the road immediately after that decision—in destroying its legal character as a private street, and creating it part of a railway within the meaning of the Act of 1892. The appeal therefore, in my judgment, fails.

LORD M'LAREN—I concur with Lord Pearson, and will only add that I have great doubts whether this is a kind of property capable of being incorporated by a railway company in its system. I agree with an observation made by the Dean of Faculty in argument, that the power of construction given to a railway company presupposes an unqualified right of property on the part of the company in the lands upon which the works are to be undertaken; and accordingly powers are given in the general Acts enabling railway companies to buy out the owners of servitudes or other lessor rights affecting the lands upon which it is proposed to undertake constructive operations. Now it is very difficult to conceive that a public or servitude road, the *solum* of which was vested in the company, could possibly be a place where a railway company had a right to lay down a railway as part of their undertaking, but as I agree with Lord Pearson I need not enter further on this aspect of the case.

The Court dismissed the appeal.

Counsel for the Appellants—Hunter, K.C.—Macmillan. Agents—J. C. Brodie & Sons, W.S.

Counsel for the Respondents—Dean of Faculty (Dickson, K.C.)—Hon. W. Watson. Agent—James Ayton, S.S.C.

Tuesday, November 3.

EXTRA DIVISION.

[Lord Guthrie, Ordinary.

POPE *v.* OUTRAM & COMPANY. POPE *v. EDINBURGH EVENING NEWS.* POPE *v.* MARR. POPE *v.* THOMSON & COMPANY.

Reparation—Slander—Privilege—Proceedings in Court—Newspaper—Fair and Accurate Report—Failure to Report Result—Relevancy—Issue.

An action of damages for slander was brought against newspaper proprietors. The pursuer averred that the defenders had published a paragraph purporting to give an account of a divorce suit then proceeding in New York, in which suit the pursuer was alleged to have committed adultery; that at the date of publication the case had been decided negativing such allegation, but the result of the suit was not given in the paragraph; that the paragraph falsely and calumniously represented the pursuer to have been guilty of adultery, and had been published recklessly; that it was not a fair and accurate report of proceedings in open court, inasmuch as it omitted the result of the suit, which was or ought to have been known to the defenders, and also referred to matters not appearing in the final pleadings of parties. The defenders pleaded that the averments were irrelevant, and also that the paragraph being a fair and accurate report of proceedings in open court they should be assoilzied.

Held that the pursuer's averments were relevant, entitling him to an issue—whether the paragraph "falsely and calumniously represented that the pursuer had committed adultery with a married woman. . . ."—it being for the defenders to establish their defence that the paragraph complained of was a fair and accurate report of proceedings in open court.

Question (*per* Lord M'Laren) whether a newspaper will forfeit its privilege of publishing proceedings in open court if it omits to state the result of the proceedings.

Opinion (*per* Lord Dundas) that as part of the defence of fair and accurate report there comes before the jury the question of the completeness of the report, and if insufficiently complete, the question of fault on the defenders' part.

Henry Richard Pope brought four actions of damages for slander against the following defenders—(1) George Outram & Company, Limited, proprietors and publishers of the *Glasgow Weekly Herald;* (2) *Edinburgh Evening News, Limited,* proprietors and publishers of the *Edinburgh Evening News;* (3) Alexander Marr, proprietor and publisher of the *Aberdeen Free Press* and the *Evening Gazette;* and (4) D. C. Thomson & Company, Limited, proprietors and publishers of the *Evening Telegraph and Post.*

The four actions were founded on the publication of similar paragraphs in each of the newspapers, and the question in each case was substantially the same. This report is based on action against Outram & Company.

The *article* complained of was—"*Strange New York Divorce Suit. Remarkable Revelations.*—A curious divorce suit, in which London figures to a large extent, began in the Supreme Court of New York a week ago. The petitioner for a separation is Mrs Ida Elizabeth Ensign, and the respondent Mr Henry Asher Ensign, a well-known New York banker. The husband counter-sues for divorce, naming Mr H. R. Pope, an automobile dealer of London, as co-respondent. The latter, who is defended by ex-Governor Black and Judge Olcott, two of the most famous lawyers in this country, joins with Mrs Ensign in vehemently denying the allegations. The petitioner (says the *Daily Telegraph* correspondent) specified numerous acts of cruelty. One night in New Mexico she says her husband drove her out of the window and compelled her to stay till daybreak on the lawn in her night

clothes. Another time he threatened to shoot her at the Marie Antoinette Hotel, New York. In the cross-suit the husband makes the remarkable allegation that he first met his wife in Piccadilly in July 1898, and, 'blinded by uncontrollable infatuation,' married her within a month, in order to reform her. He asserts that at the time of the marriage she was already the wife of a Mr Ramsay Kennedy of Glasgow, an assertion which Mrs Ensign indignantly denies. The respondent imputes misconduct to Mr Pope during a trip to Switzerland. Mrs Ensign, who is a beautiful woman and who seems perfectly refined, says her family live in Surrey, and that she has come to this country to fight for the honour of herself and those dearest to her. The husband sailed in the 'Republic' last week for the Mediterranean. In Mr Ensign's counter-petition he denied all the charges of cruelty, describing his association with the alleged Piccadilly girl in the following quaint fashion—'It was a chance acquaintance, but I was so captivated with her beauty and her winning ways that a few days only were sufficient to convince me that I could never live quite happily without her, and about a month thereafter we were married at St Martin's-in-the-Fields. I had deceived myself into the belief that by a life's devotion I could so educate and purify her mind that some day she would be a woman that any gentleman might proudly call his wife, and I loved her with all my heart and soul. I have given her unselfish and absolute devotion, and the tenderest care. I early sent her to a first-class boarding-school, that she might there improve the mere rudiments of education she possessed, but she would not study. I provided her with private tutors, introduced her to the best society in England and in this country, and surrounded her with those requirements and those influences of a Christian life to which she in early years had been a stranger. This I did in order that she might forget for all time the allurements of the abandoned life she once had led, and become imbued with the ideals of refined and virtuous living, with the true felicity of married life, and with the sacredness of home—but she would have none of it.' Mr Ensign then set forth that his wife, in following the inclination of her mind, would try to show it outwardly by blackening her eyebrows, powdering and painting her cheeks. 'I did, in fact, restrain her, for when I came home at nights and found her make-up, such as no decent woman would consent to meet her, it nearly drove me mad.' Mrs Ensign denied the insinuation, asserting that her husband possessed an ungovernable temper."

The pursuer *averred*—"(Cond. 2) In November 1906 Mrs Ida Elizabeth Ensign, residing at 7 Holles Street, Cavendish Square, London, wife of Henry Asher Ensign, banker, New York, filed a petition in the American Courts for a judicial separation from her husband on account of his cruelty. As a defence to the said action, answers were lodged by the said Henry Asher Ensign. He also counterclaimed for absolute divorce on account of his wife's misconduct. In his pleadings in said action the said Henry Asher Ensign also made various scurrilous allegations regarding his wife's moral character, and in particular accused her of adultery with the pursuer. The action was set down for trial for the 31st October 1907 on the following issues, viz.—'1. Was the plaintiff at the time of her marriage to defendant, to wit, on or about the 27th August 1898, already the legal wife of Ramsay Kennedy of Glasgow, Scotland? 2. Did the plaintiff, on or about the month of August 1906, at the White Hart Hotel, Lincoln, England, commit adultery with one H. R. Pope?' At the calling of the case the said Henry Asher Ensign made no appearance, and the judge accordingly directed the jury to find for the plaintiff in said action—*i.e.*, the said Mrs Ensign—on both issues. (Cond. 3) In their newspaper, of date 9th November 1907, the defenders printed and published an article with the following headings in large type—'Strange New York Divorce Suit. Remarkable Allegations.' Said article is in the following terms, viz. — [*quotes article v. supra*]. (Cond. 4) The said article falsely, maliciously, and calumniously represents that the pursuer had been guilty of adultery with Mrs Ensign; that he had committed adultery with her on the occasion of a trip which he had with her to Switzerland; that he was the friend and associate of a woman of ill-fame, who had been a street walker and a prostitute and had led an abandoned life; that he was of grossly immoral character and unfit to mix with people of respectable character. The said representations are false and have no foundation in fact, and in publishing them the defenders acted recklessly without regard to their truth or to the feelings and reputation of the pursuer. Moreover, the article complained of was not a fair and accurate report of the pleadings and proceedings in the said action, but, on the contrary, was misleading and untruthful in certain important respects, and was calculated to give the public an erroneous impression as to the true position of the parties and the facts of the case. In particular, it unfairly and untruly represents that what it describes as 'a curious divorce suit,' in which the pursuer figured, was then proceeding in the American court, and that the allegations against Mrs Ensign and the present pursuer were to be the subject of judicial inquiry and determination. The truth was, as the defenders knew, *or ought to have known*, at the time of the publication complained of, that the case had terminated by a verdict in favour of Mrs Ensign on both the issues quoted in article 2 *supra*, which had the effect both of establishing her innocence of the charges brought against her by her husband and of negativing the issue regarding her alleged adultery with the pursuer on the occasion mentioned in the second issue. *The verdict of 31st October was cabled to the press of this country before 1st November, and was pub-*

lished in this country on the morning of 1st November 1907. Moreover, the statement in the said article that Mr Ensign in the said action of divorce imputed misconduct to the present pursuer during a trip to Switzerland was untrue in point of fact, and was not warranted by anything contained in the said issues and in anything in the settled or final pleadings in the divorce action or by anything which took place in court. In that respect the said article was an unfair and inaccurate report. Further, the said article unfairly did not disclose what was the fact, viz., that in the early stages of the proceedings Mrs Ensign's husband had made counter charges against Mrs Ensign which had been struck out of his pleadings by order of the court. The defenders have already admitted, and it is the fact, that the article which was published by them as aforesaid gave an inaccurate account of the proceedings in the said divorce suit, and they have apologised to Mrs Ensign for the pain and annoyance which the publication had caused her." [The words printed in italics in condescendence 4 were added by minute of amendment.]

The defenders pleaded—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (3) The paragraph complained of being a fair and accurate report of the pleadings and proceedings in a public court of record, the defenders are entitled to absolvitor. (4) The said paragraph not being defamatory of the pursuer, the defenders should be assoilzied."

On 18th July 1908 the Lord Ordinary (GUTHRIE) approved of an issue in these terms—"It being admitted that the defenders printed and published in the *Glasgow Weekly Herald* newspaper of 9th November 1907 the headlines and paragraph contained in the schedule hereto annexed: Whether the statements and representations contained in said headlines and paragraph are of and concerning the pursuer, and falsely and calumniously represent that the pursuer had committed adultery with a married woman, to the loss, injury, and damage of the pursuer." [The schedule contained the paragraph quoted *supra*.]

Opinion.—"I allow the issue in view of the pursuer's amended record. If, in the circumstances now alleged, the defenders knew or ought to have known that the serious charge against the pursuer to which they had given currency had been, by the time their sensational article appeared, judicially negatived, it was their duty, if they said anything about the matter, to state the whole facts up to date. If they did not do so, the result in law was that they adopted the slander, and the ordinary form of issue must be allowed."

The defenders reclaimed, and argued—(1) The paragraph contained no slanderous matter, because it did not represent that the pursuer had been guilty of adultery, but only that he had been called as a party in an action of divorce, and that he denied the averments of the pursuer in that action regarding him. (2) The paragraph complained of being a report of proceedings in open Court was privileged if fair and accurate. It was no doubt true that the question whether a report was fair and accurate was for the jury, but the pursuer must nevertheless aver in what respects the report was unfair or inaccurate, and it would be for the Court to determine on these averments whether there was a relevant case to go to the jury—*Kimber* v. *The Press Association*, L.R. 1893, 1 K.B. 65. Here the only complaint made against the report was that it did not give the result of the pleadings. That was not a relevant averment of unfairness or inaccuracy unless a newspaper could be made liable for not employing the best means of keeping its news up to date. The mere fact that prior to publication something else had happened could not make a report, otherwise fair and accurate, slanderous. Further, a report did not cease to be fair and accurate because it was published in two issues of a newspaper instead of one. There was nothing in the pursuer's averments to negative the view that the result of the action was published in the succeeding issue. The case of *Grimwade* v. *Dicks and Others*, 1886, 2 T.L.R. 627, founded on by the pursuer, had no application, because there the paragraph complained of was an inaccurate report. The amendment did not make the record relevant unless it could be affirmed that the knowledge of one newspaper laid a duty on all others. There could be no such duty unless every newspaper took the risk of the accuracy or inaccuracy of every other newspaper.

Argued for the pursuer—(1) The paragraph contained a slander. If Ensign had published such statements he would have been liable in damages, and the newspaper was equally liable for giving currency to them. (2) To publish pleadings in Court was *prima facie* a wrong—*Richardson* v. *Wilson*, November 18, 1879, 7 R. 237, 17 S.L.R. 122, *per* Inglis, L.P.; *Wright and Greig* v. *Outram & Co.*, July 17, 1889, 16 R. 1004, 26 S.L.R. 707; *Macleod* v. *Justices of Peace of Lewis*, December 20, 1892, 20 R. 218, 39 S.L.R. 186; *Stevens* v. *Sampson*, 1879, L.R., 5 Exch. Div. 53. In such a case it was for the defenders to show that the publication was a fair and accurate report of proceedings in open Court—*Wright and Greig* v. *Outram & Co.*, March 11. 1890, 17 R. 596, *per* Lord Kyllachy at p. 598, 27 S.L.R. 482, at p. 484; *Kimber* v. *The Press Association*, *cit.*, *per* Esher, M.R., at p. 71. That question was for a jury to determine—*Grimwade* v. *Dicks and Others*, *cit.*; *M'Dougall* v. *Knight & Son*, 1886, L.R., 17 Q.B.D. 636, *per* Fry, L.J., at p. 642. The pursuer did not admit that the paragraph complained of was a report of proceedings in open Court. (3) The innuendo put upon the paragraph was one which it was capable of bearing, and the pursuer was entitled to have the case sent to a jury on the issue approved by the Lord Ordinary—*Ritchie & Co.* v. *Sexton*, March 19, 1891, 18 R. (H.L.) 20, *per* Lord Herschell, 28 S.L.R. 945; *Neil-*

son v. *Johnston*, February 8, 1890, 17 R. 442, 27 S.L.R. 333; *Wright and Greig* v. *Outram & Co.*, July 17, 1889, 16 R. 1004, 26 S.L.R. 707.

At advising—

LORD M'LAREN—The opinion I am to deliver applies to four actions against four different newspapers, because on the question of relevancy I think the actions are not distinguishable. The substance of the pursuer's case is that the newspapers published of and concerning him that in a certain action or process of divorce in the State of New York the pursuer was accused of having committed adultery with a married lady,

Prima facie this is a libel, and it makes no difference in law that the newspaper did not publish the calumny on its own authority, but gave currency to the story for what it was worth, The injury to the pursuer is exactly the same, whether the writer himself affirms the truth of the story, or whether he says that some lawyer or other person has affirmed it.

It is no doubt true that if the libel is in substance a fair and accurate report of public proceedings in a court of justice, this, on being established to the satisfaction of the presiding judge and jury, will be a good defence. But it is not at all necessary that the pursuer should anticipate and meet the defence in his summons. That would be a complete inversion of the known rules of pleading. The pursuer comes into Court saying, "You have taken away my character. You say you are entitled to do so, and that this is a fair report of public proceedings, but it is for you to establish this defence if you can."

On this broad view of the case I am prepared to adhere to the Lord Ordinary's interlocutor sending the cases to trial. But as the question has been argued, I may add that I should wish to reserve my opinion on the question whether a newspaper will forfeit its privilege of publishing proceedings in open Court if it omits to state the result of the proceedings.

At this moment we do not even know whether the case in New York has reached the stage of being heard in open Court, but if it was a case in open Court a jury might possibly take the view that a one-sided report was not in truth and substance a fair and accurate report. If such a question should arise the presiding Judge will no doubt give the jury all necessary directions.

LORD DUNDAS—I am of the same opinion. I think these cases are peculiar and rather puzzling, and I had at first some doubt whether the pursuer's record contained issuable matter, and also whether, if that were so, the issue authenticated by the Lord Ordinary in each case properly raised the real questions in dispute. But I have come to hold an affirmative opinion upon both points, though not, I think, exactly upon the same grounds as the Lord Ordinary. It appears that his Lordship would have thrown the actions out but for the amendment made by the pursuer to the effect that the defenders "ought to have known," when they published their articles, that the trial in America had terminated in the manner explained upon record, because "the verdict of 31st October was cabled to the press of this country before 1st November, and was published in this country on the morning of 1st November 1907." Now if the articles contain false and calumnious statements of and concerning the pursuer, it is for the defenders to prove if they can that their reports are fair and accurate. As part of this defence the question would arise whether they were or were not sufficiently complete reports, and if not sufficiently complete, whether the defenders ought to have known that they failed in such completeness. The matter contained in the amendment is therefore not, I consider, a necessary part of the pursuer's record, though it was probably right for him to state it in order to indicate the kind of answer he intends to make to the defenders' contention that their reports were fair and accurate. My reasons for thinking that the cases ought not to be withheld from a jury are twofold. In the first place, the parties are at issue in fact as to how far the statements published (so far as of and concerning the pursuer) represent matter contained in pleadings and in open Court. The proof as to this may raise a question of privilege, in regard to which (if it should arise) it will be the duty of the judge to direct the jury. In the second place, I think it is for the jury, after hearing evidence, and not for the Court *ab ante*, to decide whether or not the reports as published were in the circumstances fair and accurate. The form of issue appears to be justified by some of the cases to which we were referred.

The Court adhered with expenses, leaving the question of expenses to the Auditor, with the observation that the pursuer's expenses could not be incurred fourfold when he only maintained the same arguments against all the defenders.

LORD PEARSON concurred.

Counsel for the Pursuer (Respondent)—Wilson, K.C.—Steedman. Agents—Steedman, Ramage, & Co., W.S.

Counsel for the Defenders (Reclaimers)—For Outram & Company—Clyde, K.C.—Macmillan. Agents—Webster, Will, & Co., S.S.C. For *Edinburgh Evening News*—Morison, K.C.—Munro. Agents—Weir & Macgregor, S.S.C. For Marr—Morison, K.C.—Fenton. Agents—Weir & Macgregor, S.S.C. For Thomson & Company—Hunter, K.C.—Dunbar. Agents—Menzies, Bruce-Low, & Thomson, W.S.