Counsel for the heritors moved the Court in these circumstances either to sist the process of augmentation, as was done in the *Glenluce* case (*Farrel* v. *Earl of Stair*, November 9, 1874, 2 R. 76, 12 S.L.R. 56), or at all events, if the augmentation was granted, to introduce into the interlocutor a reservation in the form inserted in the case of *Minister of Morvern* v. *The Heritors*, November 22, 1865, 38 Scot. Jur. 49. This form of reservation in that case had now crystallised into the regular form of reservation in use in similar cases—*Minister of Bonhill* v. *Orr Ewing*, February 22, 1886, 13 R. 594, 23 S.L.R. 406; *Minister of Peebles* v. *Heritors of Peebles*, January 8, 1897, 24 R. 293, 34 S.L.R. 294.

The Court granted an augmentation of five chalders and refused either to sist the process or to insert in the decree a reservation of the rights of the heritors, in respect that if the heritors got a decree of approbation of the report of the Sub-Commissioners it was in their power to surrender if it was found that there was no free teind. The Lord President observed that, as the decree of augmentation would not affect the rights of the heritors, the reservation asked for in the decree of augmentation was unnecessary for the protection of their rights.

Counsel for the Minister — Anderson. Agents — Turnbull, Kitchen, & Stevens, S.S.C.

Counsel for the Heritors — Macphail. Agents—Lindsay, Howe, & Co., W.S.

COURT OF SESSION.

Wednesday, March 12.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MORRISON *v.* RITCHIE AND COMPANY.

Reparation — Slander — Newspaper—Averment of Circumstances Rendering Words Published Defamatory — False Birth Notice—Date of Marriage.

A married couple raised an action of damages against the publishers of a newspaper for slander alleged to be contained in a false birth notice which announced that twins had been born to the pursuers at a date which they averred to be about a month after their marriage. The notice was inserted at the request of a person giving a fictitious name and address, whose identity was not ascertained.

Held (*aff.* judgment of Lord Kincairney) that the pursuers were entitled to an issue in respect that the birth notice though not in itself defamatory was highly so when read in the light of the circumstances averred by them, that they were entitled to put the date of their marriage in issue in order to show that the notice was defamatory, and that the defenders must be held to represent the unknown and untraceable sender of the notice.

Opinion (*per* Lord Moncreiff, concurred in by the Lord Justice-Clerk and Lord Adam) that in every case in which the words uttered are not *prima facie* defamatory, it is competent to consider the circumstances in which they are said to have been uttered.

This was an action at the instance of George Morrison, manager, Caledonian Hotel, Ullapool, and Mary Tuach Mackenzie or Morrison, his wife, against John Ritchie and Company, publishers and proprietors of *The Scotsman* and *Weekly Scotsman*, in which the pursuers claimed damages for slander alleged to be contained in two unauthorised and untrue birth notices.

The pursuers averred that they were married on 12th July 1901; that for some time previous to his marriage the pursuer George Morrison had carried on business at 33 South Back Canongate, Edinburgh; that he was presently manager of the Caledonian Hotel, Ullapool; that the pursuer Mrs Morrison was a native of Ross-shire; and that her family had for long been connected with the Caledonian Hotel at Ullapool. "(Cond. 2) On 15th August 1901 the following notice appeared among the notices of births in the issue of *The Scotsman* of that date, viz.—'Morrison: At the Caledonian Hotel, Ullapool, on the 11th inst., the wife of George Morrison, of 33 South Back Canongate, of twin sons. Ross-shire papers please copy.' The same notice also appeared in the issue of *The Weekly Scotsman* of 17th August 1901. (Cond. 3) Neither of the pursuers instructed or authorised the said notice to be inserted. There was in point of fact no foundation for the statements therein made, no such event having taken place. The said notice was not received by the proprietors of *The Scotsman* in the ordinary course of business, or at all events in the usual way in which such notices are received by them. It is believed and averred that the said notice was enclosed in an envelope addressed as if in answer to an advertisement marked No. 2348 Scotsman Office. The advertisement No. 2348 was one applicable to the sale of a residential estate in Mid-Lothian, which appeared in the issue of *The Scotsman* on 10th August 1901. In ordinary course the said envelope was handed to the person who had inserted advertisement No. 2348 in *The Scotsman*, who returned it to the defenders, when its contents were found not to relate to the said advertisement. The envelope contained a sheet of paper on which was written the following, viz.—'Mrs Sutherland, 7 Albert Street, would like to insert in *The Scotsman*: At the Caledonian Hotel, Ullapool, on the 11th inst., the wife of George Morrison of 33 South Back Canongate, of twin sons. Ross-shire papers please copy.' This was accompanied by an order for two shillings and sixpence. On receiving the above from the advertiser of advertisement No. 2348, the defenders, without making any

inquiry as to the genuineness of the notice, or communicating with the person whose name was on the notice, or with the pursuers, inserted the notice in the column of their newspaper in which births are published. The unusual and circuitous method in which the notice came to their hands ought to have put the defenders upon inquiry before publishing the same as a notice of birth. Their suspicions as to its genuineness ought also to have been aroused by the use of the phrase 'Ross-shire papers please copy,' which is a most unusual if not entirely unique request to be added to a notice of birth. The defenders were guilty of gross recklessness and carelessness in inserting the said notice without inquiry, or without communicating with any of the parties mentioned therein. It is believed and averred that the name given as the person by whom the notice purported to be sent is fictitious, and the defenders could easily have ascertained that fact. (Cond. 4) Immediately after the said notice appeared, the pursuers' agent informed the defenders that it was fictitious and unauthorised, and requested them to take steps to prevent its repetition or its appearance in any other newspapers. . . . In spite of the warning they had already received, the defenders allowed a second notice to appear in the issue of *The Scotsman* of 2nd October 1901, in the following terms, viz.—'At 6 West Adam Street, the wife of George Morrison, secretary, Commercial Burns Club, Edinburgh, of twin sons. Ross-shire papers please copy.' There was again no foundation for the statements in said notice, no such event having taken place. The information from which this notice was compiled by the defenders was sent to them in an envelope containing an order for 2s. 6d., and a sheet of paper on which were written the words as above quoted, to which were prefixed these words, 'Please insert into *The Scotsman*.' The name and address of the person sending the notice was not given. The address given in the notice was the place of business in which the pursuer, the said George Morrison, carried on the trade of a spirit merchant before he went to 33 South Back Canongate, and while he was in Edinburgh he was widely known as the tenant of these premises, and also as the secretary of the Commercial Burns Club. In inserting this second notice the defenders were guilty of gross recklessness and carelessness. They entirely disregarded the warning they had received, which ought to have put them on their inquiry, and they neglected to take note of the suspicious and unusual request that Ross-shire papers should copy. They also neglected to enforce their rule of requiring notices of birth to be accompanied by the name and address of the sender. The insertion of said notice was not instructed or authorised by the pursuers, or either of them, and there was no foundation in fact for the statements therein. (Cond. 5) The said notices are of and concerning the pursuers and each of them, and are false, malicious, and calumnious. They falsely, maliciously, and calumniously represent that the female pursuer had, within a month and three months respectively of her marriage, given birth to twin sons of whom the male pursuer was the father, and that each of the pursuers had been guilty of antenuptial fornication, and is a person of immoral and disreputable character. They also falsely, maliciously, and calumniously represent that the female pursuer is a person of unchaste character, and had been guilty of immoral conduct prior to her marriage."

The defenders, in answer, averred—"(Ans. 6) On 19th August 1901 the defenders wrote a letter to the pursuers' agent in which they expressed regret that the notice of 15th August had been published, and in which they offered, if the pursuers' agent approved, to publish a statement in *The Scotsman*, under the heading of births, in the following terms:—'The notice of birth at the Caledonian Hotel, Ullapool, on the 11th inst., which appeared in *The Scotsman* of the 15th inst., is unfounded, no such event having taken place. Steps are being taken to discover the author of the malicious notice.' In answer to the said letter the agent for the pursuers called on the defenders and requested them to do nothing until he saw them later on. The agent for the pursuers afterwards called upon the defenders and stated that he could do nothing to authorise a correction to be published until he had communicated with his clients. The defenders suggested that the earlier the correction was made the better, and that the pursuers' agent should telegraph to his clients. The pursuers' agent did not see his way to do this, and the defenders never received any authority to publish any kind of correction. On the contrary, on 10th September 1901, the pursuers' agent wrote the defenders intimating that he was instructed to raise an action of damages against them, but not referring in any way to the defenders' offer to publish a correction. On 17th September the defenders again offered to publish a correction. Again, after the publication of the notice of 2nd October 1901, the defenders offered to publish a correction and explanation, and to assist the pursuers in discovering the authorship of the notice, but no attention was paid to the defenders' offer. . . . The defenders published the said notices in good faith and in ordinary course of business, believing them to be genuine."

The defenders pleaded, *inter alia*—"(3) The statements complained of not being defamatory, the defenders are entitled to decree of absolvitor. (4) *Separatim*—The defenders having published the statements complained of in *bona fide* in the ordinary course of their business, and the statements not being *per se* defamatory, should be assoilzied.

The following issues were proposed for the pursuers, viz.—"(1) Whether the pursuers were married on 12th July 1901, and whether the defenders in the issue of the *Scotsman* of 15th August 1901, and in the issue of the *Weekly Scotsman* of 17th August 1901, printed and published the

notice of birth printed in the first schedule hereto; whether the said notice is of and concerning the pursuer the said George Morrison, and is false and calumnious, to the loss, injury, and damage of the said pursuer? (2) Whether the pursuers were married on 12th July 1901, and whether the defenders, in the issue of the *Scotsman* of 2nd October 1901, printed and published the notice of birth printed in the second schedule hereto; whether the said notice is of and concerning the pursuer the said George Morrison, and is false and calumnious, to the loss, injury, and damage of the said pursuer? Damages laid at £1000."

The schedules referred to contained the birth notices quoted above.

The Lord Ordinary (KINCAIRNEY), by interlocutor dated 15th January 1902, approved of these issues and of two similar issues proposed for the pursuer Mrs Morrison, as the issues for the trial of the cause.

Opinion.—"This is an action of damages against the proprietors of a newspaper on account of defamatory advertisements. There are two advertisements complained of. But while the repetition may affect the amount of the damages which may be awarded, it has no bearing on the legal question; and therefore, for the sake of simplicity, I will confine my attention to the first advertisement. There can be no doubt that the pursuers have suffered a very cruel wrong, and would doubtless recover exemplary damages from the mean scoundrel who sent the advertisements, if they could discover him and if he were found to be sane and able to pay them. But their action against the newspaper raises a question of much importance and apparently of some novelty, since no precise or very close precedent has been quoted.

"The advertisement was this:—'Morrison—At the Caledonian Hotel, Ullapool, on the 11th inst., the wife of George Morrison, of 33 South Back Canongate, of twin sons. Ross-shire papers please copy.'

"The notice was published in the *Scotsman* of 15th August 1901, and was false, and was in point of fact highly slanderous, and very cruel and malignant, for the reason that Mr and Mrs Morrison had been married little more than a month before.

"I do not inquire whether sufficient vigilance was exercised in the *Scotsman* office before inserting this advertisement. A very slight inquiry would have disclosed the fraud. A telegram to Ullapool would have disclosed it. The instructions were not signed, but bore the name of Mrs Sutherland, 7 Albert Street, and an examination of the Directory would have disclosed the fact that no such house existed. But these precautions were not taken. I am far from imputing any blame on that account, because I suppose it would be barely possible to make such inquiries about the multitude of such advertisements which reach the *Scotsman*. But that is a matter which has no bearing on the question under consideration, because this action is not laid on neglect, but simply upon slander, there being no plea about neglect.

"Malice in the ordinary sense, or in any sense which can reasonably be put on the word, is not in the case. It is certain that there has been no malice. There hardly ever is when the action is laid against the proprietors of a newspaper on account of what has appeared in its columns, but the law is that the proprietors of the newspaper represent their correspondent, and are liable for the injurious paragraph as he would have been. I do not think that the law does so strange a thing as to imply malice where it manifestly and certainly does not exist.

"The peculiarity of the case seems to be this, that the words complained of have to all appearance no calumnious, insulting, or disparaging meaning whatever, and that there is no possibility of affixing any such meaning on them by any licence of innuendo, and yet it appears that, when the facts are known, the words, according to their plain and only meaning and without the least innuendo, turn out to be in the highest degree slanderous and hurtful to character, and extremely reprehensible, so that it will be regrettable if the perpetrator be not discovered and adequately punished.

"It appears, then, that the calumnious character of the words does not depend on any secret innuendo but on the other surrounding circumstances; and I think that the question of slander or not must depend on the actual state of the facts and be judged of according to them; and I am of opinion that the pursuers will be entitled to prove these circumstances for the purposes of disclosing the slanderous import of the words used.

"There have not been many similar cases, and, so far as I know, none exactly in point. But such cases might occur in other circumstances. For example, if A said of B that he had sold goods to a corporation at an exorbitant price, these words would not of themselves be libellous. But if it were shewn that B was a member of the corporation they would become so—*Christie* v. *Craik*, January 12, 1900, 2 F. 380. In *Winn* v. *Quillan*, December 16, 1899, 2 F. 322, it was held to be libellous to call the pursuer an informer. But it is not clear that it would have been so held had the pursuer not been an Irishman. To take a more general illustration, suppose a person were charged with ignorance of law, that would not be an actionable charge unless he was a practising lawyer, and then it would be actionable.

"The issues seem to have been modelled on the issue adjusted in the Second Division in *Bruce* v *J. M. Smyth, Limited*, December 21, 1898, 1 F. 333. There is no need to allude further to the other issues. I think that separate issues must be allowed to each pursuer. I see no room for any innuendo, and no ground for requiring the insertion of malice. I had some doubt at first whether the initial question in each issue should be left, and I still think that the case might be tried without putting that question. It would have been better had the defenders agreed to put that question in the form of an admission, as perhaps

they may; but if they do not, I have come to think that the issues may be approved of as they have been submitted, although I would have accepted them without the preliminary question."

The defenders reclaimed, and moved the Court to vary each of the issues "(1) by deleting the words 'Whether the pursuers were married on 12th July 1901 and,' and (2) by inserting the word 'malicious' after the word 'false.'"

Argued for the reclaimers—No malice could be implied on the part of the defenders, and there was no such thing as slander without malice—*Shaw* v. *Morgan*, July 11, 1888, 15 R. 865, Lord Young at p. 870, 25 S.L.R. 620. In all cases malice must either be presumed by presumption of law, or in cases of privilege proved. In the present case there was an entire absence of malice, and none could be proved. The publishers of a newspaper did not represent their correspondent; they were not responsible for the knowledge of a person sending a notice to be inserted—*Vizetelly* v. *Mudie* (1900), 2 Q.B. 170. There was no case in which the words published not being in themselves defamatory, the publisher of them had been held liable because they turned out to be libellous. What was untrue was not necessarily defamatory. It was not *per se* defamatory to say of a married woman that she had had a child when she had not had one; but assuming that such a statement about a married woman was defamatory on the part of the person who made it, it was not a libel on the part of the publisher, there being complete absence of malice—*Emmens* v. *Pottle* (1885), 16 Q.B.D. 354. The defenders received the notices complained of, just as the seller of the newspapers in that case received the papers without knowing that they contained any libel. No reasonable man reading a birth notice would think it libellous—*Sexton* v. *Ritchie & Company*, March 19, 1891, 18 R. (H.L.) 20, Lord Herschell at p. 20, 28 S.L.R. 945; *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741, Lord Selborne at p. 744. The words not being on the face of them libellous, it was necessary that there should be facts and circumstances set forth which would give them a libellous meaning, but the defenders had no knowledge of the facts and circumstances set forth on record. There being no issuable matter, the issues should be refused. In any event, the issues should be varied by striking out the words as to the pursuer's marriage; readers of the newspaper could have no knowledge as to that, and the introduction of the words relating thereto was not legitimate for the purpose of getting a libellous meaning out of the words of the notices.

Argued for the respondents—The freedom of the press conferred no privilege upon a newspaper in a question of private character; the defenders were in no better position than an individual uttering a false and injurious statement—*Drew* v. *Mackenzie*, February 28, 1862, 24 D. 649, Lord Deas at p. 662; *Neilson* v. *Johnston*, February 8, 1890, 17 R. 442, Lord M'Laren at p. 449, 27 S.L.R. 333. The name of the originator of the libellous notices not being disclosed, the Lord Ordinary was right in allowing issues—*Brims* v. *Reid*, May 28, 1885, 12 R. 1016, 22 S.L.R. 670; *M'Kerchar* v. *Cameron*, January 19, 1892, 19 R. 383, 29 S.L.R. 320; *Browne* v. *M'Farlane*, January 29, 1889, 16 R. 368, 26 S.L.R. 289. It was part of the defender's business to insert birth notices for profit, and it was one of the risks of their business that they might have to meet such claims as the present. Though the announcements complained of were not libellous in themselves, they were so when brought to the notice of persons acquainted with the pursuers, and there was no distinction between the publication of such notices by a newspaper and the uttering of a verbal statement by an individual to persons acquainted with the circumstances of the parties as to whom the statement was made. The pursuers were entitled to put in issue and prove the circumstances which made the notices libellous—*Christie* v. *Craik*, January 12, 1900, 2 F. 380, 37 S.L.R. 285; *Winn* v. *Quillan*, December 16, 1899, 2 F. 322, 37 S.L.R. 38 and 234; *Macrae* v. *Wicks*, March 6, 1886, 13 R. 732, 23 S.L.R. 490; *Cunningham* v. *Duncan & Jamieson*, February 2, 1889, 16 R. 383, 26 S.L.R. 316. The issues, accordingly, should not be varied. The defenders had denied the pursuers' averment as to the date of their marriage, or at least had not admitted it.

At advising—

LORD MONCREIFF—The defenders maintain that this action should be dismissed *de plano* as irrelevant. I am of opinion that the pursuers have stated a relevant case to go to a jury.

The circumstances are fortunately exceptional, but the case raises one question of importance and some difficulty, on which it is right that we should express our opinions now.

Before dealing with that question certain points may be noted which are not doubtful.

1. The first question is whether there is here a relevant averment of written slander or libel.

The pursuers, who are husband and wife, complain of what they aver to be two absolutely false birth notices which appeared in the *Scotsman*. The first appeared in the issue of the *Scotsman* of 15th August 1901, and was to the effect that the wife of George Morrison, of 33 South Back Canongate, Edinburgh, had been delivered of twin sons on 11th August 1901.

The second notice appeared in the issue of the *Scotsman* of 2nd October 1901, and was to the effect that the wife of George Morrison, secretary, Commercial Burns Club, Edinburgh, had been delivered of twin sons at 6 West Adam Street. The pursuers aver that they are the parties referred to in the notices.

The sting of these notices lies in this, that the pursuers were only married on 12th July 1901—that is, about a month

before the first notice. There is no doubt that read in the light of the circumstances which the pursuers aver and undertake to prove, the advertisements in question published in the defenders' newspaper constitute a gross and cruel libel upon the pursuers.

I should not have said even so much upon this point had it not been that the defenders' junior counsel, as I understood him, maintained and pressed upon us that the notices taken by themselves could not bear a defamatory meaning, and that we were not entitled to look at the extrinsic circumstances averred by the pursuers. I cannot accede to this suggestion. In every case in which the words uttered or written are not *prima facie* defamatory, it is competent to consider the circumstances in which they are said to have been uttered or written. If on consideration of the circumstances averred by the pursuers the Court is of opinion that the words will not bear the construction which the pursuers seek to put upon them an issue will not be allowed, but if they are of opinion in view of the facts stated that the words might bear that meaning the case will be sent to a jury to say whether they do bear that meaning. Now, there is not the slightest doubt that a false notice of birth may in some circumstances be grossly libellous, and as the present case is almost as strong a case as can be figured it is unnecessary to multiply illustrations.

2. The originator or originators of these libels—that is, the person or persons who sent these notices to the defenders for insertion—cannot be traced; and this is not surprising, seeing that all they had to do in order to get the notices inserted and escape detection was to put a false name and address upon them, which they did. The paper sending the first notice was not even signed, and there was no such house as the address given.

3. The defenders admit that they published both notices, but they entirely repudiate liability; and if they are right in this the pursuers, who have been grievously wronged if their averments are true, are left without any remedy or redress.

4. The publications which are objected to are not privileged. They concern private individuals, and may or may not affect them injuriously according as they are false or true. They are not reports or comments or even correspondence on a matter of public interest. The birth notices were inserted purely as a matter of business in respect of certain payments. It is a great advantage to advertisers to have the benefit of the circulation of a newspaper like the *Scotsman*, but, on the other hand, the advertisements add largely to the profits of a newspaper.

5. The communication not being privileged, the pursuers are not bound to aver or prove malice—malice is presumed.

But the defenders maintain that they are not liable, because (1) the notices which were sent to them for insertion were not *prima facie* defamatory, and (2) they had no reason to suppose that they concealed a libel.

I am of opinion that in the admitted circumstances this defence is not relevant. We have been referred to no case in which in judging of the liability of the proprietor, publisher, or printer of a newspaper for the publication of a statement, not privileged, affecting private character, made on the authority of a correspondent, any distinction has ever been made between a statement libellous on its face and one of which the libellous character only becomes apparent in the light of surrounding circumstances or on the words being innuendoed.

Neither were we referred to any case in which in regard to such a publication a proprietor, publisher, or printer of a newspaper has been held to be in a better position than the contributor, except it may be as to damages.

I must add, that even if the defence had been relevant the case must have gone to trial, because the defence does not arise on the pursuers' averments. The pursuers do not admit in regard to either notice that the defenders exercised due care to ascertain the genuineness of the information, and accordingly the defenders would in any case have had to satisfy the jury that they were free from blame.

The defenders are the proprietors and publishers of the *Scotsman*. For their own satisfaction they take what they consider sufficient precautions to ensure the genuineness of these advertisements. But these precautions, according to their own statements, only consist in their requiring the name and address of the sender, which may be purely fictitious. No further inquiries are made as to the genuineness of such notices. Looking to the extensive advertisement business carried on by the *Scotsman*, it probably would not be practicable, consistently with profit and dispatch, to make further inquiry into the genuineness of such advertisements. No doubt it is cheaper to run the risk (apparently not a very great one) of an action for libel, as the defendant Mr Mudie said in the case of *Vizetelly* v. *Mudie*.

There is no question of the *bona fides* of the defenders, and I fully recognise the difficulties attending the conduct of their business. But the question remains, upon whom is the loss consequent upon a false notice being published to fall?—upon the persons who through the agency of the defenders' newspaper have been widely libelled, or upon the defenders, who for their own profit and emolument, and without having succeeded in obtaining any effectual security for the genuineness of the notices, have given the libel such wide publicity?.

In the absence of any Scottish decision in his favour the defenders' counsel endeavoured to bring the case within the principle of a class of cases of which the English case of *Emmens* v. *Pottle*, L.R., 16 Q.B.D. 354, is an illustration. That case extended to newsvendors — that is, to persons who merely sell newspapers at bookstalls or in the streets—an exemption from liability which had previously been accorded to porters, carriers, and other such persons

who are ordered to carry or deliver letters or papers which contain a libel, but who have no occasion and perhaps no right to know the contents of such letters or papers. Technically every person who passes on or delivers a letter or paper containing a libel is held in England to have published the libel, but according to the law of England, in the cases to which I have referred, the persons in question (a limited class) are held to have freed themselves from liability provided they satisfy a jury that they did not know that the letter or paper contained a libel, and that their ignorance did not proceed from negligence. The burden, however, is put on the defendants to establish this, and if they succeed they are held not to have published the libel, but simply to have innocently disseminated it.

My first observation on those cases is that they are not authorities for excluding inquiry.

But the case of *Emmens* v. *Pottle* and similar cases go further. The limited class of persons who were there held entitled to exemption were persons who had nothing to do with the publication of the libel in the proper sense of the word. This is noted by the Master of the Rolls (Lord Esher) in *Emmens* v. *Pottle*. It is also noted by Lord Justice Romer in *Vizetelly* v. *Mudie*, L.R. [1900], 2 Q.B. 180. He states the result of that class of cases thus—"The result of the cases is, I think, that as regards the person *who is not the printer or the first and main publisher of the work which contains the libel*" (he is here speaking of a book), "but has only taken what I may call a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered.

The decision is interpreted in the same way in Odgers on Slander (2nd ed.) p. 161—"But if the paper was sold in the ordinary way of business by a newsvendor, *who neither wrote nor printed the libel*, and who neither knew nor ought to have known that the paper he was so selling did contain or was likely to contain any libellous matter, he will not be deemed to publish the libel which he has thus innocently disseminated."

It will be seen at once in how different a position a porter, carrier, or newsvendor is from the publishers of a newspaper, who are responsible for the supervision of letters and advertisements which appear in its columns.

The defenders' counsel also cited the case of *The Capital and Counties Bank* v. *Henty*, L.R., 7 App. Ca. 741. That case is certainly not an authority for the defenders. The ground of judgment is stated in a short sentence by Lord Selborne (p. 750)—"The document not being a libel on the face of it, is not shown to be so by any extrinsic evidence proper in my judgment to be considered by a jury for that purpose.

Can that be said of this case? Here there is a distinct averment of extrinsic facts which if proved will place the libellous character of the notices beyond doubt.

On the whole matter I am of opinion that in the circumstances the defenders must be held to represent the unknown and untraceable sender of the notices, except may be as to the amount of damages. I say may be, because that depends on the view which the jury may take on that point.

If a newspaper gives up the name of its correspondent, and proves that he was a person whose word it was justified in believing, and timeously inserts or offers to insert an adequate apology or explanation, the jury are quite entitled, if they think fit, to award a comparatively small amount, or it may even be a nominal amount, of damages against the newspaper. In my opinion, even in that case, there must be some award of damages.

If, again, the newspaper declines to give up the name of its informant, there is no doubt that it will be dealt with on the same footing as the informant would have been had his name been known.

Lastly, if a newspaper is unable to trace the correspondent, which is the case here, it will be for the jury to decide (with a view to assessment of damages) how far the newspaper has explained and excused its failure to do so. At the trial the defenders will have a full opportunity of laying before the jury everything that is to be said in their favour in mitigation of damages, including their offers to contradict the notices and the pursuers' failure to accept those offers. On the other hand, the pursuers will be entitled to found, in aggravation of damages, upon the peculiar circumstances in which both publications were made.

I think the issues approved by the Lord Ordinary are sufficient to try the case. If the facts which the pursuers undertake to prove are established I do not think an innuendo is necessary.

LORD JUSTICE-CLERK—That is my opinion also, and LORD ADAM desires me to say that he concurs.

LORD KYLLACHY, who was present at the advising to make a quorum, but was not present at the hearing, gave no opinion.

LORD YOUNG and LORD TRAYNER were absent.

The Court adhered.

Counsel for the Pursuers and Respondents —Wilson, K.C. — D. Anderson. Agent — Charles Waldie, S.S.C.

Counsel for the Defenders and Reclaimers — Jameson, K.C. — Cooper. Agents — Drummond & Reid, W.S.