Tuesday, December 20.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MACLEOD *v.* LEWIS JUSTICES OF PEACE.

Administration of Justice — Contempt of Court—Writing and Publishing Letter Reflecting on Statements on Record before Trial of Cause.

After the closing of the record in an action, the pursuer's agent, at the request of a newspaper reporter, handed him a reprint of the record, which contained new statements of fact added by the pursuer at the adjustment without the denial of said statements put in by the defenders in answer. The pursuer's statements contained charges against the defenders which were libellous and false. Next day the said statements appeared in the newspaper. Thereafter the defenders wrote to the newspaper, and the newspaper published, a letter characterising the allegations made by the pursuer on record as "a tissue of libellous falsehoods."

An application by the pursuer that the letter should be held to have constituted a contempt of Court, and that the defenders and the newspaper proprietors and publishers should be appointed to appear at the bar for punishment, *refused*, without expenses to any of the parties.

Reparation—Issue—Privilege—Newspaper Publishing Record before Trial.

Opinions that the proprietors and publishers of a newspaper could not plead privilege if they published portions of an open or closed record not referred to in discussions in open Court, and before the trial of the cause.

Malcolm Macleod, general grocer and spirit dealer, Stornoway, raised an action against Donald Smith, Chief Magistrate of Stornoway, and others, Justices of the Peace for the Lewis district of the county of Ross and Cromarty, for reduction of a decree by the defenders sitting in the Licensing Court on 19th April 1892 refusing him renewal of his licence, and for an order upon the defenders requiring them to issue a certificate to him.

The record in the action was adjusted and closed on 28th October. The pursuer, by way of adjustment, added to his condescendence certain articles containing charges against two of the defenders, viz., Dr Roderick Ross, Barvas, Lews, and the Rev. Roderick Macrae, minister of the Free Church, Carloway, Lews, accusing them of getting up bogus petitions against the granting of the licence. The pursuer's agent, instead of communicating these additions in manuscript to the defenders' agents, for convenience reprinted the record with the additions, and so communicated them. Thereafter the defenders answered these additional articles with a general denial. When the record was closed in Court, the reporter of the *North British Daily Mail* applied to the pursuer's agent for a copy of the record, and received the reprinted record with the pursuer's additions, but without the defenders' denial. In the report of the case in the *North British Daily Mail* on 29th October, and the *Scottish Highlander* on 3rd November, the articles added by the pursuer at the closing of the record, and containing the above-mentioned grave charges against Dr Ross and Mr Macrae appeared *in extenso* without the denial put in for these defenders. The pleas-in-law for the parties were also published, one of the defenders' being a general denial of the pursuer's averments.

On 3rd and 10th November respectively a letter appeared in the *North British Daily Mail* and the *Scottish Highlander* in practically identical terms. The letter to the *Mail* was as follows:—

"MACLEOD *v.* LEWIS JUSTICES.

"Sir,—Referring to the report of the proceedings in the Court of Session in your paper of the 29th ult., we, the undersigned, beg to state that the allegations made concerning us in the record by pursuer in the above case are a tissue of libellous falsehoods, which have not the slightest foundation in fact; and accordingly we trust that you, and all others who may have given currency to said report, will insert this correction in an early issue of your paper.—We are, &c.,

"RODERICK ROSS, J.P.
"RODERICK MACRAE, J.P.

"Island of Lewis, November 2."

The pursuer presented a minute to the Court asking that it be found that the letters constituted a contempt of Court, and that the defenders Dr Ross and the Rev. Mr Macrae, and also Alexander Mackenzie, the managing director and editor of the *Scottish Highlander*, and Gunn & Cameron, the publishers of the *North British Daily Mail*, be appointed to appear at the bar for punishment.

The Lord Ordinary (STORMONTH DARLING) reported the case to the Second Division.

On 24th November the Court ordered intimation and answers.

In their answers the defenders Dr Ross and the Rev. Mr Macrae averred—"They both felt that the publication of those statements, without the explicit denial of the defenders, was calculated seriously to prejudice them both in their personal character and in their respective capacities as minister of the Gospel and medical practitioner. To communicate with their agents in Edinburgh would have taken several days, and the *Scottish Highlander*, in which a report appeared, is only published once a week. These respondents therefore felt that it was necessary for them at once to explain that the statements referred to were emphatically denied by them. Their only motive and object was to correct the newspaper reports, and the letters were only sent to those news-

papers in which, so far as known to them, the partial and, as appeared to those respondents, incorrect and misleading report of the case appeared."

In the answers lodged by Gunn & Cameron and Alexander Mackenzie they averred that having given publication in their newspapers to an incomplete record, they thought it fair to allow the writers of the letters to emphasise their denial of the statements made on the other side, and that they had published the letter in good faith and without intention of offending.

Argued for the pursuer—The motion should be granted. The defenders Dr Ross and Mr Macrae had written this letter describing the pursuer's case as "a tissue of libellous falsehoods," which meant that it contained falsehoods deliberately concocted for the purpose of injuring the defenders. The *North British Daily Mail* and the *Scottish Highlander* had published that letter. It was not permissible for one of the parties to a cause to put his version of the case before the public by means of the public prints while the cause was depending in a court of law. Such conduct in a case like the present was doubly objectionable, because (1) prejudice would be excited in the public mind so as to bias a jury at the trial; and (2) the newspapers were circulated and statements promulgated among a class of impressionable and not very well educated people, with the result that *animus* would be aroused in the minds of possible witnesses, and prevent them coming forward to give testimony. The defenders Dr Ross and Mr Macrae, in writing the letter and sending it to the newspapers for publication, and the newspapers in publishing such a letter, had committed contempt of Court. Authorities—*Henderson* v. *Laing*, December 10, 1824, 3 S. 384; *Miller* v. *Mitchell*, March 7, 1835, 13 S. 644, and December 16, 1835, 14 S. 172; *Paterson* v. *Kilgour*, July 19, 1865, 3 Macph. 1119. The precedents in the English Courts were more recent, and also applied—*Dow* v. *Eley*, December 15, 1868, L.R., 7 Eq. 149; *Brodribb* v. *Brodribb*, May 4, 1886, L.R., 11 Prob. Div. 66; *Peters* v. *Bradlaugh*, March 19, 1888, 4 Times' Law Rep. 414; *ex parte Green and Others*, March 24, 1891, 7 Times' Law Rep. 411. The case of *Kitcat* v. *Sharp*, December 14, 1882, 48 Law Times, 64, was specially applicable, as there one of the parties to the cause threatened to publish as a comment on his opponent's case precisely the same words as were used here, viz., "a tissue of falsehoods." [LORD YOUNG—But had the adversary waited for the trial in that case? Was the party complaining waiting for the trial, or had he sent his accusations to the papers for publication? Mr W. C. SMITH — There had been no publication at all. LORD YOUNG—That makes a great difference; you did not wait for the trial. You sent your charges to the papers for publication, and the papers most improperly published them. Mr SMITH—Whatever liabilities might be involved in that act it would not excuse the contempt of Court committed by the defenders Dr Ross and Mr Macrae, and by the newspapers in writing and publishing the letter.] The suggestion that the letter was written to point out and correct a defect in the newspaper report was inadmissible, for these reasons—(1) The report contained a general denial in the defenders' plea-in-law, and a general denial was all that was afterwards put on record; (2) the letter does not distinguish between the averments first put in and those added at adjustment; and (3) the letter makes an offensive attack on pursuer. The pursuer therefore appealed to the jurisdiction of the Court to protect him from the contempt of Court.

Argued for the defenders Dr Ross and Mr Macrae—It was now admitted that the pursuer through his agent supplied the incomplete record to the newspapers. The letter was simply a correction of this incomplete statement. If it should be considered more, it was justified in the circumstances of the case. There was no substantial or technical contempt of Court in the letter. There was no evidence that it had prevented witnesses coming forward. The application should be refused—*Schlesinger* v. *Flersheim*, 1845, 2 Dowling Lowndes, 737.

Argued for the proprietors and publishers of the *North British Daily Mail* and the *Scottish Highlander*—The newspapers had no intention or desire to do anything except what was right in the matter. Having made a publication which reflected very grievously on Dr Ross and Mr Macrae, they thought it also right to give their denial, however warmly expressed.

At advising—

LORD JUSTICE-CLERK—There cannot be the slightest doubt that in this case a very grave irregularity was committed when an incomplete record was handed over by the agent of one of the parties to a newspaper for publication. It may be the practice to hand over complete records to newspapers for publication, but certainly it strikes me as a practice which is not to be looked upon with favour. But the giving of a record which has not been closed to a newspaper for publication is unquestionably a very grave irregularity indeed. Now, such an act is a totally different thing from what does occur in all the Courts in this country, and not only in Scotland, but in England and Ireland, when a case has been brought to the point that it makes its appearance in open Court as a litigated cause, and when the parties are pleading before the Court and leading evidence in open Court before the public. It is the universal practice in this country, and the recognised practice, that that which occurs before the public, who are then present, and who are entitled to be present as long as they behave, in order to hear the case, may reach the rest of the public through fair and honest reporting and publication. That is manifestly a totally different thing from publishing the formal pleadings in a cause, and a still more different thing from publishing an incomplete statement of the formal proceedings which have been ini-

tiated, and are being met by the defenders in the cause. Therefore this case started with a grave irregularity. The document which was handed to the newspaper, and the summary made from it which appeared in the newspaper, were both, from the very nature of the case raised by this pursuer, of a most grossly libellous character if untrue. They contained accusations of the most base and illegal conduct upon the part of persons in respectable position—persons in position of authority and exercising an office in connection with the matter with regard to which the accusations were made, and accordingly the defenders in the case thought it proper to write a letter to the newspapers to give an emphatic denial to the statements which had been made and copied into the newspapers in the form of a summary. Now I must say I think some of the terms used in the letter are censurable—censurable in this sense, that when people are engaged in a litigation they must keep their temper, and not use strong and unnecessary terms even under provocation. Indeed, one would wish that in all circumstances people were sufficiently able to restrain themselves as not to spoil their denials of the accusations made against them by turning them into accusations against other people. A man that protests too much is always in a less satisfactory condition than a man who when he is accused, and who, knowing himself not to be guilty, calmly and quietly denies the charge, and states that he will meet it in the proper place. The question we have to consider is, whether this letter, in the circumstances in which it was written, is to be characterised as contempt of Court. Now, I must say that I think it is quite possible in certain circumstances that a letter written by a litigant which used the terms contained in the letter before us might be contempt of Court, but each case of that kind must be judged upon its own merits, and looking to the fact here that the pursuer began with what I think was, and what I have already characterised as a grave irregularity, and looking to the nature of the charges which were published through that grave irregularity, I am not prepared to say that I hold that the denial of them expressed in these very strong and emphatic terms was a contempt of Court. The object which the pursuer may have had here is sufficiently served by this discussion. As to his having been prejudiced in the conduct of his case by anything that has occurred in consequence of the writing of the letter, we should require very much stronger information laid before us than anything we have had. I have come to the conclusion that we ought not to hold this to have been contempt of Court. I think the proper course will be to refuse the motion without finding any of the parties entitled to expenses. I think there has been blame on both sides.

LORD YOUNG—I concur in the decision. There are certain rules of law in this Court applicable to the subject before us which are not at all doubtful. It is clear, to begin with, that statements in the pleadings before this Court, and in the conduct of litigations before this Court by either party are privileged. However libellous they may be upon the face of them—making charges of the grossest kind—they are nevertheless privileged, but there is no privilege whatever in the publication of the pleadings, although there is privilege in the reporting of the proceedings taking place in this or any other open court of justice. It has been pointed out by your Lordship, and has been frequently remarked, that the reporting of proceedings in a court of justice is simply an extension of the audience. Courts are of limited capacity. All who can find accommodation may hear what goes on, and the audience is extended by reporters who report what those present hear, and enable those who are outside and at a distance to read it. The most common case is reporting proceedings at trials, and it would be quite legitimate, and is constantly done, to report discussions upon relevancy, whether a relevant ground of action has been stated which requires reference to the pleadings which are read so far as necessary, and commented upon so far as necessary, on the one side and the other. All that may be reported, and there will be privilege if the reports are fair and accurate. But there is no privilege in publishing the pleadings, which are not public documents. Although a pursuer is privileged in the statements which he puts into his summons or into his condescendence originally or upon revisal, there is no privilege—either before or or after the closing of the record, which I think has no bearing upon the matter, for the closing of the record only means that nothing more, unless under exceptional circumstances, is to be added on either side—there is no privilege in sending all this to a newspaper for publication, or in the newspaper publishing it, and if there are slanderous statements therein contained against any individual, the parties sending this for publication and circulation, and the newspaper making the publication and circulation will be answerable accordingly, and have no plea of privilege. The law to that effect is, I think, sufficient to ensure propriety in this matter without appealing to the exceptional subject of contempt of Court, which I should be very slow to extend. I should be slow to hold that there was a contempt of Court by implication where there was no contempt intended, for contempt of Court really means unduly and contumaciously interfering with the regularity and usefulness of proceedings before a court of justice, or contumaciously resisting its authority. Now, in the present case there are most libellous statements made against the two defenders, one of whom is a dissenting minister, and the other a medical practitioner, and to both of whom their characters and reputations must be matter of the greatest interest and concern. There is privilege in putting these statements in the pleadings, and the pursuer undertakes to prove the truth of them, but

they are libellous if untrue. Now, we are told that the pursuer's agent—I am glad to think not spontaneously, but in answer to an application—handed the pleadings containing these statements to a newspaper reporter for publication and circulation. For the reasons which I have already stated, it was, in my opinion, altogether reprehensible on the part of the agent who did so, and on the part of the newspapers which published and circulated them. I have already stated that I think the common law of the land, without reference or appeal to the exceptional circumstances of contempt of Court, is sufficient to enforce a remedy, and that remedy may be resorted to if the parties injured desire it. But it is plain that that irregular proceeding—the publication of these very gross charges of most infamous conduct—led to the defenders sending the letter which is complained of, in which they characterise these statements as a tissue of libellous falsehoods. I must say that I think that letter was provoked by the prior publication of these charges, and although more moderate and more forcible language might have been used—for strong language is not always the most forcible or powerful—I am not prepared to say that anyone against whom such charges are improperly published in the newspapers is altogether inexcusable in sending a strong letter of denial; and the irregularity which the newspapers had committed in making the publication was, I think, not increased by what the pursuer complains of, namely, the publication of this strong denial. Having made the one publication—I think inexcusably—I am not disposed at all to condemn them for having made the second. Therefore I agree with your Lordship that both the defenders and the newspapers are to blame here, the newspapers especially. If they were not, I should have condemned the pursuer in expenses. I think the pursuer is decidedly the greatest offender of all, and my first impression was to subject him in expenses to those parties whom he has brought before us by the application, which we now dismiss.

LORD TRAYNER—The matter now before your Lordships for decision is brought up by a complaint on the part of the pursuer. He complains of the publication of a letter in the *North British Daily Mail* and the *Scottish Highlander* written by the defenders, and it appears that the letter which they wrote was written by them in order to vindicate themselves against certain statements of a very serious character made regarding them by the pursuer in his summons. I rather take the view that the Court should not only discourage but should restrain parties who are litigants before the Court from expressing their own views, and their arguments in support of these views, in the public newspapers while their case is in dependence before the Court. I should look with considerable jealousy and disfavour upon any letter written by a litigant, and published in the newspapers, which might have the effect of prejudicing either party in the fair and full maintenance of his cause, and in the obtaining of the justice which he is entitled to at the Court's hands; but when I come to consider the present complaint, and the letter upon which it is based, I agree with your Lordships in thinking that there is no room here for the interference of the Court, or for any censure to be pronounced upon the defenders or others complained of upon the ground of their having been guilty of contempt of Court. The origin of the whole matter was, I think, owing to the improper conduct of the pursuer in handing this unclosed or closed record—for I think, with Lord Young, that whether closed or not was of no importance—to the public newspapers for publication. The defenders' letter is, I think, expressed in terms which probably if they had had more time to consider what they were doing they would not have used. It is too strong. They might equally well have served their purpose by saying that they denied the statements which the pursuer had made. But, again, I am not disposed to view with very great strictness the course that the defenders took, and I am not astonished that they should have resorted to strong expressions to repel what were undoubtedly exceedingly strong and offensive allegations. Therefore I am not prepared at all to censure the defenders for writing this letter, although I think they would have done better had they exercised more self-control in writing it. Nor am I prepared to censure the *North British Daily Mail* or the *Highlander* newspapers for publishing the defenders' letter, because the ground they take up seems to me perfectly reasonable. They say—"We had published, whether rightly or wrongly, the pursuer's averments against the defenders, and we thought it fair to the defenders that they should have the use of our columns, in which the offensive charges against them had appeared, for the purpose of asserting their innocence of these charges, and making the statement that the charges were untrue." Therefore I concur in the result at which your Lordships have arrived, although, I repeat, I would be most unwilling to say anything or do anything to indicate approval of letters being written by either party in a case to the public prints, while the case is in dependence, which might have the effect of prejudicing the minds either of the Court or anybody else against or in favour of either party. I think the view your Lordships have taken is the right one. The pursuer was to blame in giving the pleadings for publication. I think the defenders were somewhat to blame for the terms in which they wrote, and the newspapers were to blame for having published the pleadings, but not so much for having published the letter. I think all parties concerned are somewhat to blame, and that the proper course to follow is that neither party be found entitled to or liable in expenses.

LORD RUTHERFURD CLARK was absent.

The Court refused the application of the pursuer, and found none of the parties entitled to expenses.

Counsel for Pursuer—Graham Murray, Q.C.—W. C. Smith. Agent—James Purves, S.S.C.

Counsel for Defenders Ross and Macrae—Guthrie. Agents—Henry & Scott, W.S.

Counsel for Gunn & Cameron—Lord Adv. Balfour, Q.C.—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for Alexander Mackenzie—Strachan. Agents—W. & J. L. Officer, W.S.

Wednesday, December 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

THE CERA LIGHT COMPANY *v.* DOBBIE & SON.

Patent—Anticipation—Disconformity between Provisional and Final Specification.

A patent was taken out for the purpose of adapting ships' lamps for burning solid paraffin and other oils that freeze at a low temperature, the mode of melting the oil being the bringing of heat from the flame of the lamp by means of a conducting copper plate or wire into the body of the lamp. The provisional specification stated that the conductor was carried down inside the vessel to the bottom "near" the wick-tube; the final specification stated that the conductor was carried down "near or soldered to one side of" the wick-tube.

Held that the patent was invalid, because (1) a conductor from the flame placed near the wick-tube was not a new and patentable invention, having been anticipated by another patent, and (2) no invention of a conductor in metallic contact with the wick-holder was foreshadowed in the provisional specification.

On 19th May 1885 James Gilchrist, binnacle maker, Glasgow, obtained a patent for improvement in ship lamps. In the provisional specification the invention is thus described—"This invention has reference to improvements in or connected with the construction of ships' binnacle lamps and side lamps, and other lamps which only require to radiate or reflect their light out through a portion of a segment of the circle round them, the object of the invention being to adapt such lamps for burning solid paraffin or paraffin scale, naphthaline, or such oils as cocoa-nut oils which freeze or solidify at low temperatures. . . . The improvements consists in fitting thereto a rod, plate, or band of copper or other conducting metal at the back of the wick-tube or tubes, such conductor being carried up through the top of the lamp vessel outside to a funnel or plate which is heated by the flame. The lower end of this copper plate is carried down inside the vessel to the bottom near the wick-tube, which is also carried well down, so that both the plate and wick-tube conduct the heat imparted to their upper ends from the flame outside to their lower ends inside, which being down into the paraffin or frozen oil melts it first in the centre of the vessel around the wick, and as the heat increases liquifies the whole contents of the lamp, so that the wick can then conduct this melted oil to its upper end, where it burns bright and clear." In the complete specification the improvements were thus set forth—"My said improvements specially consist in fitting close to the back or one side of the wick-tube or tubes, a rod, plate, or band of copper, or other good heat-conducting metal. This heat-conductor is soldered to the cap of the wick-tubes, and is carried up as a rod or stem through the neck and top of the lamp vessel outside this, close to and higher than the flame, . . . and has mounted on it, by a deep conducting split spring stem above the flame, a conical funnel, which is heated by the flame. . . . The lower end of this copper or other metal heat-conductor is preferably made broad as a plate, and carried down inside the vessel to the bottom near or soldered to one side of the wick-tube or tubes, which are also carried well down, so that both the plates and wick-tubes conduct the heat imparted to their upper ends from the flame outside and from the heat-receiving funnel and rod to their lower ends inside, which being down into the paraffin or frozen oil or hydrocarbon, melt it first in the centre of the vessel around the wick-tubes, and loose the wick below, and as the heat increases the plates liquify the whole contents of the lamp vessel, so that the wick can then conduct this melted hydrocarbon or oil to its upper end, where it burns bright and clear. . . . Having now particularly described and ascertained the nature of my said invention, and in what manner the same is to be performed, I declare that what I claim is—First, The arrangement and combination of parts . . . of ship and other signal lamps for the purposes and substantially as herein described. . . . . Second, In ship and other signal lamps, and connected with their wick-tubes, the arrangement and combination of heat-receiving and conducting metal rods and plate surfaces . . . for the purposes and substantially as herein described. . . . Third, In ship and other signal lamps, the fitting and connecting with their tubes of a heat-receiving and conducting rod, plate, or band carried down below the flame into the lamp, and high above or over it, either with or without a moveable funnel or plate piece over the flame." To the specification there was a drawing annexed showing the heat-conductor attached to a plate fastened to the wick-holder.

The patent was afterwards acquired from James Gilchrist by the Cera Light Company, Limited.

In 1891 the Cera Light Company raised