as one and the same concern. I am of opinion on these grounds that these premises must be all included in the valuation and liability for the inhabited house-duty.

Lord Shand—I am of the same opinion. There can be no doubt that this hotel is occupied as an inhabited house or dwelling-house. The case does not show very distinctly whether the person charged with the duty himself resides in the house at night. There is a passage which might be read as meaning that either he or his wife resides in the house at night. But I do not think it of any consequence how that may be, because it is clear that there are servants permanently there residing in the house by day and by night, and also that there is constantly a number of guests in the house who occupy it as a dwelling-house. It is a dwelling-house clearly in the ordinary sense of the term. Although the person charged with the duty as occupier of the house does not personally reside there, if he keeps it, using it as a residence for his servants and guests, it is nevertheless an inhabited house, and accordingly the case falls plainly within the spirit and letter of the earlier Acts of Parliament. The only question that arises is, whether the exemption in the statute of 41 Vict. cap. 15, can, notwithstanding that this is the very kind of house that it was intended to make subject to taxation, be held to relieve the occupier of the house from the duty. That statute provides that "Every house or tenement which is occupied solely for the purpose of any trade or business, or of any profession or calling by which the owner seeks a livelihood or profit, shall be exempted from the duties by the said Commissioners upon proof of the facts to their satisfaction;" and then follow what I think are very important words—"And this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof." I think it is impossible to read that exemption in the way that seems to be contended for by the occupier here, as it would exempt from the duty a person who was carrying on a business the very purpose and object of which is to make profit of the house as a dwelling-house. He is carrying on a business there no doubt, but the business he is carrying on is to use the building as a dwelling-house—being the very class of house that the statutes are intended to include and make liable to assessment. That is quite apparent when one looks at the concluding words. The exemption is to have effect although the owner's servant or other person may be there, if there merely for the protection of the house—showing that the exemption cannot on any reasonable construction of it be applied to a house which is obviously used as a dwelling-house, and as to which the success of the business carried on depends on its being constantly used as a dwelling-house.

On that branch of the case, accordingly, I have no difficulty in agreeing with your Lordships. I think the occupier of this house is responsible for it as an inhabited house, because he occupies it as a dwelling-house through his servants and the guests he may receive.

On the second point I have nothing to add. I think the case shows that these stables are in the first place in connection physically to some extent with the hotel, and in the next place are used in connection with the private hotel business. Taking the case as of that kind, I am of opinion that no distinction can be made between the hotel and the stables as a part of the premises.

Lord Deas—As has been observed now and formerly, there is a want of precision in the statement of the case, particularly in the words alluded to by Lord Shand, which might lead to the supposition that the man or his wife sleeps in the hotel. I understand that in reality neither of them do so.

Lord Shand—For my part I think that quite immaterial.

Lord President—And so do I. I deal with the case as the ordinary case of an hotel.

Lord Mure was absent.

The Court reversed the decision of the Commissioners, and remitted to them to confirm the assessment, and refuse the appeal.

Counsel for Inland Revenue—Lord Advocate (Watson) — Solicitor-General (Macdonald) — Rutherfurd. Agent — D. Crole, Solicitor of Inland Revenue.

Tuesday, November 18.

FIRST DIVISION.

[Lord Craighill, Ordinary.

RICHARDSON *v.* WILSON.

Reparation — Newspaper Libel — Publication of Summons just Called in Court.

Held that a summons which has only been called in Court cannot lawfully be made public, and that a claim of damages at the instance of a third party (a stranger to that suit) against a newspaper editor for publishing such a summons, which contained statements alleged to be false and injurious to him, was therefore relevant.

Robert Richardson, a sheriff-officer, brought this action of damages for libel against John Wilson, printer and publisher of the *Edinburgh Evening News*. An article had appeared in several issues of that newspaper on 2d July 1879 in the following terms:—

"Action of Damages by an Edinburgh Artist.

"An action has been called in the Court of Session before Lord Craighill by John Le Conte, Glanville Place, Edinburgh, in which he sues W. S. Douglas, Greyfriars Place, for reduction of a deed of poinding, and sale following thereon, at the defender's instance, and payment of £300 in name of damages. The pursuer says that during the last forty years in which he has followed his profession he has accumulated a vast number of proofs and copies of rare old engravings, and persons in search of such works of art were wont to come to him to be supplied with such. The defender, he alleges, formed a scheme for obtaining possession of these works of art, and in pursuance of this scheme he is said to have instructed Robert Richardson, a sheriff-officer, to execute a pretended poinding and sale of the whole effects of the pursuer upon a small-debt decree for £12, 4s. 1d., dated 12th July 1876, at the instance of the defender against pursuer. The sheriff-

officer made an inventory of the pursuer's works of art and furniture, putting an absurd valuation upon the property and slumping the articles into a few lots so as to conceal the false and fictitious nature of the valuation. The articles valued at £12, 4s. 1d. are alleged to be worth £130. A sale was made on the 23d May to the defender, and on the following morning he and a son are alleged to have forcibly invaded pursuer's dwelling-house in his absence, which they ransacked, and carried off not only the articles inventoried, but a large number of engravings and unfinished proofs not included in the inventory. The defender is alleged to have stripped pursuer's house of his whole effects, leaving him and his family destitute of a home at a late hour on a Saturday night. These proceedings, the pursuer says, were illegal, cruel, and oppressive. The poinding is averred to be inept for want of a proper inventory and specification of the articles, and ought to be reduced, and in respect of the alleged illegal actings of the defender he claims payment of £300 as reparation."

The summons in the action alluded to had in fact been served on 20th June, and had been called in Court on 1st July 1879; and the newspaper report was admitted by the pursuer of this action, who was the Robert Richardson referred to in the article, to be correct.

He pleaded, *inter alia*—"(1) The defender having wrongfully and illegally printed and published the said slanderous and injurious statements before any proceedings had taken place in Court which could be made the subject of a newspaper report, he is liable in reparation."

The defender admitted having published the article, which he stated was copied from the morning papers of the day in question. He pleaded, *inter alia*—"(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons. (2) The paragraph in question being a *bona fide* and correct report of the averments made in an action then called and pending in the Court of Session, the defender was entitled to publish the same, and the pursuer is not entitled to damages for the publication thereof." The pursuer proposed this issue for the trial of the cause—"Whether on or about 2d July 1879 the defender wrongfully published in the *Edinburgh Evening News* an article or paragraph in the terms of the schedule hereunto annexed? and whether the statements therein set forth are of and concerning the pursuer, and falsely and calumniously represent him to be a dishonest person, and unfit to hold the office of a sheriff officer, to the loss, injury, and damage of the pursuer?—Damages laid at £500."

The schedule contained the newspaper article as quoted above.

The Lord Ordinary (CRAIGHILL) pronounced an interlocutor repelling the first and second pleas-in-law for defender, and approving of the above issue for the trial of the cause. He added this note:—

"*Note.*—There is involved in the granting of the issue which in this case has been allowed as important a question as has in recent times been brought before the Court. The pursuer sues for reparation on account of injury said to result from the publication in the defender's newspaper of the statements in a summons which had been called. These statements, the pursuer says, were not only untrue but libellous, and the defender is sued as the publisher of a libel. The defender contends that as the summons had been called, its contents were the property of the world, and the publication of these can no more be the subject of an action of damages for libel than a report of proceedings in open Court. The article complained of, it is right to mention, is not said to be in any way unfair as a representation of the statements in the summons, and consequently issue is at once joined on the question whether, using the words of the defender's second plea, the article in question being a '*bona fide* and correct report of the averments made in an action then called and pending in the Court of Session, the defender was entitled to publish the same, and the pursuer is not entitled to damages for the publication thereof.' This, the defender argued, should be treated not as a private but as a public question. The public, however, the Lord Ordinary thinks, have little to do with it, unless in so far as every individual is interested in the prevention of that which may be an injury to some and cannot be a benefit to any. Judicial proceedings, properly so called, are accessible to all, for the courts of justice in this country are open; and stating the case generally, what may be seen and heard may be published. But it does not follow from this that every step of process in a cause, whether it be taken or not taken in Court, from the calling of the summons till final judgment has been given, is an occasion on which everything which can be discovered by an examination of the process may be published to the world. Were such a rule to be recognised, the right of the world to be informed of the contents of writs or productions in a suit would outstrip in point of time the right of the Court. The public, in the opinion of the Lord Ordinary, have no right and have no interest to know more than can be learned by attendance in Court. Not that some things read short, or which have only been referred to in the arguments of counsel, or in observations made by the judge, may not sometimes be fully reported. The less or the more is a question of degree; but the public cannot demand to know, and newspaper reporters who cater for the public cannot insist on knowing, what was not intended to be published merely because a writ or a production has been made a step in judicial procedure. The right and the interest of the public are concerned not with the statements which one party in a cause may make against his adversary, but with the proceedings in open Court, by which between both justice is to be administered.

"The case for the defence was argued with great ability by Mr Trayner, but the argument, as the Lord Ordinary thinks, did not go to the root of the matter. Everything, so far as Scots law and practice are concerned, was rested on the passage in Erskine's Institutes (b. iv. t. i. sec. 8) where it is said that 'the summons must be called by the clerk of the process within a year after the last diet, otherwise the depending process falls. This calling of the cause in the Outer House by the clerk of the process after elapsing of the days of compearance was the first step taken in it by the pursuer. The most ancient form required this to be gone about in the presence of a judge; and though no judge has for a long time past interponed his authority to it in person, yet he is in the judgment of law

considered as present, so that it is still to be deemed a judicial step.' Perhaps—though not referred to on the part of the defender—a similar, though not quite the same, statement in Mr Beveridge's work on the Forms of Process, vol. i. p. 247, ought here to be cited for the information of the parties and of the Court. At what time the judge was present at the calling the Lord Ordinary has not discovered. But there is little that turns upon this point. Be it, as Erskine says, that in a sense the calling of the summons is 'still to be deemed a judicial step'—What of it? Will it confer on the public a right to know more than this step—the calling of the summons? Of course, if, as is assumed by the defender, the publication of the contents of the summons is implied in the 'calling,' there may conceivably be a right to know and to make known these contents even though the reading of the writ itself is not a part of the proceeding. But there is absolutely no authority for such an assumption; all authority indeed appears to be against it.

"The earliest reference in the books to what is described as the calling of a summons, so far as the Lord Ordinary is aware, is to be found in Balfour's Practicks under the head 'of Saumanding,' No. 143. What is there reported occurred in 1528, which was in the days of the 'Session' and nine years before the institution of the College of Justice. It is not safe to say what was the abuse for which a remedy was then provided, but whatever it was, the Lord Ordinary is inclined to think that the 'calling of the "Saumands"' here referred to was not the initial step which in more modern times has been so described, but was rather the calling of the cause for hearing and for judgment. This view of the matter he thinks is borne out by the relative enactments in the Act 1537, c. 44, by which the College of Justice was established. The provisions of that statute as regards procedure must import more than rules for bringing actions into Court; and on this point the regulations introduced by the Act 1672, cap. 16, section 1, are also instructive. These are quoted by Stair (Instit. iv. 2, 6), and they make it plain that the first step, which was really 'a proceeding in Court,' properly so called, was that which was taken when processes were 'discussed and determined, as the parties are in readiness and do call for justice after the processes have been seen by the defender's advocates and are returned by them'—the purpose of the regulations being that 'all processes should be discussed and determined' according to the date of the returns, 'which are set down and signed by the defender's advocate upon the process itself, that no parties be preferred in obtaining justice to any other who was ready and calling for it before.' On the calling of the summons, as that expression is now employed, little of authority is to be found of very ancient date; but in more recent times there is abundance, which may be divided into what implies that the calling was not a publication of the summons, and what is, by implication at least, a prohibition or exclusion of its publication. Reference may be made to a work published in 1799 by 'a member of the College of Justice' on the Forms of Process, pp. 46, 56, and 343; to Bell on Deeds, v. 6, p. 45, third edition; and to Ivory's Forms of Process, p. 173. These all tell us what the calling was prior to 1820, and as described in the first of these treatises, p. 52, it was then nothing more 'than the reading aloud at the Fore Bar the *partibus* and roll of the defenders' names.' On 11th March 1820 there was passed an Act of Sederunt, several of the provisions of which are material on the present occasion. By one of these it is enacted that the summons, &c., shall immediately be entered in the list for calling, containing in appropriate columns the names of the pursuer or suspender and defender or charger, and of the counsel and agent of the pursuer or suspender, and shall not thereafter be given up by the clerk except when borrowed by the agent on his receipt, or when transmitted to some other officer of Court. By another, that the calling by the depute clerks or their assistants shall in future be performed, not *viva voce* as at present, but by the exhibition of the said lists, which shall be subscribed with the proper office-mark, and hung up for public inspection in the Outer House on each sederunt-day immediately preceding a day for the enrolment of causes in the Outer House rolls, and shall so remain hung up from ten o'clock in the morning till two o'clock in the afternoon. And by a third, that in the afternoon of every such day appearance may be entered for defenders or chargers, for which purpose their agents shall attend at the clerk's office between the hours of six and seven, when the appearance shall be marked by the clerk upon the *partibus* in common form, and the agent shall be entitled to borrow the process on his receipt, which shall infer an obligation to return the same to the clerk on or before the sixth day after entering appearance, under the pain of caption.

"These enactments show not only that the publication of the contents of the summons is not a result involved in the calling, but, on the contrary, that this is a result which is not intended to occur, and which indeed cannot occur if the prescribed regulations are observed.

"The Lord Ordinary will only add that the words inscribed on the *partibus*, long used and still in use, when appearance is entered for a defender are themselves almost conclusive evidence that the publication of the contents of a summons is not a thing implied in the calling. '*Alt.* To see,' are the words used. The summons and the productions are given out to the procurator for the defender to be seen, and if there is any meaning in the expression, this at least is implied, that the summons and productions are not to be considered as already published.

"Authorities in English law were cited to the Lord Ordinary on the part of the defender, the purpose for which these were adduced being to show that reports even of *ex parte* cases may be published.

"This, even from these authorities, appears to be a right which may be subjected to restriction, but it is sufficient to say that in the opinion of the Lord Ordinary they do not touch the present controversy. It may be right or it may be wrong for *ex parte* cases to be heard in open Court, but if they are so heard, it may follow that in most cases the ordinary rule as to the publishing of judicial proceedings in open Court should be recognised. The distinction between such cases and the present is, that in the former nothing is published but what occurs in Court, whereas in the latter nothing occurs in Court, and what has

been published is not a report of judicial procedure, but the publication of the contents of a writ the contents of which were at the time even unknown to the Court.

"As regards the form of the issue, it may be explained that the pursuer and the defender are agreed; what has been settled by the Lord Ordinary was the ultimate form proposed by the pursuer, which, on the assumption that there is to be an issue, was accepted by the defender.

"The Lord Ordinary considers it to be appropriate for the trial of the cause."

The defender reclaimed, and argued—The tendency of modern decisions was towards freedom of publication. As a general rule, newspapers might report (if they did so correctly) any case pending in the Court. This was a "pending case," for the calling of the summons was a "step of judicial procedure;" if not, what point was to be fixed, short of the final judgment in a case, at which the proceedings might begin to be reported? In England reports of cases *ex parte* were published.

Authorities (on the general rule)—*Wason* v. *Walter*, Nov. 25, 1868, 4 L.R. (Q.B.) 73 (Cockburn, C.-J., p. 93); Folkard on Libel, 193; Addison on Torts, pp. 791-2, and cases there; *Lewis* v. *Levy*, 27 L.J. (Q.B.) 282 (Lord Campbell, p. 289); *Curry* v. *Walter*, 1 B. and P. 525. (On the effect of calling the summons)—*Aitken* v. *Dick*, July 7, 1863, 1 Macph. 1038; Ersk. Inst. iv. 1, 8; Shand's Practice, vol. i. p. 247; Beveridge's Forms of Process, i. 247; Russell's Forms, i. 36.

Replied for the respondent—The statements in a summons must be regarded very differently from those made for a party in open Court. Calling a summons did not make it public property. The Act of Sederunt forbade the clerk to give up or exhibit a summons at this stage to anyone save the agents. If the public might inspect the summons, why should they not also have access to the productions also? The defender here was really giving unlawfully to the public what they could not lawfully at that stage get for themselves.

Authorities—Act of Sederunt, March 11, 1820; *Gilfillan* v. *Ure*, May 18, 1824, 3 S. 21; Shand's Practice, i. 40; Borthwick on Libel, 211, and case of *Stewart* v. *Allan and Mackay* there, Dec. 31, 1818, not reported.

At advising—

Lord President—The publication by newspapers of what takes place in Court at the hearing of any cause is undoubtedly lawful; and if it be reported in a fair and faithful manner the publisher is not responsible, though the report contain statements or details of evidence affecting the character either of the parties or of other persons; and whatever takes place in open Court falls under the same rule, though it may be either before or after the proper hearing of the cause. The principle on which this rule is founded seems to be, that as courts of justice are open to the public, anything that takes place before a judge or judges is thereby necessarily and legitimately made public, and being once made legitimately public property, may be republished without inferring any responsibility. But the defender in this case seeks to apply this rule to what does not fall either within the rule itself or the principle on which that rule is founded.

The pursuer states on record, that an action of damages had been raised by a Mr John Le Conte against a Mr W. S. Douglas, and that the summons was served on the defender therein on 20th June 1879, and had been called in Court on 1st July 1879. The cause had proceeded no further. The pursuer says that summons contained statements calumnious and injurious to his character. The pursuer of this action was no party to that previous action but a stranger to the suit. Now, the summons having been called, was in the hands of the clerk to the process, and the duty of the clerk at that stage is plain. He cannot part with the summons or give access to it except to the parties to the suit or their agents; and if he either parts with it or exhibits it to anyone else he is guilty of a culpable breach of duty. Parties and their agents are entitled to have access to the summons, but they must also use proper caution. If the parties were to make its contents public at this stage they would undeniably be subject to an action of damages if it contained statements defamatory of any other person; and if the agent of either party were guilty of publishing it in any way, he would not only be liable, like his principal, but would also be answerable to the Court for his misconduct.

The observations which I have now made apply only to that stage of the process at which the summons has been served and called but no defences lodged and no record closed and no discussion or proceedings have taken place before the Lord Ordinary. It is at this first stage in the cause that the statements contained in the summons in question were reported in the newspaper of which the defender is the publisher; and I ventured to ask during the argument by what means a newspaper reporter or any other member of the public could at that stage obtain access legitimately to a summons. I have not yet had an answer to that question; and I have no hesitation in saying that no one except parties or their agents can then lawfully obtain access to the summons. The inference is that it must have been obtained in an illegitimate manner. There is no occasion to inquire at present how it was obtained, but it obviously must have been done in some surreptitious and unlawful way. As regards the relevancy of this action and the liability of the publisher, I have no doubt; and I am therefore for adhering to the Lord Ordinary's interlocutor and giving the pursuer his issue.

Lord Deas—The law of libel in Scotland and in England is different, and I do not think we can with safety reason from the one to the other. In England libel may be prosecuted criminally, and the party made liable to imprisonment or other punishment at the discretion of the Court. That is a debarring check to abuse which we do not possess. With us an action for libel is purely a civil action concluding for damages, and not inferring any punishment upon the libeller. Our civil procedure is also different from that of England. We have our own forms and rules, and our own prescribed papers to be printed and used in the process, and which are different from those in an English civil suit, although they have of late

years, I think in Chancery, borrowed to some extent from our form of records.

I ought to say, having made these observations, that I am prepared to agree in nearly all the observations which your Lordship has made in this case. But I do so with this qualification (if qualification it be), that in saying that whatever takes place before a judge may be reported, I do not mean (nor do I understand your Lordship to mean) to imply that all papers whatever which have been laid before the judge may be forthwith printed for the world at large. I do not think that follows in the least degree, and it would be very undesirable that it should be supposed that we are giving encouragement to any such idea. The principle which lies at the root of the right to publish is that when both parties have publicly stated their case an impartial report will be privileged, because there may be then justice and expediency in the public knowing accurately what is passing in courts of law, including the views urged on both sides. But documents printed *ex parte* before the case has proceeded beyond the initial stage may stand in a different position. In this particular case I agree with your Lordship that we need not go further into the matter than to explain that a summons is not by being called made public, and that not only is it not made public, but the clerk and agent are violating our rules and their duty if they take upon them to enable anyone to publish it at that stage at all. This is a most wholesome rule, for otherwise a pursuer who has nothing to lose, and cannot be criminally punished, might by raising a summons (which is a mere *ex parte* writ), and handing or causing it to be handed to the newspapers, ruin irretrievably the character of anyone he chose. The word "called" is a technical word. It has quite a different meaning in the Civil Court from what it has in the Justiciary Court (*vide* 3 Couper's Rep. 118). It does not mean publication in Court, although if the case goes on the date of dependence will, for reasons of expediency connected with diligence, prescription, &c., be held to draw back to the date of the calling, which forms the notice to the defender to attend to his defence as the case is now on the eve of coming into Court. On these grounds I agree with your Lordship that the Lord Ordinary's judgment should be adhered to.

Lord Mure—I concur, and I have no doubt of the relevancy of the action. In coming to this conclusion I do not consider that we are in any degree trenching upon the rule that what is publicly stated before the judge in open Court may be published in the newspapers. That, as I understand them, was the import of the English cases referred to; but this summons has never been so dealt with. It had only been placed in the hands of an officer of Court for the special purpose of having it called, and, as pointed out by your Lordship, that official was only entitled to deal with it in the limited manner prescribed by the Act of Sederunt, and that being so, neither this document nor the statements in it have ever been in a position in which they could be made known to the public in Court. When in such circumstances access is somehow or other obtained to a summons, and statements in it which contain matters injuriously and calumniously reflecting on the character of third parties are, as here, published in the newspapers, an action of damages will, I think, lie against the publisher at the instance of a party aggrieved.

Lord Shand—Proceedings in open Court before a judge may be made the subject of newspaper reports, provided always that the report be fairly and correctly stated. The public are entitled to be present to hear what occurs in open Court, and what is there published in their hearing may be again published if correctly repeated. But I agree with your Lordships that while the law so stands it will not aid the defender here. There had been no publication in Court or before a judge of this summons. I should think that as a condition of a right to publish what he did the defender must show that he was in such circumstances as gave him a right of access to and publication of the document. But, in the first place, in regard to the custodier of the summons—the clerk—it is provided by the Act of Sederunt that he shall not be entitled to give access to the summons or to exhibit it to anyone except the agents in the case. It is nothing for the defender to say that the calling of the summons was a judicial step of procedure unless he can further show either that he had a right of access to it as a public document or that it had been published in Court in the sense which I have explained. The only other way in which the summons can be obtained is through one or other of the parties. If they published statements of a calumnious or slanderous nature they would be liable in damages, and so must any third party who takes advantage of information obtained from them and in this way publishes statements calumnious in themselves. It was explained for the defender that he took his report from the morning papers, but that was no justification unless these papers were entitled to publish what they did. I agree with your Lordships in holding that the action is relevant and that the pursuer is entitled to an issue.

The Court adhered, and after striking out the word "wrongfully" approved of the issue as above set forth.

Counsel for Pursuer (Respondent)—J. C. Smith—Rhind. Agent—D. Turner, S.L.

Counsel for Defender (Reclaimer)—Trayner—J. A. Reid. Agents—Philip, Laing, & Co., S.S.C.

Tuesday, November 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BARR (LAMONT'S TRUSTEE) *v.* SMITH & CHAMBERLAIN.

Jurisdiction—Reconvention—Where a Claim is Lodged in a Sequestration.

Held that the fact that an English firm had lodged a claim in a Scotch sequestration sub-