband, A. R.
 “ Tranent, August 30th.”

Such was the statement of the respondent. The appellant, John Johnston, on the other hand, stated, that on the 31st of Aug. 1797, there was delivered at his printing-office a general account of the events at Tranent, written with apparent temper and candour; and its truth being confirmed by many concurring reports, the appellant resolved to print it on the day following, Sept. 1, being the next day in course of publishing his newspaper. That on the evening of the same day (31st August) Archibald Rodger, a tradesman and housekeeper in Edinburgh, accompanied by three of his neighbours, called at the appellant's house, and showed a letter he had written to his wife, the day before, from Tranent, (whither he had gone to attend the funeral of his sister, who was unfortunately killed there), giving an account of the behaviour of the people, of the Deputy Lieutenants, and of the military on the 29th. Accordingly, in the Scots Chronicle published on the day following, there was inserted the foresaid general account of the transactions at Tranent, and also the letter above mentioned, altered in such a manner as, in the appellant's apprehension, to be harmless and inoffensive to any person. And the chief fact laid hold of in the general account printed in the Scots Chronicle was, that a number of innocent people, when peaceably travelling on the high ways, or busy in their occupations of husbandry in the fields, at the distance of one or two miles from Tranent, and totally ignorant of what passed there, were attacked and killed by a party of dragoons who attended the Deputy Lieutenants on that occasion. A few days after, a different account of the transactions appeared in the other Scotch papers; and in about three weeks thereafter there was published in all these papers a libel, in which the Scots Chronicle was called an *infamous paper*, and the account of the affair given by it *false and scandalous*. Amidst these strong expressions no exception was taken to the above letter, and no insinuation dropped of any improper imputation as against Mr. Cadell. And in the investigation under the authority of the Court of Justiciary it was established by the precognition, that the account given in the paper was an extremely mitigated one. It was further stated, that it was his intention to publish the letter, by omitting the name of Mr. Cadell, mentioned in it, but being called off to attend the Sheriff, he was pre-

vented from doing this, although, on his return to the office, he ordered his name to be expunged from the remainder of the paper still to be thrown off.

The original letter mentioned Captain Finlay along with Mr. Cadell, but in that published Captain Finlay's name was omitted, and Mr. Cadell's alone published.

These being the facts, it was further alleged, in the defences given in, that the summons of damages was raised by Mr. Buchan, not on the employment of Mr. Cadell, but on the employment of certain persons in the county of Haddington. But thereafter a new summons was raised by Mr. Cathcart, Mr. Cadell's son-in-law, at the distance of three weeks after the date and service of the first, to which, it was alleged, was affixed the date of the first summons. It was carried to the signet office for the signet. The officer there asked if the first summons had been served? the clerk replied it had not, which was contrary to fact, he affixed the stamp to the new summons as of the date of the old. And it was therefore maintained that the new summons was false in two respects, 1st. In its date of signing; 2d. In its date of signeting; and that the old summons was cancelled. The defences also called for production of every paper on which the pursuer founded in his libel, but the Lord Ordinary found it unnecessary in *hoc statu* to produce these. The defences, therefore, be-

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sides the defence of *veritas convicii*, stated objections to the summons so raised, and the Lord Ordinary, in considering these, of this date, repelled "the first defence
 "pleaded for the said John Johnston, as to the calumnious
 "nature of the action; and, before answer as to the other
 "defences, ordains the said John Johnston, defender, to
 "give in a special condescendence of facts he avers in sup-
 "port of the fourth article of his defences."

Feb. 16, 1798.

The appellant having represented against this interlocutor, and a report being lodged from the keeper of the signet, as to the practice in regard to signeting summonses in such cases, the appellant presented an additional petition, contending that the report was confined to the issuing duplicates of the same summons, and, consequently, could not apply to the present case. The Lord Ordinary took the

Mar. 7, 1798.

case to report to the Court, who pronounced this interlocutor,
 "Repel the objections to the action, adhere to the Lord Ordina-
 "nary's interlocutor, and refuse the desire of both petitions;
 "renew the order on the defender, John Johnston, to give
 "a special condescendence of the facts he avers and offers

July 3, 1798.

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 ————— " and appoint the same to be printed, and put into the
 MORTHLAND, " boxes on Friday next, the cause to be advised on Satur-
 &c. " day or Tuesday next, with or without condescendence."
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The appellant obeyed this order, and put in a condescendence of the facts above related, and which were offered to be proved. Considerable debate then ensued upon the relevancy of the facts so stated to go to proof, particularly with reference to the excesses of the military, although it was stated in the summons that his account of those excesses was false, and inserted for the purpose of aggravating the libel against the pursuer.

July 11, 1798. The following interlocutor was pronounced:—" They, " before answer, allow the pursuer a proof of his libel and " condescendence, and to the defenders a conjunct proba- " tion; and the question having been put by the Court to " the counsel for the defender, John Johnston, whether he " demanded a proof of the 4th article of his condescendence, " with its subdivisions, as connected with, or applicable to " the conduct of the pursuer, Mr. Cadell; and his coun- " sel having declined to make any explicit answer to that " question, but insisted that his client was entitled to prove " the whole articles of his condescendence, whether imput- " able to Mr. Cadell personally or not. The Lords do " further allow the defenders to prove articles 1st, 2d, and " 3d of their condescendence, and allow the pursuer a con- " junct probation thereanent; and refuse to allow any proof " of the 4th article, with its subdivisions, nor of the 5th ar- " ticle, which are not explicitly stated as applicable to the " pursuer—(this was the conduct of the military); and " grants commission to the Sheriffs Deputes of Edinburgh " and Haddington, or either of them, to take the said proof " at Edinburgh and Haddington, any of the lawful days of " the ensuing vacation," &c.* The proof was led.

* Opinions of the Judges on point of Form.

LORD PRESIDENT CAMPBELL.—" I am of opinion that the objections, in point of form, are of little importance. The cause ought to have gone to proof before now upon the summons, for it is quite clear that duplicates of such summonses are usual in practice, and it seems admitted that there was a regular summons duly executed. This is sufficient. None but the party himself could afterwards discharge it. If it was unduly cancelled, the tenor may be proved.

In all these proceedings Mr. Morthland denied that he was the proprietor, editor, and publisher of the Scots Chronicle; and, in the course of the proof, having discovered that the pursuer, Mr. Cadell, and others employed by

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But this is not necessary. By the old forms, even a blunder could be altered; and still is so in the Admiralty Court.

“The cause, therefore, ought to go to proof. The pursuer must be allowed a proof of this libel in common form, and the defenders a conjunct probation. The defenders are likewise entitled to a proof of their defences, in so far as pertinent to the cause, and allowable in such cases.”

LORD ESKGROVE.—“I am for repelling the objection.”

LORD MEADOWBANK.—“I am of the same opinion.”

LORD ARMADALE.—“There is a danger of substituting one summons for another.”

As to the Veritas Convicii.

LORD PRESIDENT CAMPBELL.—“It has been often disputed, whether the proof of the *veritas convicii* be allowable. In England there is a distinction made between the criminal or penal prosecution *ad vindictam publicam*, and the civil action of damages. In the former, no proof is allowed to justify the words spoken or written. It is considered merely as a breach of public police; and it is equally an offence, whether the facts be true or false. But, in the latter, which is for reparation of a damage to the individual, it is held to be *damnum absque injuria*, if the facts be true, and the party is not entitled to reparation. In either case, a wicked and malicious intention must be set forth. *Vide* Termly Reports, vol. iii. p. 428; and act 32 Geo. III. c. 60.

“With us, for a long time, and indeed till very lately, we stuck by the doctrine of the civil law, that *veritas convicii non excusat*, whether the action was of a civil or of a criminal nature, and therefore, in the case of Hamilton against Rutherford, in 1771, the Court, upon very full argument, refused to allow a proof of the bribery imputed to the pursuer. Mor. 13924.

“In later cases, however, the Court has been disposed to adopt the English practice; see Dict. vol. iv. p. 230. The two cases of Chalmers against Douglas, 22d February 1785,—affirmed in the House of Lords; and Peat against Smith, 6th March 1793, support that state of the law. *Vide ante* vol. iii. p. 26. Mor. 13941.

“Perhaps the Court went a little too far, in the case of Chalmers, by going back into the history of the lady’s conduct at an early life. But the case of Peat against Smith seems to have been well decided; and the Court did not indiscriminately allow a proof of the *veritas*, but made distinctions. See the interlocutors. Mor. 13941.

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him or his agents, had been guilty of practices apparently tending to influence or tamper with the witnesses, the appellants presented a petition and complaint to the Court; but the Court found “neither the facts charged, nor those acknowledged, are sufficient to bar any further procedure

“In the present case, the defenders have not yet stated precisely what they offer to prove upon this head, (*veritas convicii.*) They cannot be allowed to prove against third parties, unconnected with pursuer; *e. g.* supposing it had been said in the letter, that one of the persons killed was a young lady, who was with child to a person not her husband. Some such thing was thrown out in the case of Peat; but a proof of it was not allowed.

“The circumstance of the pursuer saying in his libel, that the letter complained of was false and malicious in general terms, is nothing to the purpose. The falsehood and malice will be presumed, if nothing to the contrary appears. The proof lies on the defenders, to justify their account in publishing this attack upon the conduct of a public officer, by justifying the act of publication as lawful, and, *inter alia*, by proving the truth of what is there asserted, so far as it applies to the pursuer, Mr. Cadell, or to his conduct in the premises. But so far as it does not apply to him, it is out of the cause altogether, and resolves into a charge against third parties, who are not here to defend themselves.

“But the defenders may so state their allegation as to make it apply to Mr. Cadell, and to entitle them to a proof of it; thus they may, in their defences *in causa*, or in their answers to the condescendence, state pointedly that Mr. Cadell, acting as a Justice of the Peace, and Deputy Lieutenant, did, without any just reason, call for the aid and assistance of the Cinque Port Cavalry, and did give orders or directions to the commanding officer to cause his men fire upon the persons then assembled, or attack them sword in hand, whereby a number of innocent persons, who were not engaged in any tumult, nor doing any harm at the time, were put to death, and Mr. Cadell thereby did in effect commit murder, which is the crime insinuated against him in the letter first published.

“The defenders therefore ought immediately to state in writing what they offer to prove, and if the Court, upon considering it, shall be of opinion that it comes within the proper description of *veritas convicii*, it will allow the defenders a proof of their defence, and the pursuer a conjunct probation relative thereto.

“But the cause having been too long delayed already, the pursuer is entitled to have an act and commission for proving his libel, in order that the proof may go on during the vacation, although the defenders should not be ready to state pointedly what they undertake to prove in defence, so far as the *veritas convicii* is concerned.”

“ in this action ;” but superseded consideration of the petition *quoad ultra*.

The fact stated in the letter, that “ when the people presented their petitions and certificates, they were totally rejected, especially by Mr. Cadell, who told the people he would receive none of them, as they were determined to enforce the act,” was disproved. It was proved that Mr. Cadell offered to receive every petition and certificate brought forward, and, in point of fact, did receive these, and a great many were struck off the lists.

On the other hand, it was proved by others that Mr. Cadell had struck at several of them with a stick—had cried, “ knock them down,”—had rejected some petitions and certificates,—had used violent and harsh language; and had ordered the military to act against the people, upon being violently attacked by them. The defender Morthland, on the proof, pleaded that it had not been proved that he was connected with the Scots Chronicle, at the time libelled, either as editor, proprietor, or publisher of the paper; and that on no other ground could he be held liable for the publication.

The Court pronounced this interlocutor: “ Find that the letter published in the newspaper called the Scots Chronicle, dated 1st September, and complained of by the pursuer, was, and is a false, calumnious, and injurious libel against the pursuer: Find it not relevant to charge the defender, John Morthland, as the legal adviser or abettor of that paper, or as held, believed, and understood to be concerned in it; but find the charge against him contained in the libelled summons and condescendence relevant in other respects: Find it sufficiently instructed and proved that the said defender, John Morthland, was, at the first establishment of that newspaper, the only ostensible proprietor, conductor, and editor thereof; and although, at subsequent periods, John Lawder and Robert Paul, who have been engaged by him as clerks in the printing office, were prevailed on successively to assume the ostensible name and character of sole proprietors of the paper, in certain bonds granted by them to the stamp office, yet the said John Morthland still continued, down to the days of the publication complained of, to take the general direction and superintendence of that newspaper, in the same way as before; and the interest and concern which he originally had in that business, for himself and others his employers, never did truly cease, or undergo any material al-

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“ teration : Find it sufficiently proved, as well 'as admitted,
 “ that the other defender, John Johnston, was and is the
 “ printer of the said newspaper, and also concerned in the
 “ publication thereof : Repel the defences pleaded for both
 “ defenders : Find them jointly and severally liable to the
 “ pursuer in damages. Modify these damages to £300
 “ Sterling, and decern : Find them also liable in ex-
 “ penses.”*

* Opinions of the Judges on the Merits.

LORD PRESIDENT CAMPBELL.—“ 1st.—The first question is, Whether the publication is defamatory, that is, amounts to a libel, or not ?

“ Little doubt can be entertained as to this. The whole letter must be taken together, and not a few words picked out from one part of it, signifying only that petitions were refused,—or “ ordered to charge sword in hand,” &c. &c.

“ The object in view is plain ; and he who takes it upon him to publish and circulate such a paper, is an enemy not only to good order, but to the liberty of the press itself, which cannot exist if so abused.

“ In the letter's original state, the blame was divided between Captain Finlay and Mr. Cadell, but the former was left out, probably because the publishers were afraid that he might resent it in a different way than by an action at law. But they seem to have considered the pursuer as fair game, and the letter evidently ascribes to his conduct, all the consequences which ensued that day.

“ A more heinous injury cannot be conceived against a magistrate, acting in his public official character. The very corrections made on the letter show that the publishers went deliberately to work. The leaving his name blank in some of the copies makes little difference, as the description, at any rate, included him. The object was to hold him up to resentment of all the lower classes of people, who were then inflamed to a degree of frenzy against the militia law.

“ It is not necessary that any specific damage should be proved. The law of Scotland gives damages in such a case in name of *solutium*, and here they ought to be exemplary.

“ The next question is, Who are the parties liable ?

“ Johnston the printer, makes little defence, except one, which aggravates the injury, by insisting on the *veritas convicii*. The witnesses adduced upon this head were among the rioters, and have given a false and exaggerated view of the matter. It is clear from the depositions of Major Wight and Mr. Gray, &c., that the pursuer conducted himself with propriety ; that the calling for the assistance of the military was unavoidable ; and that the unfortunate consequences which ensued were imputable, not to the pursuer, but to those who instigated and encouraged the riot.

Thereafter the Court resumed consideration of the petition and complaint, and found, “ In respect it is admitted “ by Mr. John Cadell, that upon the occasion mentioned “ in the complaint, he said to Mrs. Kedgley, she had been

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“ Johnston seems willing, if the above defences are overruled, which they must be, to make himself a sacrifice in this cause, for he seems to admit even a greater share of responsibility than he probably had. He gives himself up, not only as the printer, but the sole *editor*; which last character he might perhaps have divided with others.

“ As to Mr. Morthland, he is variously described in the summons and in the condescendence. Some part of the description given to him in the former, seems not relevant, but the designations of proprietor and editor are relevant; and articles 3d and 4th of the condescendence, where he is said also to be conductor, director, manager, and superintendent, are likewise relevant. These last words are indeed no more than amplifications, or further explanations of the preceding epithet, viz. *editor*.

“ Johnston, in his Dictionary, makes this term synonymous with publisher. The one is the Latin word, the other the English. He who prepares a work for publication is literally the editor; and this seems to be nearly the same thing with publisher. The act 38 Geo. III. c. 78, § 28, seems also to consider them as synonymous.

“ That Mr. Morthland set out as the editor or chief person concerned in the publication, or, as one of the witnesses calls him, the chief man in the Chronicle office, is made out by his own letters, p. 176, &c. and during the whole time that Lauder was in the office. Johnston himself swears that Lauder was unfit to be an editor, and therefore took a great deal of assistance from Mr. Morthland. He says, that after Lauder was dismissed, and Paul introduced as proprietor, he, Johnston, became the editor or compiler of the paper; but admits that he got some assistance from Mr. Morthland for a month or two, though his name was given up as the sole editor in the stamp office. He seems desirous it should be understood that Mr. Morthland ceased to be an assistant editor, just immediately before the Tranent business, yet we find him continuing to take an active concern as to the books, and receiving the London newspapers and letters, &c. all along; and it is an awkward circumstance, that we find him in the printing office, at the very moments of the publication.

“ Mr. Morthland appears to have become more cautious of appearing in any distinct character, as connected with this publication; and therefore the name of editor is given to the printer, whose salary of £100 was not thereby increased; and the name of proprietor to another clerk in the office, whose situation was even subordinate, and with a salary only of £52.

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“ guilty of perjury when examined as a witness; find that
 “ his having done so was highly improper and censurable,
 “ and the complainers were justifiable in bringing the com-
 “ plaint: Find Mr. Cadell liable to the complainers in

“ The pursuer of this action, which is a mere civil action of damages on account of a defamatory libel, and which does not require the same strictness of form that a criminal action would do, had no occasion to give any other description to the defenders, than merely that they were concerned in the publication of the abuse complained of. It is no matter, whether as proprietor, printer, editor, publisher, conductor, or in any other way; it is sufficient that they are art and part in the publication, or accessory to it in any shape.

“ In the present case, there is much contrariety in the parole evidence, so far as Mr. Morthland is concerned, owing partly to the prejudices of the witnesses on the one side or the other. It is therefore extremely difficult to pronounce what was Mr. Morthland’s precise situation with respect to this newspaper, but not difficult to see that he took an active concern in it, if this be thought sufficiently relevant, and sufficiently within the terms used in laying the action. The proprietor of a paper may be an infant; but the manager of a paper is more clearly liable. At the sametime, the proprietor is also responsible for the general conduct of his paper.”

LORD MEADOWBANK.—“ Suppose he had been trustee for the subscribers, the truster would be liable for the conduct of the business under him, and for the debts contracted on account of it.”

LORD CRAIG.—“ What if a vessel was run down, and that the ship which did the damage was a smuggler, and sent out under ostensible names? I think Morthland liable.”

LORD BANNATYNE.—“ I doubt as to his responsibility. I doubt if the property ever was in Morthland. There is no evidence of that, and nothing but suspicion. The character of editor stood in Johnston. And the terms art and part are not enough to subject him in liability. If his assistance was merely voluntarily and occasional, such as happens almost in every paper daily, by persons in other respects no way connected with it, is he to be held liable? I cannot assent to that proposition.”

LORD GLENLEE.—“ Morthland’s liability is the natural result of what he himself admitted. The original subscription goes into his hands; and he is the employer of Paul, &c., for the benefit and behoof of his constituents. If he has a control over the management, this is enough. The case of Innes, who fell into the pit, is an illustration.”

LORD CRAIG.—“ On reconsideration, I think the libel a scandalous one as to Johnston; but I doubt whether Morthland be liable. Constructive proprietor is not sufficient.”

“ expenses, which they modify to fifteen guineas, decern
 “ therefor, and for the full expense of extract; and further
 “ find and amerciate Mr. Cadell in the sum of ten guineas,
 “ to be paid to the collector for the poor.”

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The appellants reclaimed against the interlocutor in the principal cause, but the Court adhered.

Against the interlocutors in the principal cause the appellants brought an appeal to the House of Lords.

Pleaded for Mr. Johnston.—The original summons in this action was cancelled and suppressed, in the manner that has

LORD ARMADALE.—“ I incline to be of the same opinion. Certain parties must be responsible; but, in the case of a ship running down another, the owners are liable, though ignorant, and innocent of the injury done, just because they are the owners, and so responsible; but here it is different. Others appear as the avowed editor and proprietor. If we depart from the actual publication of this letter, we must fix the full character upon him from which we infer responsibility. In the case of a vessel, would the interest that creditors have upon a respondentia bond make them liable? Suppose such a creditor on board—suppose he is one personally at the helm—or one that writes in the log book, would these make him liable?”

LORD HERMAND.—“ The real evidence here is to be attended to, and that evidence connects Morthland in such a way as makes him liable.”

LORD JUSTICE CLERK.—“ I am of the same opinion.”

LORD ANCKERVILLE.—“ I think the case altogether one of trifling circumstance. The letter innocent and inoffensive”

LORD BALMUTO.—“ It is clearly a libel, and Morthland liable, as the chief manager of the paper.”

LORD CULLEN.—“ We should have had more light on the law of the case. Vide Buller’s *Nisi Prius Cases*. I think Johnston clearly liable, but there may be circumstances in mitigation. 1st. There is no *animus injurandi*. 2d. He softened the expression, in publishing the letter. The word Cadell was underscored in the original. As to Morthland, I have doubts. Why did he not call Paul in the summons? Summons too loose, and an undue degree of latitude taken. It was the pursuer’s duty to be more precise. I think there is no evidence of property in Morthland.”

LORD MEADOWBANK.—“ This is clearly a libel. Both defenders are liable. It may be that the claim of property in Morthland is not made out, and that the claim as manager is scarcely sufficient; but the real ground is, that the true proprietors are concealed behind.”

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been stated; after which, it is humbly thought, that the action, or instance necessarily fell to the ground. No action can proceed without a writ of summons, and where the writ is purposely vitiated, cancelled, or destroyed, by the pursuer himself, nothing remains to which the defender can be compelled to make his answer or defence.

After the parties have gone to issue in Court, if an accident happens to the writ of summons, or to any other paper, the appellants do not conceive such accident to afford a ground for abating the action; though, in that case, it is always in practice necessary to prove judicially the tenor and contents of the writ so accidentally lost, by an action of proving the tenor. But here the pursuer cancelled, vitiated, and abandoned his original summons altogether, and totally departed from his action proceeding on that summons.

It is true, the respondent produced a certificate from John Hume, substitute keeper of the Signet, "that it has been the uniform practice to issue from his office, a duplicate or more copies of any summons previously signeted, upon production of the signeted summons; the duplicate or other summons being of the same tenor as the first signeted summons." But these duplicates here alluded to are used where there are several defenders, each duplicate being a warrant for citation. They are only warrants for *future* citation, and do not apply to citations *already given*. The duplicate in this case was resorted to for the purpose of concealing a defect in the original summons. But even supposing it is competent for an action to proceed upon such duplicate, yet, as that very duplicate was *vitiated in date*, and falsified in the signeting, by putting the date of the signing and signeting to the original summons, which had been executed three weeks before, it was equally invalid and inept. No doubt, no trace of the original summons is to be found on the records of the signet—a fact curious enough—although by an express regulation this is enjoined. But it has been decided by several cases, that the inserting a false date, *ex proposito*, renders the writ null. Yet, notwithstanding this, the Court of Session repelled the defences on this head, and sustained the instance.

2. On the merits, the appellant maintains that no legal evidence of the publication of the newspaper founded on in the summons is yet produced. The Lord Ordinary and the Court seem to have thought that it was sufficient to prove and produce the said paper in the course of the process, though not along with the summons, in the regular way, and in terms of their

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own act of sederunt. But their Lordships did not go the length of saying, that a pursuer had no occasion to prove and produce the writing he founded on at all. The respondent, however, stands in this singular predicament, of having come into Court with a summons, which, according to all the forms of judicial procedure hitherto known and observed in practice, is *funditus* void and null, and has been allowed to proceed to an ultimate decision, without producing and authenticating the writing narrated in his summons. Besides, the words above quoted from the letter, which are said to have been libellous, do not import a slanderous charge against Mr. Cadell. They do not infer any reproach, and consequently are not actionable.

But if these facts imputed to Mr. Cadell shall be held to import a slanderous charge against him, the appellant then insists upon the *veritas convicii* as a valid defence, and humbly maintains that the facts made out in proof of the actual conduct of the pursuer at Tranent, are more than sufficient to justify the statement charged as libellous.

3. But supposing that the matter of the letter was actionable, and the appellant has failed to prove his defence of *veritas convicii*, yet, he contends, that his conduct in printing the letter was not done in *animo injurandi* towards Mr. Cadell; and if there was no *malus animus*, it is clear in law that no action lies. Here the facts were notorious. It was a public event as well as a public calamity, and such as fell within the notice of newspapers.

Pleaded for Mr. Morthland.—1. The interlocutor of the Court, besides sustaining much irrelevant matter, is not founded on the evidence adduced. The respondent has entirely failed in his attempt to prove the appellant to be either the proprietor, editor, or publisher, of the Scots Chronicle; or ever, either directly or indirectly, to have received profit or emolument therefrom: and notwithstanding the many disadvantages with which the appellant had to struggle in the course of his proof, he has clearly established that the rights and functions of proprietor, editor, and publisher, were exclusively vested in and discharged by other persons, at periods both prior and subsequent to the publication complained of; excepting the above characters, and that of printer, the appellant has never heard of any situation or connection with a newspaper inferring general responsibility for its contents; and to these specific heads the proof, in this case, ought to have been restricted.

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2. The uncertainty and looseness of the proof is wholly imputable to the respondent. This is a civil action, pursued by an individual claiming a sum of money on account of an alleged offensive publication. Exclusive of the author, Messrs. Paul and Johnston were the persons indisputably and avowedly responsible for that publication, the former being the known and avowed proprietor and publisher, and the latter, the known and avowed printer and editor of the said newspaper. The pursuer, therefore, seeking merely pecuniary redress, if a *bona fide* litigant, had a strong and manifest interest to direct his action solely against those who were avowedly responsible; against whom, if the grounds of his claim were relevant, he would obtain a decree for his money without further delay or expense of investigation. The pursuer, however, has thought proper to pass by the known author of the letter, and the avowed proprietor and publisher of the newspaper, and to single out a person standing in no such situation; and therefore, as was in such a case to be expected, the designations in the summons are not only irrelevant, but cannot apply to him, namely, “Editor or proprietor, legal adviser, and abettor of, or otherwise *held, believed, and understood* to be concerned in conducting, printing, and publishing of the said periodical paper called the Scots Chronicle.” Of the whole of these, the pursuer has been allowed a proof without limitation. The Court, besides subjecting the appellant to go into this proof of irrelevant matter, foreign to the issue, has given the pursuer an opportunity of prosecuting inquiries into the appellant’s conduct, and into the whole history of his domestic life, during a course of years. Notwithstanding all these, the attempt of proving his connection with the paper has completely failed. On the contrary, the testimony of Mr. Johnston and John Webster, depones, that during the years 1796, 1797, and 1798, the appellant never gave any instructions regarding the printing of the paper, nor did superintend the press.

Pleaded for the Respondent.—1. The letter inserted in the newspaper, called the Scots Chronicle, on the 1st September 1797, was a false, calumnious, injurious libel upon the character and conduct of the respondent, and most peculiarly aggravated by the period and circumstances of its publication. 2. The appellant, John Johnston, was the person who, under no one circumstance of excuse and alleviation, printed, or caused to be printed and published, the

newspaper containing the said libel. 3. The appellant, Mr. Morthland, was originally the sole and only real, as well as ostensible proprietor, editor, and conductor of the newspaper called the Scots Chronicle; and that the substantial right and interest which he had in all and each of these characters, in relation to that newspaper, never truly ceased and determined, down to a period subsequent to the publication of the 1st September 1797, which contained the libel in question; or, at least, because he stood in such a situation in regard to it, as to be in law completely responsible for the whole contents of that newspaper at the above mentioned period of its publication.

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After hearing counsel,

It was ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam, John Clerk, Chas. Moore.*

For the Respondent, *Wm. Alexander, David Boyle.*

NOTE.—Unreported in the Court of Session.

SIR W. A. CUNYNGHAME, Bart., Hon. Wm. Baillie of Polkemmet, Andrew Buchanan, Andrew Gillon of Wallhouse, and Others, } *Appellants;*

John Alexander Higgins, W.S., Assignee for the Hon. Henry Erskine, the Hon. Wm. Honyman of Armadale, one of the Senators of the College of Justice, the Representatives of Sir John Inglis of Cramond, Bart., and for seven other Trustees of the Edinburgh and Glasgow Turnpike, } *Respondent.*

House of Lords, 26th June 1802.

TRUST—ROAD TRUSTEES—POWERS TO BORROW MONEY—RELIEF.—

In the construction of a turnpike road, under an act of Parliament, it became necessary to borrow money upon the security of the tolls. It was objected, by some of the trustees who had authorized the borrowing of money, and had attended the meetings in regard to the roads, and done other acts in the execu-