

And it makes no difference in this rule, whether this misconduct consists in *omitting* to do what the agent ought to have known was *necessary*, or in actually doing what he ought to have known was *unnecessary* and injurious; and it being incontestible, that the decree obtained in the first process, was amply sufficient for the respondent's security against the effect of the bond, until that decree was reduced *legitimo modo* in a process of reduction, it makes no difference whether the proceedings so taken were ultimately successful, or whether the respondent derived benefit from them or not.

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After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be, and the same are hereby affirmed, with £200 costs.

For Appellant, *Sir John Scott, George Ferguson, Neil Ferguson, Wm. Tait.*

For Respondent, *Wm. Adam, Thomas M'Gregor.*

(M. 12375.)

ROBERT PAUL,	.	.	.	.	<i>Appellant;</i>
JOHN CADELL, Esq.,	.	.	.	.	<i>Respondent.</i>

House of Lords, 30th May 1799.

PROOF — WITNESS — PRODUCTION OF BOOKS. — In an action of damages for libel, brought against two parties, the one the publisher, the other the editor and proprietor of the "Scots Chronicle" Newspaper; the defence stated by the latter was, that he was not the proprietor, or any way concerned in the paper. A witness was summoned as a haver, to produce all the account books, ledgers, &c., of the Scots Chronicle office, prior to his becoming the proprietor, in order to prove that the defender was proprietor at the period mentioned. The witness refused, in respect that it would disclose his own private affairs. The Court found him bound to allow inspection of the books to the Commissioner, and to take excerpts. On appeal to the House of Lords by the witness, this was affirmed.

An action of damages was raised against "John Johnstone, as the publisher, and John Morthland, Esq., advocate, as the editor, proprietor, legal adviser, and

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“ abettor of, or otherwise held, believed, and understood to
 “ be concerned in conducting, printing, and publishing the
 “ periodical paper called the ‘ Scots Chronicle,’ ” for pub-
 lishing a libel on the respondent’s character in that
 paper.

The appellant was the real proprietor of the paper, hav-
 ing acquired the property thereof sometime previous to the
 facts complained of by the respondent.

Defences were lodged by Mr. Morthland, denying that he
 was proprietor, or any way concerned in the paper. Parties
 having joined issue on that point, a proof was allowed, and
 a remit made to the Sheriff, commissioner, to take the
 proof.

As it was proved by one of the witnesses that Mr. Morth-
 land occasionally wrote entries in the books of the Scots
 Chronicle, it was expected that, from these entries, certain
 evidence would appear to establish his connection with the
 concern ; and the appellant, in whose possession these books
 were, being cited to give evidence as a haver, on the part
 of the respondent (pursuer); and being asked to produce all
 the books of the concern, he declined to do so, in respect it
 would disclose his own private affairs, he being now the
 proprietor of the Scots Chronicle, and of these books. He
 was also asked to allow inspection of his books prior to the
 period when he became proprietor, on condition that the
 part which referred to his own transactions should be fold-
 ed down, but he refused : Whereupon the respondent ap-
 plied by petition to the Court for letters of *first* and *second*
 diligence against havers for the production and inspection
 of the journal, ledger, order, cash, letter, and ALL OTHER
 books kept and used in the Scots Chronicle office prior to,
 and at the period of the publication of the article in the news-
 paper founded on in this action. The petition was an-
 swered by stating that the respondent had not stated any
 one article or entry in the books which, if exhibited, would
 prove the fact put in issue between him and Mr. Morthland ;
 but the Court, on report to it, was pleased to pronounce this
 interlocutor :—“ The Lords having advised this petition,
 “ with the answers thereto for Robert Paul, and heard
 “ parties’ procurators thereon, grant warrant for letters of
 “ first and second diligence at the instance of the petitioner
 “ against havers, for the production of the journal, ledger,
 “ order book, cash book, letter book, and all other books
 “ kept and used in the Scots Chronicle office, prior to and at

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“ the period of the publication of the newspaper founded on
 “ in this action, that the same may be inspected by the
 “ commissioner for taking the proof in this cause, and he
 “ may take such excerpts therefrom as he shall think mate-
 “ rial to the issue; renew the commission to the commis-
 “ sioner formerly named for proving the facts *hinc inde*
 “ formerly admitted to probation, grant diligence at the
 “ instance of both parties against havers and witnesses.”

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Against this interlocutor the present appeal was brought to the House of Lords by the appellant.

Pleaded for the Appellant.—The judgment appealed from goes to establish a novel doctrine, that the pursuer, asserting matter of fact in his libel, and undertaking to prove it, may compel a third party to produce or allow inspection of all his books and papers, in order that it may be discovered whether they contain any thing which can be made evidence in a matter in which he is not concerned: hitherto it has been understood, that one who comes into a court asserting a fact, must be prepared with his evidence, or able to say upon what he proceeded; but to proceed in the manner proposed, thus to fish for evidence, is new in practice, and against all principle. The interlocutor establishes that the whole books and papers of a *third party*, and of course all his private concerns, may be canvassed and exposed; an exposure possibly ruinous, and certainly vexatious and injurious, merely because it is alleged that *perhaps* those books and papers *may* contain something *which may be* made evidence in a cause to which he is a stranger. The appellant has sworn in evidence, that he became the sole proprietor of the paper in March 1797; and yet the respondent's object is, to prove by his books, that another person was really the proprietor. The Court has modified the respondent's demand, by only allowing the books to be examined by the commissioner, to take excerpts of all that he might think material to the issue; but this course is equally exceptionable as the former general and sweeping demand, because it makes the commissioner judge of what is, and what is not evidence, thus precluding the parties and the witnesses from their undoubted right of objecting to the admissibility of any thing tendered as evidence.

Pleaded for the Respondent.—There is no ground for maintaining that the appellant is the real and sole proprietor of the newspaper called the Scots Chronicle, and, consequently, in that character, he is not entitled to oppose the

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inspection of the books of that office. Even if he was the undoubted proprietor of the newspaper in question, he is not entitled to refuse inspection of such parts of these books as are material to the decision of the present cause, depending between third parties, so that whether the appellant be the proprietor of the Scots Chronicle or not, the respondent is, by the law and practice of Scotland, entitled to such an inspection as the interlocutor of the Court of Session allows.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed, with £100 costs.

For Appellant, *T. Erskine, W. Adam.*

For Respondent, *R. Dundas, W. Grant.*

(Writ in Error)

From Exchequer in Scotland.

ROBERT DUNDAS, Esq. His Majesty's Advocate General,	} <i>Plaintiff in Error;</i>
WILLIAM MENZIES, Spirit Dealer, Glasgow,	
	} <i>Defendant in Error.</i>

House of Lords, 7th June 1799.

DISTILLERY LAWS—LICENSE.—A distiller having a distiller's license for the manufacture of spirits, which expired on 10th Oct. 1797, gave notice to the crown on 10th June 1797 that he had ceased to be a distiller, and had disposed of the same to a third party, he at sametime having 11,500 gallons of spirits on hand; the question was, whether he could sell these under his distillery license, which was then current and not expired, or was bound to take out a new license as for a wholesale dealer, he having ceased *de facto* to be a distiller? The Court of Exchequer, on a special verdict of a jury argued before them, found for the defendant in error; but reversed in the House of Lords, and held, that the moment he renounced the character of distiller, he was bound to take out a license as a dealer or seller of spirits.

The defendant commenced the business of a distiller, and, in terms of the statute, granted bond to the crown, with one sufficient surety, for the regular payment of the duty on two stills to be licensed to him for distilling spirits at