by one banker of another who stands in no special relation to him, then in the absence of special circumstances from which a contract to be careful can be inferred, I think there is no duty excepting the duty of common honesty to which I have referred.

In saying that I wish emphatically to repeat what I said in advising this House in the case of *Nocton* v. *Lord Ashburton* (*cit.*) that it is a great mistake to suppose that because the principle in *Derry* v. *Peek* (*cit.*) clearly covers all cases of the class to which I have referred, therefore the freedom of action of the Courts in recognising special duties arising out of other kinds of relationship which they find established by the evidence is in any way affected. I think, as I said in *Nocton's* case, that an exaggerated view was taken by a good many people of the scope of the decision in *Derry* v. *Peek*. The whole of the doctrines as to fiduciary relationships, as to the duty of care arising from implied as well as express contracts, as to the duty of care arising from other special relationships which the Courts may find to exist in particular cases still remains, and I should be very sorry if any word fell from me which should suggest that the Courts are in any way hampered in recognising that the duty of care may be established when such cases really occur.

Further than that I have nothing to add, and I concur in the general view which has been taken of this appeal by my noble and learned friend on the Woolsack.

LORD KINNEAR—I agree with what has been said by both my noble and learned friends who have preceded me, and I have nothing to add.

LORD ATKINSON—I quite concur with what has been said by my three noble and learned friends who have preceded me.

I do not discuss whether there may not be established the relations between two men where a duty is imposed upon one to see that the information which he conveys to the other is accurate; but it appears to me to be perfectly clear that the facts of this case do not impose upon Mr M'Arthur any such duty towards the inquirer he was making inquiry for, and therefore the case comes back and rests upon the doctrine of *Derry* v. *Peek;* and I quite concur with my noble and learned friend upon the Woolsack that although the facts do place Mr M'Arthur in an extremely awkward position, yet they are not sufficiently cogent to induce me to come to the conclusion that the Judge who saw him and listened to his evidence came to a wrong conclusion.

In reference to the question of costs I fully concur in what has been suggested by my noble friend on the Woolsack, for I cannot but feel that this litigation is entirely due to the unbusinesslike procedure and the most unbusinesslike transaction on the part of Mr M'Arthur, Honest though it may have been, it was most negligent and most misleading, and but for that this litigation would never probably have been started.

Their Lordships dismissed the appeal, but allowed neither party any expenses in their House or in the Courts below throughout the case.

Counsel for the Appellant—Condie Sandeman, K.C. — Gentles. Agents — E. J. Findlay, Edinburgh—Lawrance, Webster, Messer, & Nicholls, London.

Counsel for the Respondents—Blackburn, K.C.—Carmont. Agents—Mackenzie, Innes, & Logan, W.S., Edinburgh — Murray, Hutchins, Stirling, & Company, London.

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*Tuesday, April* 11.

(Before the Lord Chancellor (Buckmaster), Earl Loreburn, Viscount Haldane, Lord Kinnear, and Lord Atkinson.)

## WALLACE JAMES *v.* BAIRD.

(In the Court of Session, January 13, 1916, 53 S.L.R. 324.)

*Reparation—Slander—Privilege—District Nursing Association—Parish Council—Parish Medical Officer.*

A lady interested in the poor, and president of the district nursing association, believed that owing to the opinions held by the parish medical officer the district nurse's services were not employed as frequently as they ought to have been. The Parish Council, which contributed to the nursing association, had considered the matter and had instructed the medical officer to employ the nurse in such cases as he considered necessary. The president of the nursing association having had brought under her notice the case of an old age pensioner, who was being attended by the medical officer, and who ought as she thought to have had the benefit of the nurse's services, wrote to the chairman of the parish council. The medical officer who had attended the pensioner as a private patient innuendoed the letter as imputing professional negligence, and brought an action of damages for slander.

*Held* (*rev.* judgment of the First Division) that the letter was privileged.

The appellant "was in fact president of the association, and her position as such president, coupled with the general interest that she took in the welfare of the poor, was sufficient to justify a communication made by her to the Parish Council with regard to a circumstance which she believed to show that the respondent was not duly regarding the directions he had received with regard to the district nurse."—*Per* Lord Chancellor.

"To protect those who are not able to protect themselves is a duty which every one owes to society."—*Per* Lord Macnaghten in *Jenoure* v. *Delmege*, [1891] A.C. 73 at 77, *approved.*

*Poor—Parish Council—Pensioner—Old Age Pensions Act* 1908 (8 *Edw. VII, cap.* 40)*—Duty of Parish Council to Old-Age Pensioners.*

Old-age pensioners are not entirely outwith the discharge of the duties which a parish council owes to the poor.

*Reparation—Slander—Issues—Court's Province in Adjustment.*

*Observations* on the province of the Court in the adjustment of an issue for the trial of an action of damages for slander based on a letter which is innuendoed.

This case is reported *ante ut supra.*

The defender appealed.

LORD CHANCELLOR—This is an appea from the judgment of the First Division of the Court of Session upon a bill of exceptions lodged by the appellant against the direction of the Lord Ordinary at the trial of an action for libel. The real question involved in the dispute is whether the matter complained of was published on a privileged occasion. The bill of exceptions deals with this question of privilege on a very narrow and particular footing, and the respondent urges that your Lordships' attention must be confined to that narrow issue. For reasons that will appear, I do not think that question is material, because even in relation to the special circumstances referred to in the bill of exceptions I think the occasion was a privileged one. The dispute is a most unfortunate one, and appears to have arisen owing to differences of opinion strongly and I doubt not sincerely held by the appellant and the respondent with regard to the wisdom of establishing and employing a district nurse in the parish of Haddington. The appellant, who is a lady resident in the district and greatly interested in the welfare of the poor, in 1908 established a nursing association in the parish, of which she was elected to, and still continues to hold, the office of president. The main object of this association is to provide the services of a district nurse for the care of sick and poor people in their own homes. Its objects are in no way limited to attending the poor who are in receipt of poor relief or otherwise under control of the poor law authorities. The respondent is the medical officer of health for the parish, and he was appointed in 1907. He took the view that the institution of the district nurse was not necessary, and that poor people can find equal comfort and relief when attended in their sickness by the kind attention of their neighbours and friends. The Parish Council, however, looked favourably on the institution, and appears to have originally voted a sum of £5 for the district nurse, but on the 8th September 1908 that vote was rescinded and the £5 was divided as to £3 to the nursing association of the borough and £2 of the county.

The respondent appears to have completely disregarded the opportunity for using the services of the nurse, and accordingly in 1909 the appellant wrote to the chairman of the Parish Council calling attention to the fact that the district nurse had not been called in for any case of illness among the poor who were on the poor roll of the parish. In June 1909 the Parish Council considered this letter, and after considerable discussion and hearing what the respondent had to say, passed a resolution in these terms—"That when Dr Wallace-James finds a case of sickness requiring nursing he should instead of calling in a neighbour call in the services of the district nurse." A further resolution on the same matter was passed on the 14th June 1910 "to the effect that in future the medical officer be instructed to call in the district nurse in all cases of pauper sickness and of filthy or verminous persons on the pauper roll," and this was amended by yet another resolution on the 6th July 1910, which provided that the services of the nurse should only be called in by the doctor and that sickness should be the only reason for calling in the nurse.

For the purpose of this appeal it is unnecessary to consider all the details of what took place after the passing of that resolution and the writing of the letter which gave rise to the action. It is sufficient to say that the appellant appears to have thought that the respondent did not make full use of the services of the nurse, and this fact she regarded as prejudicial to the welfare of the poor in the district. On the 8th December 1913 she wrote the letter which contains the alleged libel. It is desirable that that should be read in full, and it is in these terms—"The Chairman, Parish Council of Haddington, Coalstoun, Haddington, N.B. 8th December 1913. Dear Sir—As president of the Haddington District Nursing Association, I am writing to ask your attention to the following:—I am informed that Mrs Haldane, Kilpair Street, an old-age pensioner, sent to Dr James for medical assistance on the 7th of November. He did not come on that day or the next, and another doctor was sent for on the 9th. Dr James called on the 10th, but did not order in the district nurse, or, so far as I understand, call again. The nurse was sent in by the other doctor on the 14th, and has been in attendance ever since. Mrs Haldane is quite helpless, by which I mean unable to move in bed at all, and is said to be suffering from a malignant disease. She has very extensive bed sores. Her daughter, who lives above her, does what she can, but it is a typical case requiring a trained nurse. Only a nurse can prevent bed sores occurring, and once established they are very difficult to cure, and cause the patient much pain and distress. The Council, besides giving a grant of £2 a-year to the nursing association, have twice passed resolutions enjoining their medical officer to call in the nurse when required. I beg to enclose one of them, the last was passed in July 1910. Immediately upon the passing of the last, ten cases on the roll were given us. The following year there were nineteen. In 1912 *none* were notified as requiring attention, nor have there been any this year. I venture to bring Mrs Haldane's case to your notice as one who should have been given the help which was within reach, and to

which she was entitled." The respondent regarded this as a defamatory statement and instituted proceedings for libel. In the course of those proceedings certain issues were discussed, and at last the issue to be left to the jury was allowed by the First Division of the Court of Session in the following form:—"Whether the said letter is of and concerning the pursuer, and falsely and calumniously represents that the pursuer while medical officer of the parish of Haddington failed in breach of his duty as such medical officer to call in the district nurse to Mrs Haldane mentioned in the said letter, to the loss, injury, and damage of the pursuer?" It does not appear that this was the form of issue which either party individually desired—it was imposed upon them by the Court—and I cannot help thinking that it very imperfectly represented the true issue which the jury had to try.

The action was tried before Lord Anderson, and a verdict was returned in favour of the respondent with damages £1000.

A bill of exceptions was taken to the finding of the Lord Ordinary, and he was asked to direct the jury in the following terms—"In respect that Mrs Haldane as an old-age pensioner is a person to whom the Parish Council had a duty to see that she got medical relief when needed, the letter complained of was privileged." His Lordship refused to give this direction, and the Court of Session have supported him in his refusal, though Lord Johnston dissented from the judgment. It is from that judgment that this appeal has been brought.

The appellant's counsel has laid this case before your Lordships' House upon the general ground that, having regard to all the circumstances of the case the occasion was privileged, and not merely because of the limited and particular circumstance to which the bill of exceptions relates. I think both on the broad and the narrow ground the appellant is right. It appears to me plain that the occasion upon which this publication was made was privileged. The appellant was a lady interested in the welfare of the sick poor in the district; she was president of an association for providing them with help in sickness; she thought that the directions which had been given by the Parish Council to the respondent with regard to the employment of the nurse had not been properly obeyed, and with this in her mind she wrote to the chairman. To my mind her letter really does no more than call the attention of the Parish Council to this view of the situation, and to bring before them the case of Mrs Haldane as an instance where, according to information before the appellant, this direction had been disregarded. This is to my mind clearly within the discharge of the duty which is referred to by Lord Macnaghten in the case of *Jenoure* v. *Delmege*, [1891] A.C. 73, at page 77, where he says this—"To protect those who are not able to protect themselves is a duty which everyone owes to society"—even though she was wrong in her belief that Mrs Haldane was attended by the respondent in his official and not his private capacity. For the purpose of determining the question of privilege it is unnecessary to consider whether all the facts stated in the communication were accurate, and whether the communication was defamatory or no. It is, of course, only where matter has been published which is in itself actionable that the plea of privilege is of any service, and on the general question the actual circumstances attending the case of Mrs Haldane were not material.

The error of the Court of Session can be best exemplified by referring to the statement of Lord Anderson—"The matter of privilege depended on the relationship which subsisted between the pursuer and Mrs Haldane. If he attended her as medical officer the occasion was undoubtedly privileged, and the defender had a right to intervene; if Mrs Haldane was a private patient the Parish Council had nothing to do with her case, and the defender had no right or duty to communicate with the Parish Council regarding the pursuer's treatment of the case." I do not think the privilege depends upon whether or no Mrs Haldane was attended by the respondent as medical officer. That is a question of fact in connection with the publication, but it does not affect the circumstance which made the communication privileged. It is quite true that no protection can be afforded to a person who wrongly assumes the facts which constitute a privileged occasion. No person can, even with the best of good faith, assume relationships which do not in fact exist, or think that they possess duties which the real facts of the case show were no duties at all.

It is said on behalf of the respondent that in fact the letter was not written by the appellant in discharge of her duty as president of the association. That, to my mind, is immaterial. She was in fact president of the association, and her position as such president, coupled with the general interest that she took in the welfare of the poor, was sufficient to justify a communication made by her to the Parish Council with regard to a circumstance which she believed to show that the respondent was not duly regarding the directions he had received with regard to the district nurse. If, however, the plea of privilege as put forward in the bill of exceptions be the only one to be regarded, my opinion would be the same. I do not think it is possible for the Parish Council to regard an old-age pensioner who is not in receipt of poor relief as a person entirely outside the discharge of duties which they owe to the poor. Indeed, the true construction of the circular of the 30th May 1911 shows that this is not so. It is stated to be a circular issued by the Local Government Board to inspectors of the poor, and is headed "Poor Law Circular No. 1. Relation of Parish Councils to Old-Age Pensioners." Its opening sentence is in these terms—"Consequent on the partial removal of the disqualification for an old-age pension arising out of the receipt of poor relief, a large number of aged persons have recently ceased to receive relief from parish councils and have received old-age pensions. This change has given rise to a number of ques-

tions as to the relation of parish councils to old-age pensioners, and the board think it advisable to direct the attention of parish councils to the following points." These words to my mind make it plain that the circular affects not merely old-age pensioners who have been or who are in receipt of poor relief, but all old-age pensioners within the jurisdiction of the particular parish council. It then contains, in separate paragraphs, first, provisions as to the "supervision of ex-pauper pensioners," and then under a different heading "poor relief to pensioners" and "medical relief to pensioners." It is unnecessary to read these later clauses in full, but I think they clearly show that old-age pensioners are properly considered to be an object of solicitude on the part of the poor law authorities, who are bound to aid them if necessary with money, with medical assistance, and even with advice, and whether or no Mrs Haldane became an object of poor law relief, I think there was a duty cast upon the appellant of the character mentioned by Lord Macnaghten to call attention to the fact that a person who was in a certain sense under the care though not under the control of the poor law authorities had not received what she regarded as the benefit of the attention of a nurse, and that the doctor who had attended her was the medical officer of the Council who had for some time past avoided sending in the district nurse to poor people, notwithstanding the fact that he had been so directed to do.

It does not appear that the attention of the learned Judges either in the Court of Session or at the trial of the action ever fastened upon the important statement that I have read from Lord Macnaghten's judgment; the case itself so far as I can see was only referred to in the opinion of Lord Johnston, who differed from the rest of his colleagues.

Your Lordships' opinion upon the relevant facts of this case is much circumscribed by the technical methods of procedure by which this appeal is encompassed. The question of whether the publication is capable of the innuendo and the question of the right form of the issue for the jury are both matters of importance in this dispute, but they are both matters upon which the opinion of this House can only indirectly be brought to bear. This is, I think, a matter much to be regretted. Had it been competent for your Lordships to bring these questions under your consideration it might have been possible that this House could have finally ended this unhappy quarrel. As it is, the only course open to your Lordships is to accede to the request of the appellant to allow the second exception to the Lord Ordinary's finding, and to vary the interlocutor of the Court of Session accordingly.

EARL LOREBURN—I am entirely of the same opinion. I think there has been an unfortunate miscarriage of justice in this case, and I share the opinion expressed in the Inner House about the remarkable damages which have been assessed by the jury in this case. But I go further. This is an action of defamation, and the first question always is whether the document impugned is capable of a defamatory meaning at all. That is a matter for the Court, and if the Court thinks it is capable of a defamatory meaning then of course it is for the jury to say whether that is the meaning or not. But in my respectful opinion it is for the parties to state the innuendo which they attach to the words, and it is not for the Court to do so.

If the document is capable of a defamatory meaning, then the jury have to say what its true meaning is and when those things have been established, together with the falsity of the charges contained in the document, there may be considered the point as to whether the occasion was privileged or not.

In considering the question whether the occasion was an occasion of privilege the Court will regard the alleged libel and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty, and the consideration of these things may involve the consideration of questions of public policy, as had to be done in a comparatively recent case in the Privy Council.

I wish to say that I find it difficult to imagine a case in which there was a higher social or moral duty than there was in this case. There can be no higher social duty than for one person who is interested in the welfare of the poor to urge on another person who can help, the propriety of assisting those who are in sickness, if it is done in good faith. I heartily assent to the opinion expressed by Lord Macnaghten in the case which my noble and learned friend has quoted from the Woolsack, and it is perfectly clear that in no event can this pursuer succeed in this action unless he makes out malice or *malus animus*.

I desire to say one thing further. I wish to reserve for myself the right to say that this letter is not capable of any defamatory meaning whatever. It is not possible for your Lordships to say that on this occasion by reason of the form in which the appeal comes to us, but I desire to reserve the right so to rule if unhappily this case should come here again, and no doubt the pursuer will consider for himself the prospect of this question having to be determined hereafter.

VISCOUNT HALDANE—I concur.

LORD KINNEAR—I also agree entirely with what has been said by both the noble and learned Lords who have spoken.

I am bound to say that I think the proceedings in the Court below are far from satisfactory, but I think that we must consider this case, as my noble and learned friends have done, according to the conditions which are fixed by final interlocutors, or at least interlocutors which are for the present time final of the Court below, because these have not been brought before the House by way of appeal, and we have

not heard counsel about them. We must take it therefore as fixed for the present purpose—although I agree with my noble and learned friend opposite that they still might possibly, I think unhappily, be reopened—but for the present purpose we must hold it fixed that the letter written by this lady to the Parish Council is capable of bearing the defamatory meaning ascribed to it in the issue, and therefore that the true question which was before the judge and the Court after the issue had been fixed, and which is before your Lordships now, is simply whether on that assumption the occasion on which the letter was written was privileged so as to prevent the pursuer from recovering a verdict in his favour unless he could satisfy the jury that the letter was not written in a fair exercise of the respondent's privilege, but was written maliciously for some other purpose than the due performance of a duty which she had assumed.

Now upon that question I am very clearly of opinion that the occasion was privileged. I do not desire to repeat what has been already said much better than I could say it, but I wish to express my entire concurrence with all that has been said by both the noble and learned Lords who have spoken, as to the privilege of this occasion, and I agree that the decision taken in the Court below for the purpose of excluding privilege is entirely untenable. I think it is untenable in law apart from the special circumstances of this case, because I hold that the defender in the exercise of a moral and social duty which she had undertaken, but which was none the less a duty when she had undertaken it, was entirely justified in calling the attention of the Parish Council to the lack of sufficient provision for the attendance of nurses upon the poor persons, and especially upon this particular poor person who was under consideration, even although the Parish Council had no direct duty to supply such attendants themselves. But then I think it has been made clear by the references which the Lord Chancellor has made to the circular of the Local Government Board that the mere fact of this poor woman not being upon the poor roll did not in itself withdraw her from the supervision, I will not say from the control, but from the supervision and care of the Parish Council, if the Parish Council directing its attention to her circumstances thought it was proper to interfere. I have no doubt that the occasion was privileged and that the pursuer cannot recover without proving malice.

I wish to add that I entirely concur with the observation which fell from my noble and learned friend opposite as to the adjustment of the issue. I agree with the Lord President (52 S.L.R. at p. 18) that what he says has become recently the practice of the Court of Session is an entirely erroneous practice. There can be no question at all I think that the law is as it was laid down by Lord President Inglis in the case (*Sexton* v. *Ritchie & Company*, 1890, 17 R. 680, 27 S.L.R. 536) which the present Lord President cites, namely, that in all actions for libel it is the duty of the pursuer to state on the record what he understands and undertakes to show is the true meaning of the writing taken as a whole. If he proposes to put upon words that are apparently harmless a defamatory meaning by reading them with some special application, then it is his duty to allege the extrinsic circumstances which he says prove that defamatory meaning, but if there is no occasion for alleging extrinsic facts at all, it is still, as the Lord President says, his duty, although he is not necessarily required to state extrinsic facts, to state distinctly the libellous meaning which he attaches to the writing. I take it therefore that that is the duty of the pursuer and it is not the duty of the Court. The duty of the Court in framing issues is perfectly clear and perfectly well understood. They are to extract, or to see that the parties extract, from the averments of the pursuer on the record an adequate and appropriate statement of the facts which he undertakes to prove to the jury; and if the issue which he proposes seems to them improper, insufficient, or unauthorised by the averment of facts, they may alter it, but they cannot find their facts anywhere but on the pursuer's averments. I think the learned Judges in the present case forgot that innuendo is a fact and that they cannot put upon the pursuer the duty to prove something which he himself has not alleged, and they cannot discover for him a ground of complaint which he has not discovered for himself. It is for him to say in what way the language which he complains of has hurt his reputation, and I think the Court goes altogether out of its province when it undertakes to say for him what he has not ventured to say for himself. I therefore desire to express my agreement in what fell upon this point from the noble and learned Earl.

LORD ATKINSON—I concur.

Their Lordships pronounced this order—

"Order that the interlocutor appealed from be reversed in so far as it disallows the second exception, and also in so far as it finds the pursuer entitled to three-fourths of his expenses: Allows the second exception; and declare the occasion of the writing of the letter of 8th December 1913, forming the schedule to the issue, was privileged; *quoad ultra* with this declaration, affirm the interlocutor appealed from and remit to the Court of Session"—and allowed the appellant the expenses of the appeal.

Counsel for the Appellant—Condie Sandeman, K.C.—Guild. Agents—Guild & Guild, W.S., Edinburgh—Thorne, Priest, & Co., London.

Counsel for the Respondent—Roberton Christie, K.C.—King Murray. Agents—Patrick & James, S.S.C., Edinburgh—Beveridge, Greig, & Co., Westminster.