of the property." If this section stood by itself it might be doubtful whether in the present case the "owners" meant only the limited company (or the Messrs Anderson, who for the purposes of the case are really the same as the company), or might include the beneficiaries in the £40,000. But I think that section 14 (1) makes it plain that the latter interpretation is correct, and that these beneficiaries must contribute rateably to the repayment of the duty to the executors; for it is provided that "in the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by" the executor who has paid the duty to the Crown "from the person entitled to any sum charged on such property . . . under a disposition not containing any express provision to the contrary." I am therefore for answering questions 1, 2, and 3 in the negative, and question 4 in the affirmative. [*His Lordship then dealt with the other questions.*]

LORD SALVESEN—I concur in the judgment proposed. I think it is plain in the first place that the executor is not liable as such for the estate-duty upon the land which forms part of the deceased's estate. That being so, the only question is—upon whom does that estate-duty fall to be charged? If the Messrs Anderson had received a bequest of this land by itself and without burdens I do not think it would have been argued that they would not have been liable for the full amount of the estate-duty which attached to the bequest. Equally I think it is plain that if they had received a bequest of the land burdened with a bond and disposition in security for exactly the same amount as the value of the land, the persons who would have been chargeable with the estate-duty would have been the bondholders, because they had received the entire benefit of the bequest.

In the present case we have a mixed state of matters. The Messrs Anderson received a bequest of the value of £58,000, of which £18,000 represented the value of the heritable subjects forming part of the bequest, but they received it under burden of a bond for £40,000, which was to be paid off in a specified manner. In those circumstances both parties derived benefit from the bequest, one to the extent of £18,000 and the other to the extent of £40,000, and accordingly the estate-duty must be borne in these proportions. [*His Lordship then dealt with the other questions in the case.*]

LORD GUTHRIE concurred.

The Court answered the first, second, and third questions in the negative, and the fourth question in the affirmative.

Counsel for the First and Fourth Parties—Constable, K.C.—Forbes. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Second Parties—Sandeman, K.C.—Gentles. Agents—Guild & Shepherd, W.S.

Counsel for the Third Parties—Solicitor-General (Morison, K.C.)—Lippe. Agents—R. Addison Smith & Co., W.S.

Thursday, January 13, 1916.

FIRST DIVISION.

[Lord Anderson, Ordinary.

WALLACE-JAMES *v.* BAIRD.

(See *ante*, 1915 S.C. 23, 52 S.L.R. 14.)

Reparation—Slander—Innuendo—Truth of Statements Made.

In an action of damages for slander the pursuer, who was medical officer of the parish of H., founded on a letter written by the defender as president of the District Nursing Association of H. to the chairman of the Parish Council of H., making statements as to the helpless condition of an old-age pensioner, and to her not having had the care of the district nurse. The issue was in the following terms:—"Whether the letter . . . falsely and calumniously represents that the pursuer, while medical officer of the parish of H., failed in breach of his duty as such medical officer to call in the district nurse" [to the case specified], to the loss, injury, and damage of the pursuer. At the trial counsel for the defender asked a direction to the jury that if the letter was substantially nothing but a correct statement of facts, the jury could not find for the pursuer, because his action was based wholly on the falsity of the statements in the letter. The Lord Ordinary having refused to give the direction asked, and counsel for the defender having excepted to his ruling, *held* that the Lord Ordinary was right.

Dictum of Lord President Inglis in *Campbell* v. *Ferguson*, 1882, 9 R. 467, at p. 469, 19 S.L.R. 404, at p. 405, *commented on.*

Reparation—Slander—Privilege—Parish Council—Parish Medical Officer—District Nursing Association—President of Nursing Association Writing to Chairman of Parish Council as to Failure of Medical Officer to Employ Nurse in the Case of an Old-Age Pensioner.

An action of damages for slander by a parish medical officer against the president of the district nursing association to which the Parish Council contributed, was founded on a letter written by the defender to the chairman of the Parish Council reflecting upon the conduct of the medical officer in failing to call in the association's nurse to attend to an old-age pensioner. The Parish Council had directed the medical officer to employ the nurse in such cases as he considered necessary. In a circular letter of the Local Government Board to inspectors of poor the inspector was directed to offer poor relief to any pensioner whose resources on consideration were found to be inadequate for his support, and the inspector was also informed that every pensioner who was in need of medical assistance, and who was unable to pay for it, was entitled to obtain it from the Parish Council without forfeiture of the pension. The old-age

pensioner referred to never applied for medical relief, but employed and paid the medical officer as her private attendant. *Held* (*diss.* Lord Johnston) that the occasion was not privileged inasmuch there was no duty on the Parish Council calling for the disclosure to it of the alleged facts, and the defender's belief that there was could not create privilege which did not exist.

Process—Jury Trial—Verdict—Excessive Damages—New Trial—Conduct of Defender's Case by Counsel.

Observations per Lords Johnston and Anderson that a jury were not entitled to take into consideration in fixing the amount of damages the manner in which the case for the defender had been conducted by counsel.

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

Held (*diss.* Lord Johnston) that a parish council had no such duty toward an old-age pensioner as to protect with privilege the disclosure to it, by the president of the district nursing association, of alleged neglectful medical treatment.

Observations on the duty of parish councils and their officials toward old-age pensioners.

Dr John George Wallace-James, *pursuer*, brought an action of damages for slander in the Court of Session against Mrs Baird of Colstoun, Haddington, *defender*.

The case is reported *supra*, (1914), 52 S.L.R. 14, from which report the averments of the parties appear.

The following issue was adjusted for the trial of the cause—"It being admitted that the letter which is printed in the schedule annexed hereto was written and sent by the defender to the chairman of the Parish Council of Haddington on or about the date it bears, Whether the 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? Damages laid at £5000 stg.

"*Schedule.*

"The Chairman, Parish Council of Haddington.

"Colstoun, Haddington, N.B., *Dec. 8th*, 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.—Believe me, yours truly, "(Sgd.) S. G. BAIRD."

The case was tried by Lord Anderson and a jury on the 14th, 15th, 16th, and 19th July 1915.

The evidence was to the following effect:—The defender was first informed of Mrs Haldane's case by a Mr Badger. She then asked the nurse of the District Nursing Association and Mr Badger to make inquiry as to the case. The nurse thereafter sent the following letter to the defender:—

"*Victoria Terrace*, 4/12/13.

"Dear Mrs Baird,—After inquiring from Mrs M'Lean, Mrs Haldane's daughter, I find out Dr James was asked to call on 7th Nov. As he did not turn up that day nor the next two days, another Dr was called in on the 9th. Dr James called on the 10th, that was the day the two doctors nearly met. I called on the 14th at Dr Caverhill's request, and found her in the condition as I described to you yesterday. As far as I hear going about, the Parish Council won't put up with him now as they did before. I am afraid he has lost a big number of his friends there.—I remain, yours respectfully, ALLISON B. OLIVER."

And Mr Badger gave the defender the following memorandum:—

"*Private.*

"*Case of Mrs Haldane, Kilpair Street.*

"This woman's husband was a pauper, and before his death he received medical relief. The woman was also attended by the medical officer during the husband's lifetime and after his death. Previous to Dr James being appointed medical officer Dr Howden, his predecessor, attended at this case. Dr James has from time to time attended the woman as required. Nearly five weeks ago her son informed Dr James on a Friday that his mother was worse and required attention. The medical officer promised to call. The same evening Mrs Maclean, a daughter, called at Dr James's house and informed him that her mother was very bad. He gave her a pill and promised to call. On Sunday, as the medical officer had not called either on Friday or Saturday, Mrs Maclean requested Dr Caverhill to see her mother. He came at

once and made a careful examination, and on finding bed-sores called in the district nurse. The nurse is still attending the case. In the Parish Council books there does not appear any entry of an application by Mrs Haldane for medical relief, but Mrs Maclean, the daughter, states that both Dr Howden and Dr James attended her mother. Mrs Haldane was the wife of a pauper. She was attended by the late Dr Robert Howden, the parish doctor, as a pauper. She has been attended in the same capacity by Dr James himself. She was given by him to the nurse as a pauper, and she has never paid anything for medical attendance."

Those documents contained the whole information in the possession of the defender when she wrote the above letter. The defender made no other inquiries, and in particular made no inquiries as to Mrs Haldane's status from the Inspector of Poor. In point of fact Mrs Haldane was an old-age pensioner, she was not on the poor roll as a pauper, and was not in receipt of and had made no application for poor relief. She had not as an old-age pensioner made any application for medical or other relief, and was attended by the pursuer as his private patient. The pursuer was called in by Mrs Haldane on 1st November and visited her on 3rd November, when he treated her. As he was leaving the house he met another doctor who had been called in and visited Mrs Haldane on 2nd November, and in whose hands the case then was. This other doctor was paid by Mrs Haldane. On 2nd November Mrs Haldane was not suffering from bed sores; on 13th November she for the first time complained of what was a threatened bed-sore, and on the 14th the nurse was called in. In 1912 and 1913 the nurse was called in to two cases by the pursuer—one in each year.

The defender was president of the Haddington District Nursing Association, a charitable organisation intended to provide a trained nurse for the poor of Haddington parish. The Parish Council of Haddington subscribed annually to the Association. By resolutions, dated 14th June 1910, 6th July 1910, and 9th September 1913, the Parish Council directed the pursuer to employ the nurse of the Association in all cases in which he considered her services necessary.

The relations of parish councils to old-age pensioners were indicated in a circular letter dated 30th May 1911 addressed by the Local Government Board to inspectors of poor in the following terms:—

"*Relation of Parish Councils to Old-Age Pensioners.*

"*Supervision of Ex-Pauper Pensioners.*—While in most cases the circumstances of these old-age pensioners will be such as to relieve the parish council and the inspector of poor of all solicitude regarding them, there will remain a number of cases where a continuance of supervision will be advisable. Where, for instance, pensioners of infirm health are living alone, apart from friends or neighbours, the parish council and their officers will recognise that, although there is no legal obligation on them to attend to such pensioners, it is necessary to keep them under observation so as to secure that persons so situated shall not suffer from neglect. The inspector of poor is obviously the person best qualified to afford the necessary supervision, and the Board will expect him to use a wise discretion in regard to such cases. Visits should not partake of the nature of inspections, but should rather be friendly and informal calls designed to ascertain whether the pensioners are living in circumstances of comparative comfort or whether they require medical or other parochial relief.

"*Poor Relief to Pensioners.*—It is not to be assumed that because a person is in receipt of a pension he cannot be a proper object of poor relief. The circumstances of each pensioner should be considered, and if it be found that the pension together with any other resources he may have is inadequate for his requirements, relief should be unhesitatingly offered. Whether the acceptance of such offer will entail the forfeiture of the pension will depend on the nature of the relief given, but even if that result be involved, the pensioner should be urged to accept relief when it is clearly necessary.

"*Medical Relief to Pensioners.*—If the relief given is of the nature of 'medical or surgical assistance (including food or comforts) supplied by or on the recommendation of a medical officer' (Old-Age Pensions Act 1908, sec. 3 (1) (*a*), (*i*)), disqualification for a pension will not follow. Accordingly every pensioner who is in need of such assistance and is unable to pay for it is entitled to obtain it from the parish council without forfeiture of the pension. It will be observed that the medical relief which may be given without disqualification covers more than mere medical visitation. In the opinion of the Board it includes, besides medicines, medical and surgical appliances, nutritious diet, &c., such nursing or attendance as may be ordered by the medical officer as part of the medical or surgical treatment of the case. It must, however, be pointed out that while medical relief does not in itself disqualify for receipt of a pension, the value of such relief must be reckoned as part of the income of the recipient. There may accordingly be cases where the amount of the relief is such as to prevent the recipient in respect of means from being eligible for a pension.

"*Procedure when Medical Relief is Granted.*—When a pensioner is afforded medical relief his name should be entered on the roll of poor in the usual way. The relieving parish is entitled to make a claim on the parish of settlement, regard, of course, being had to the reciprocal rule affecting medical attendance. . . ."

The defender was not aware of the circular letter when she wrote the letter sued upon, but she stated she had been informed by Mr Badger that old-age pensioners were entitled to medical relief if they required it. Mr Badger stated that he informed the defender that a pauper who became an old-age pensioner was not necessarily disqualified from obtaining medical relief. The defender made no inquiries before writing

the letter founded on as to whether Mrs Haldane had ever applied for or got medical relief.

At the trial considerable evidence was led directed to proving that the pursuer had been guilty of neglect of various other pauper patients, and specific cases were gone into.

At the trial the Lord Ordinary (ANDERSON) directed the jury that the letter was not privileged.

Counsel for the defenders thereupon asked the Lord Ordinary to direct the jury in the following terms—"Whether the letter complained of is privileged or not, if it was substantially nothing but a correct statement of facts which had actually occurred, you (the jury) cannot bring in a verdict for the pursuer, because his whole action is based on the averment that the statements in the letter are false, and if they are true the basis of his action has gone"—Which direction his Lordship refused to give; whereupon counsel for the defenders excepted to the said refusal.

Counsel for the defender further asked the Lord Ordinary to direct the jury in the following terms:—"In respect that Mrs Haldane as an old-age pensioner was 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"—Which direction his Lordship refused to give; whereupon counsel for the defenders excepted to the said refusal.

The jury found for the pursuer and assessed the damages at £1000.

The defender lodged a bill of exceptions and a minute of *res noviter*, and moved for a new trial on the grounds that the verdict was contrary to evidence and that the damages were excessive. The hearings on the bill of exceptions, minute of *res noviter*, and rule were taken together.

Argued for the pursuer—(1) The judge was right in refusing to give the first direction asked. It was *res judicata* that the letter was capable of the innuendo in the issue. The question for the jury there was whether in fact the letter falsely and calumniously represented that the pursuer had failed, in breach of his duty as medical officer, to call in the nurse to Mrs Haldane. Though the letter was true it might quite well make a false representation. *Campbell* v. *Ferguson*, 1882, 9 R. 467, 19 S.L.R. 404, and *Archer* v. *Ritchie & Company*, 1891, 18 R. 719, 28 S.L.R. 547, were distinguishable, for both were cases of fair criticism of public conduct following upon a true statement of fact. Here the innuendo was not of the nature of fair criticism or legitimate expression of opinion, but was a false representation of fact. *Henderson* v. *Russell*, 1895, 23 R. 25, 33 S.L.R. 14, was a case where the facts stated were true and not actionable, but where a trial was allowed upon an innuendo to find if the fact stated made a false representation. Further, if the innuendo was reasonable a counter issue would not be allowed if the defender merely stated that the statements made were true without denying the innuendo—*Bertram* v. *Pace*, 1885, 12 R. 798, 22 S.L.R. 525. In any event there was evidence before the jury on which they could find that the statements in the letter were not true. (2) The letter was not privileged. The premises of the direction asked were not consistent with the evidence. (*a*) The Parish Council had no duty to see that Mrs Haldane as an old-age pensioner got medical relief when needed. She was a private patient of the pursuer; she was not a pauper, and though she was an old-age pensioner she had made no application for medical or other relief. The relation of the Parish Council to old-age pensioners depended on the Old Age Pensions Act 1908 (8 Edw. VII, cap. 40) and the circular letter of the Local Government Board. An old-age pensioner was like a member of the public a potential object of poor or other relief, and that was her status in the eyes of the Parish Council, and that was not altered by the Old Age Pensions Act 1908 or the circular letter. The former merely enacted, section 310 (*a*), that receipt of medical relief did not disqualify for a pension; the latter merely recommended watchfulness in the case of pensioners. Without actual notice of need of poor or medical relief the Parish Council had no duty towards a pensioner. On the evidence Mrs Haldane was able to pay and did pay her medical attendant. (*b*) The Parish Council having no duty to Mrs Haldane, the defender was not protected in communicating with them. Privilege depended on the facts of the case, not upon the *bona fide* belief by the person claiming privilege that the facts were such as to give him that protection. The fact that the defender believed that there was a duty towards Mrs Haldane either as an old-age pensioner or as a pauper, even if her mistake was excusable, was irrelevant. Her mistake, however, was not excusable, for slight inquiry at the person obviously best able to give the information would have demonstrated the mistake—Odgers on Libel and Slander, 5th ed., p. 250; *Stuart* v. *Bell*, [1891] 2 Q.B. 341, *per* Lindley, L.J., at p. 349; *Hebditch* v. *MacIlwaine*, [1894] 2 Q.B. 54, *per* Esher, M.R., at p. 60; *Jenoure* v. *Delmege*, [1891] A.C. 73. In any event if there was privilege the defender had overstepped her privilege in making a charge against the pursuer—*Craig* v. *Jex-Blake*, 1871, 9 Macph. 973, 8 S.L.R. 616. (3) The damages were not excessive. *Inter alia*, the jury were entitled to take into consideration the manner in which the case had been conducted for the defence. A general charge of neglect had been brought against the pursuer without notice on record and without reasonable justification, and it was relevant for the jury to consider this. *Praed* v. *Graham*, 1889, 24 Q.B.D. 53, *per* Esher, M.R., at p. 55; *Thoms* v. *Caledonian Railway Company*, 1913 S.C. 804, 50 S.L.R. 498; *Landell* v. *Landell*, 1841, 3 D. 819; *Christian* v. *Lord Kennedy*, 1818, 2 Mur. 51; *Duberley* v. *Gunning*, 1792, 4 D. & E. 651, were also cited on the general question of excess of damages.

Argued for the defender—(1) The first direction should have been given to the jury. The letter was substantially a true

statement of fact, and accordingly the pursuer was in Court upon an innuendo alone. The pursuer must be able to found upon some untrue statement. It was not enough that a false representation could be taken from a true statement—*Campbell* v. *Fergusson* (*cit.*). (2) The second direction should have been given to the jury. (*a*) The letter was privileged, for the Parish Council owed a duty to Mrs Haldane. The Parish Council owed a duty to the "poor." The word "poor" was not defined in the Poor Law Acts and was to be read in the ordinary popular sense. In that sense Mrs Haldane was one of the poor, for all she had was her pension. The duty of the Parish Council was not limited to persons on the roll of paupers—Poor Law (Scotland) Amendment Act 1845 (8 and 9 Vict. cap. 83), section 55—nor was an application for relief a condition-precedent to the existence of a duty. There was therefore a duty to Mrs Haldane as a poor person to see if she required relief, and if so to offer it. Apart from that there was a duty to Mrs Haldane as an old-age pensioner. The circular letter of 30th May 1911 clearly laid a duty upon the parish council to make themselves aware of the circumstances of old-age pensioners, and if they required relief to offer it to them without awaiting an application. The Old Age Pensions Act 1908, section 3 (1) (*a*), contemplated medical relief given by the parish to the pensioner. If Mrs Haldane's case was a proper one for the consideration of the Parish Council the defender was entitled to make the disclosures she did to them as a matter of public interest—*Purcell* v *Rowler*, 1877, 2 C.P.D. 215. (*b*) Whether the Parish Council had a duty or interest in Mrs Haldane's case or not, the defender had a duty both as a member of the public and as president of the Nursing Association to make a complaint to what she reasonably believed was the proper authority. It was for the judge, not the jury, to determine if the occasion was privileged, and in doing so he must place himself in the position of the defender and consider whether she acted reasonably in view of the information in her possession—*Stuart* v. *Bell*, [1891] 2 Q.B. 341; Odgers on Libel and Slander, 5th ed., p. 250. If she had information before her reasonably calling for inquiry it was her duty without inquiring further to communicate her information to the proper authorities for investigation — *Couper* v. *Lord Balfour of Burleigh*, 1913 S.C. 492, 50 S.L.R. 320. This was what she did. Any ratepayer was entitled to ask for investigation as to what was being done with the rates he paid. Privilege was not lost if by *bona fide* mistake a substantial case for inquiry was communicated to the wrong person—*Harrison* v. *Bush*, 1855, 5 E. & B. 344; *Jenoure* v. *Delmege* (*cit.*). [It was further argued that if the occasion was privileged there was no evidence of malice and the verdict ought to be entered for the defender—Jury Trials Amendment (Scotland) Act 1910 (1 Geo. V, cap. 31).] (3) The damages were excessive — *Johnston* v. *Dilke*, 1875, 2 R. 836, 12 S.L.R. 486; *Boal* v. *Scottish Catholic Printing Company, Limited*, 1908 S.C. 667, 45 S.L.R. 476. The conduct of the case could not relevantly be considered by the jury in assessing the damages. That lay entirely with counsel, and apart from express instructions to him by his client—and there were no such instructions here—his actings could not fix his client with liability. It was relevant to consider prior instances of neglect. These were part of the history of the case and qualified the defender's attitude and actings.

At advising—

LORD PRESIDENT—This case comes before us on a motion for a new trial on the ground that the verdict is contrary to evidence and that the damages awarded are excessive. There is also a bill of exceptions on which the main controversy now rests. The issue which went to the jury was whether a certain letter addressed by the defender to the chairman of the Parish Council of Haddington "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 said letter, to the loss, injury, and damage of the pursuer?" We decided that the letter was susceptible of bearing the meaning placed upon it in the issue, and the jury has found upon the evidence that it did bear that meaning, and consequently that the defender is liable in damages. It was not maintained before us that this finding was wrong. It was, however, urged that the facts proved at the trial clearly disclosed that the occasion was privileged, and inasmuch as there was no evidence of malice the defender claimed the verdict. The direction which Lord Anderson, who presided at the trial, was asked to give was as follows—"In respect that Mrs Haldane as an old-age pensioner was 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." This direction Lord Anderson refused to give. I am of opinion that he was right. It is clear that the mere fact that the patient was an old-age pensioner in the need of medical relief did not render it the duty of the pursuer as medical officer of the parish to attend her. To entitle her to medical relief from the pursuer it was necessary that relief should have been asked on her behalf, that her circumstances should have been inquired into by the parish authorities, and that permission should have been given. Until all this had taken place the pursuer owed no duty to the patient in his capacity as medical officer of the parish. The situation is, I think, summarised with accuracy by the inspector of poor in his evidence, where he says—"In Mrs Baird's letter of 8th December 1913 it is stated that Mrs Haldane is an old-age pensioner. (Q) If she is an old-age pensioner may she get medical relief if she asks it?—(A) If she is a proper object of relief. (Q) How is that ascertained?—(A) I would require to investigate the case first. I would do so on an application being made to me by Mrs Haldane, or on her behalf. Neither Mrs Hal-

dane nor anyone on her behalf ever asked me for medical relief for her. I was aware of her having two able-bodied sons, and of her circumstances. I do not think I would have given her medical relief if she had applied for it in the circumstances which I knew. I knew the circumstances; I knew the two sons were both working. . . . Dr James, as medical officer of Haddington, has no duty whatever to give medical relief or attendance without an order from me by writing or verbally. I never gave him any instructions with regard to Mrs Haldane, nor did she ever apply for any medical relief." The refusal of the presiding judge to give this direction was not indeed seriously challenged. We heard, however, a novel and interesting argument to the effect that the occasion was privileged because the facts, as they appeared to the defender at the time, disclosed a case of privilege. This argument I consider unsound in law and in the present case destitute of foundation in fact. It is conceded that it is for the Court to decide whether or not an occasion is privileged. I am of opinion that the Court must decide that question on the facts as averred by the pursuer, or admitted or proved, and not upon the facts as they may appear to the alleged slanderer. Now in the present case it plainly appeared upon the evidence that the patient to whom it was alleged that the pursuer as medical officer had failed to call in the nurse was his private patient, to whom as medical officer of Haddington he owed no duty whatever. The letter to the chairman of the Parish Council ought therefore never to have been written. He had no duty and no interest in the matter. The letter was addressed to him under a misapprehension in fact, and is consequently not protected. The contention advanced for the defender was that if she had plausible grounds for thinking that the pursuer did owe a duty to the patient in his capacity as medical officer, and if she honestly did so think, then the Court must hold the occasion to be privileged. I am unable to see how an occasion which in point of fact is not privileged can become privileged because the defender in good faith and on grounds which commended themselves to her considered that it was privileged. Her good faith, however strong its foundation, cannot convert a non-privileged occasion into a privileged occasion, although it may afford excellent evidence of the absence of malice. No authority in the law of Scotland was quoted in support of the argument that appearance and not fact was the true test to be applied. Exactly the contrary was decided in the Court of Appeal in England in the case of *Hebditch* ([1894] 2 Q.B. 54, esp. pp. 60-1). That decision, although not binding on us, seems to me to be sound law. The reasoning of the Master of the Rolls and of A. L. Smith and Davey, L.JJ., is I think unassailable. Opinions to a like effect were expressed by Lindley, L.J., and Kay, L.J., in the case of *Stuart* v. *Bell* ([1891] 2 Q.B. at pp. 349 and 358). Lindley, L.J., puts the matter in a nutshell thus—"The question (whether the occasion was or was not privileged) does not depend on the defendant's belief, but on whether he was right or mistaken in that belief." The law is, in my opinion, quite settled. A communication honestly made upon any subject in which a person has an interest, social or moral, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty. But, obviously, the duty or interest on which the privilege rests must exist in fact. It is not sufficient for the person who makes the communication honestly to believe that a duty or interest exists. And the defence of privilege fails even although the person making the communication reasonably believed that the person to whom he made it had some duty or interest in the subject-matter, if none such really existed. In the case before us the facts proved clearly showed that there was no duty or interest to make the communication to the chairman of the Parish Council, and that he had no interest in the subject-matter of the letter. Mrs Haldane having been proved to be a private patient of the pursuer the case for privilege was gone.

But even had the law been as was contended on behalf of the defender I should have reached the same conclusion on the facts. The defender knew, and she distinctly so avers, that Mrs Haldane was not a pauper but an old-age pensioner, and that as such she was entitled to medical relief only if a request was made to and granted by the parish authorities. She knew, I think, further, that the Parish Council books did not disclose that any application had been made for medical relief on behalf of Mrs Haldane. I consider, therefore, that the defender was not warranted, without making further inquiry, to jump to the conclusion that the patient was entitled to the doctor's services in his capacity as medical officer. A simple question put to the inspector of poor would at once have elicited the truth, and the letter, I feel certain, would not have been written. I acquit the defender from any imputation of being actuated in what she did by any improper motive. On the contrary, her motive was, so it appears to me, of the best. Her sole concern was for the welfare of the sick poor. She had no desire whatever to injure the pursuer's personal reputation, and, so far as I can judge, she may have believed she had adequate information on which to base her charge. But she had not. She lacked just that information, readily procurable at any moment, which would have completely settled the question of the patient's position relative to the doctor. And accordingly, if it were relevant on the question of privilege to inquire how the facts appeared to the defender at the time, I should have been inclined to hold that the defence had failed.

Little was said in support of the first direction asked. Obviously it could not be given, for it signifies nothing that the statements made in the letter are substantially correct if the representation it makes, as set out in the issue, is false. The jury did, on the evidence, so find, and their finding is not on this ground impeached. [*His*

Lordship then dealt with the question of the amount of damages, holding that the amount awarded by the jury was excessive.]

LORD JOHNSTON—The pursuer in this case of damages for defamation has obtained a verdict for £1000, and under this motion for a new trial and bill of exceptions two questions arise for decision—(1) Whether the occasion was privileged, and if so, whether malice is established; and (2) Whether the damages are so excessive that the verdict ought to be quashed.

The question of privilege could only be determined at the trial, and the Lord Ordinary charged the jury to the effect that there was no privilege. The defender excepted to this direction not merely directly but by asking a direction in the special terms—"In respect that Mrs Haldane as an old-age pensioner was 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. While the exception to the general direction given by the Lord Ordinary was not, I think, well founded, I am myself of opinion that a good exception has been taken to his Lordship's refusal to give the special direction asked, and that not only was the occasion privileged, but, notwithstanding the efforts of the pursuer's counsel, that the case must be declared to be as absolutely clear of malice as a case could well be.

I am further of opinion that the jury have so egregiously erred in their award of damages, which, if due at all, should have been nominal merely, that in any case a new trial must be allowed.

In these circumstances it would be enough to rest my judgment on the latter point alone, but I do not feel that I should do so, because in my view it is necessary to examine circumstances which equally affect both the above points; because I do not think that full justice can be done to the defender unless the question of privilege and malice is dealt with; and because (though having regard to what I understand to be your Lordships' views, this is not now of any importance) if, as I think, the occasion was privileged and there was no malice, the defender is entitled to be placed in the position of asking that a verdict be entered for her under the Act of 1910, 1 Geo. V, cap. 31, if that be competent, as to which I indicate no opinion.

The case is one not of direct slander but of slander by innuendo, and though the law is clear, and I have no doubt as to the proper result, the case does present certain points of some difficulty in applying the law to the particular facts.

The letter complained of was on 8th December 1913 addressed by Mrs Baird, writing as president of the Haddington District Nursing Association, to the chairman of the Haddington Parish Council. It communicated to him information which Mrs Baird had received regarding a certain Mrs Haldane and the failure of Dr James, who is the parish doctor, to afford her the services of the District Association's nurse. After giving certain details about Dr James' connection with the case and Mrs Haldane's condition, Mrs Baird added—"It is a typical case requiring a trained nurse"; and concluded—"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."

But the full bearing or rather explanation of Mrs Baird's approach to the Parish Council cannot be understood without adding that Mrs Baird introduced her report by a reference to the fact that the Parish Council were supporters of the Nursing Association, and had passed at two different times resolutions as to the employment of its nurse.

It will at once be noticed that Mrs Baird does not describe Mrs Haldane as a pauper, though she certainly understood and believed that she was such. She describes her as an "old-age pensioner." The distinction is all important, and I think has been somewhat lost sight of. [*His Lordship narrated the facts of the case leading up to the writing of the letter complained of.*]

The question of privilege comes first. I do not for a moment dispute the law of the English cases of *Stuart*, [1891] 2 Q.B., at p. 349, and *Hebditch*, [1894] 2 Q.B., at p. 60. The distinction must always be drawn between the communication and its occasion. It is the occasion which is privileged, not the communication, or only the communication through the occasion. "The proper meaning of a privileged communication" is said by Park, B., in *Wright* v. *Woodgate*, (1835) 2 C. M. & R., at p. 577, to be "only this, that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication was made." To make the occasion privileged, as was further laid down by Lord Campbell, C.J., in *Harrison* v. *Bush*, (1855) 5 E. & B. 344, a communication must be made *bona fide* upon some subject-matter "in which the party communicating has an interest or in reference to which he has a duty . . . to a person having a corresponding interest or duty." If made under such circumstances there is privilege, although the statement contains "criminatory matter which, without this privilege, would be slanderous and actionable." What I have quoted are passages adopted in *Stuart's* and *Hebditch's* cases, and also in the case of *Jenoure* in the Privy Council, [1891] A.C. 73. Shortly, there must be a corresponding interest or duty in the person making and the person receiving the alleged slanderous statement. All that the case of *Hebditch* adds is that the *bona fide* belief of the person making the statement as to the duty either of himself to make or of the person he addresses to receive the communication is an irrelevant consideration. The only thing which I would venture to add is that the correspondence of interest and duty is a matter a little indefinite if stated in this shorthand way. There may be interest in the maker of the

communication and a relative duty in the receiver, or a duty in the maker and a relative interest in the receiver. But I do not think that mere corresponding interest in maker and receiver is intended to be covered. The corresponding interest must, I think, be such as to infer a duty, though possibly merely social or moral, in the maker.

In the present case there can, I think, be no doubt as to the interest and the duty of Mrs Baird as president of the Haddington Nursing Association. I disregard the contention that she had no authority to write in that capacity. I think she had full authority in the circumstances disclosed, and that no better proof is wanted than that for over six years the Parish Council, themselves members of the Association, had been freely corresponding with her upon the subject in question in that capacity. The subject-matter of the communication was the conduct of what was the Association's business, and I do not think that there can be any doubt that Mrs Baird, as representing the members of and subscribers to the Association, had both an interest and a duty to make the communication in question, provided that she did so in the right quarter. The Parish Council had certainly a corresponding interest as themselves members of and subscribers to the Association. Their act of subscription was performed in the execution of their duty to provide for the treatment of the sick poor, and they were as subscribers interested in seeing that their subscription had an effective result. But I do not rest upon that, because the object of the communication was to move them to action in their capacity as Parish Council, and I am content to take it that the real question is, had they any duty or power to take action on the communication. If they had not, the *bona fide* belief of Mrs Baird that they had will not protect her.

It was a good deal assumed in the debate by the pursuer's counsel that it was quite enough for him to show that the Mrs Haldane referred to in the letter with regard to whom the issue asks the question whether the pursuer as parish doctor had failed in breach of his duty as such to call in the district nurse to her was not on the roll of paupers, but was a private patient of Dr James. I am quite aware that both the district nurse, on whose information Mrs Baird wrote, and Mrs Baird herself, believed, and I think on very good grounds, that Mrs Haldane was a pauper in the proper sense of the term. It is unnecessary to go into the evidence as to the exiguous extent of private attendance given her by Dr James, or as to his having slumped her with his pauper patients in calling in the district nurse to her in 1911, and so himself led to the nurse's reasonable assumption that she was a parish patient—a fact which might fairly be pleaded in bar of Dr James founding on the mistake, were the mistake of any pertinency. But it is not her assumed pauperdom but the fact that she is an old-age pensioner that is made by Mrs Baird expressly the reason for introducing Mrs Haldane's name and circumstances as leading up to the concluding passage of the letter in which she ventures 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." Had Mrs Haldane been introduced as a pauper and the culminating request been hung on that peg, then if she was really not a pauper but Dr James' private patient, the Parish Council would have had no interest or concern with his treatment of her and no power or duty to which Mrs Baird could appeal. But that is not the situation. The question is whether they had any interest and concern inferring power and duty with regard to Mrs Haldane *qua* old-age pensioner. I think they had.

One must keep first in view what was the object of Mrs Baird's letter. It was to press the resumption of the practice of calling in the district nurse when required, which had been induced by the result of her first and second appeal on behalf of the Association, and had prevailed during the years 1910 and 1911, but which to all appearance had been departed from in 1912 and 1913. As on the previous occasion, she brings this third appeal to a practical point by instancing a case which, as she represents, might and ought to have had the benefit of the district nurse. The question of the Parish Council's interest or concern and inferential power or duty does not depend on the accuracy of the statements regarding Mrs Haldane, but upon her status as, not a pauper on the roll, but merely an old-age pensioner.

Now, as regards the power and duties of parish councils and their officials, I entirely demur to the idea which seems to prevail in the official mind, at any rate in Haddington, that the inspector has no duty until he is applied to, and the doctor no power or duty until he has the inspector's order, even in a case which he has previously attended. Such is certainly not the principle on which the Poor Law has been and is being administered in Scotland either under the Board of Supervision or under the Local Government Board which has succeeded it. Both parish inspectors and doctors are called upon to have their eyes about them, and to move when appropriate and necessary on their own initiative. They are not entitled to say we are so bound by red tape that we cannot and ought not to move until Form X is filled up and delivered. In the present instance, even on the Haddington official interpretation of the power and duties of inspector and doctor, I conceive that it might be the doctor's duty, and certainly within his power, to communicate with the inspector, and to tell him to put things in train for calling in the district nurse to this old-age pensioner. Have then the inspectors and parish doctors and their masters the parish council any concern with and power and duty regarding old-age pensioners? The Old-Age Pension Act 1908, 8 Edw. VII, cap. 40, sec. 3, disqualifies from pension anyone in receipt of poor relief, but exempts from such disqualification the receipt of "any medical or surgical assistance (including food or comforts) supplied by or on the recommendation of a medical officer." *Ex hypothesi* the general old-age pensioner is

not far removed from chargeability, as his private resources must at the best not exceed £31, 10s. a-year or 14s. a-week. Mrs Baird thought that the Parish Council had a duty to such persons, and wrote of one of them quite irrespective of the question of chargeability. The Local Government Board had thought the same two years before, for in May 1911 they issued a circular which must be assumed to have come to the knowledge of the Haddington Parish Council and of their officials, and which was in force at 8th December 1913 when Mrs Baird's letter was written. It inculcates upon them that they have a duty to old-age pensioners though not paupers, and intimates to them that "the medical relief which may be given without disqualification covers more than mere medical visitation. In the opinion of the Board it includes, besides medicines, medical and surgical appliances, nutritious diet, &c., such nursing or attendance as may be ordered by the medical officer as part of the medical or surgical treatment of the case."

Now (1) assuming that the statements in the initial part of the letter regarding Mrs Haldane and Dr James were correct, would Mrs Haldane's case have been one which Mrs Baird was justified in bringing before the Parish Council, because they would have had interest or concern with and duty regarding it? It did not, I think, require that it should be a pauper case on the roll that this should be so. If Dr James, being the parish doctor, when called to a private patient in Mrs Haldane's position, found her in the condition alleged, the use of the district nurse was open to him, and if he did not take steps to have her called in it was certainly a matter of which the Parish Council could properly have cognisance, and which Mrs Baird might therefore properly bring before them. It was enough that Mrs Haldane was alleged to be helpless and suffering from an incurable disease, and that bedsores had developed since Dr James' abortive call. Whether in existence at that date was not asserted.

What Mrs Haldane's real position was the Parish Council would have found to be that her husband had been a pauper before his death, that he and she had been attended by the parish doctor of the day in her husband's latter years, that in 1908 Mrs Haldane then a widow became an old-age pensioner, that from that date she had nothing of her own but her pension, and beyond that was dependent on the precarious assistance of a daughter with children, married to a working tailor in Haddington, and of two sons, discharged soldiers, who occasionally had work and occasionally lived with her. Dr James has no foundation for attributing to them earnings of 30s. a-week each. The statement is one of these random and flippant statements which are to be found in his evidence. But the more important thing is that Mrs Haldane had long had an internal trouble—had been in Dr James' hands in 1911 when he called in the district nurse as a matter of course, though he did not inform the association, as he was bound to do if he was taking advantage of their nurse for a private patient, that she was his private patient and in poor circumstances and not a pauper patient; and that she was again ill in December 1913, presumably with the same symptoms, as she died in the end of January 1914. The fact that the Parish Council would have had a duty to inquire on Mrs Baird's statement, and if they found out as above to make up their minds what course they ought to take, whatever their judgment on inquiry might be, certainly stamps the matter as one which Mrs Baird as President of the District Nursing Association was entitled to bring before the Parish Council under the protection of privilege.

(2) But Mrs Baird's information was incorrect. Her dates were wrong by a week. Dr James was called in by Mrs Haldane not on the 7th but on 1st November. He did not come on 1st, which was a Saturday, or on 2nd, which was a Sunday. But he came on Monday the 3rd, met another doctor, who had meantime been sent for, on the stair and resigned the case to him, instead of seeing Mrs Haldane and failing, as implied, to call in the nurse to her. While it was at the same time correct to say that it was on 13th or 14th that the nurse was called in by the doctor attending, bed-sores having been discovered. This therefore separates the calling in of Dr James from the actual calling in of the nurse by a fortnight in place of a week, and aggravates any imputation which might be drawn from the statement of the more exact facts. But what then? Mrs Baird's mistake does not deprive her of her privilege, if she has privilege by reason of the subject-matter and not merely of the details of the communication, and by reason of the corresponding interest and duty of herself as President of the Nursing Association, and of the Parish Council. The value of the plea of privilege is precisely to protect against the effect of mistake. And *bona fides* in the statement made and complained of is imputed to the privileged defender in a resulting action for slander. The *onus* of proving the contrary lies on the pursuer. The case here falls much more under that of *Jenoure* than that of *Hebditch*. But Mrs Baird's mistake may countervail the privilege if it turns the scale in proof of malice, which is just another way of saying that if the pursuer can dispute the *bona fides* of the mistake that will go far to help him in the proof of malice to displace the privilege. I shall refer later to the proof of malice in general. But I think this element in the proof of malice may be at once dismissed. Mrs Baird made the mistake in all good faith, relying on reasonable information derived through the district nurse from the son and daughter of Mrs Haldane, and I think in part from Mrs Haldane herself.

For these reasons, though I accept the law as laid down in *Hebditch's* case, I do not think that it covers the present. For in that case the circumstances show that there was a clear cleavage in the matter of power and duty between the party appealed to by the defenders claiming privilege and the party

who should have been appealed to, whereas here there was none such. [*His Lordship dealt with the question of malice.*]

Being thus of opinion that privilege is established and malice is negatived, I should myself have been prepared to sustain the second exception taken by the defender, for I think that the learned Judge at the trial ought to have given the jury the direction asked.

But as your Lordships are not prepared to support me in this mode of disposing of the case, I am also convinced that the jury has erred in awarding excessive damages, and that their verdict cannot be allowed to stand. It is not a case of less or more. The verdict is not merely extravagant but unconscionable,

On this branch of the case it is right to make some reference to the argument of pursuer's counsel to the effect that the defender's conduct of the case was in itself sufficient proof of such malice towards the pursuer as the jury might fairly hold to aggravate the damage, in respect that in her counsel's cross-examination of pursuer opportunity was taken to attack his treatment of pauper patients along the whole line. This argument he founded upon the case of *Praed* v. *Graham*, 24 Q.B.D. 53. Lord Esher, M.R., is there reported to have said—"The jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during trial." Before action the defender's conduct was unexceptionable. Neither do I find after action raised anything written by her agents—she wrote nothing herself—or anything in the terms of her defence to which exception can be taken, particularly now that we know the full facts which preceded the writing of the letter complained of. General apology was, in the circumstances disclosed, out of the question. And the pursuer's own record is drawn in such a vague and indeterminate way that it was not possible for Mrs Baird even to realise precisely what mistake she had been led to make in the matter of dates, far less to express regret for the mistake in detail. As to her conduct in Court during the trial I think that the pursuer's counsel has mistaken Lord Esher's meaning. He was, I think, when he spoke of conduct "in Court during trial," referring to defender's personal conduct in Court, such as demeanour in the witness-box or the complexion of the evidence there given, and not to the conduct of the case by defender's counsel. Unless hampered by express instructions by his client, of which there is no suspicion here, and which the surviving senior counsel for the defender has expressly denied, counsel is a free agent, and on his discretion in the conduct of the case his client is entitled to rely implicitly, and cannot be held responsible for the line his counsel thinks proper to take. [*His Lordship then dealt with the question of the amount of damages, holding that the amount awarded by the jury was excessive.*]

LORD SKERRINGTON—The first exception taken by the defender's counsel at the trial was against the refusal of the judge to direct the jury that if the letter complained of "was substantially nothing but a correct statement of facts which had actually occurred, you (the jury) cannot bring in a verdict for the pursuer, because his whole action is based on the averment that the statements in the letter are false, and if they are true the basis of his action has gone." This direction was, in my opinion, misleading, and was based upon a misunderstanding and misapplication of a dictum of Lord President Inglis in the case of *Campbell* v. *Ferguson*, 1882, 9 R. 467, 19 S.L.R. 404, to the effect that "no man can come into Court only on an innuendo; he must have a statement that the statements complained of are false. He has no such statement here, and therefore I think that this record is quite irrelevant." The actual decision in *Campbell's* case has no application because it was a judgment refusing an issue in a case where the pursuer admitted the literal truth of the facts stated in the letter complained of and did not allege that these facts had been stated in such a way as to convey a false representation in regard to some fact as distinguished from the writer's opinion upon the admitted facts. In the present case the Court has already decided that the defender's letter may reasonably be construed as conveying a representation which the pursuer alleged to be untrue in point of fact, viz., that he had attended Mrs Haldane in his capacity as medical officer, whereas, according to his averment, he had attended her as his private patient. Though the defender's counsel was driven to argue that it is in all cases a good defence to an action of libel to prove the literal truth of the facts stated in the writing complained of irrespective of any false suggestion which they may have conveyed, nothing of the kind was intended by the Lord President whose dictum was of course perfectly accurate when considered with reference to the case with which he was dealing. The pursuer was a minister who complained of a letter to a newspaper in which it was stated that he had been absent from his charge for six weeks without the consent of his congregation or even intimation from the pulpit of his intended absence, and that no substitute had been provided although he would draw his salary all the same as if he had preached twice every Sabbath. The pursuer did not in his pleadings deny the truth of these facts, but he objected to and innuendoed an expression by the correspondent of his hope that the presbytery would "not allow this part of their vineyard to be neglected." This expression was plainly libellous, and if it had stood alone would have entitled the pursuer to an issue containing the innuendo that he had neglected his ministerial duties and behaved in a manner unbecoming a minister of the Gospel. The ground of the pursuer's complaint, however, being an expression of opinion upon a matter of public interest which involved no misstatement of fact and no attack upon private

character, the case fell within the principle explained by Lord M'Laren in the later case of *Archer* v. *Ritchie & Company*, 1891, 18 R. 719, at p. 727, 28 S.L.R. 547, to the effect that "the expression of an opinion as to a state of facts truly set forth is not actionable, even when that opinion is couched in vituperative or contumelious language. The Good Templars are a society constituted for public objects and appealing to the public for support, and observations on their proceedings cannot be said to lie outside the legitimate sphere of journalism. I see nothing in the expressions used which can be construed as an imputation on the moral character of the pursuer—nothing, indeed, beyond what persons taking a part in public work must be content to bear with good temper, and, if necessary, to meet by suitable reply." In the case of *Boal* v. *Catholic Printing Company*, 1907 S.C. 1120, 44 S.L.R. 836, the same judge again pointed out that this dictum had reference to a critique which, "however severe it may be in its terms, is, in the opinion of any fair-minded reader, nothing but criticism of public conduct." A different result might have been reached in *Campbell's* case if the correspondent had proceeded to attack the pursuer's private character by expressing the hope that the parishioners would lock their doors at night lest the pursuer should be minded to misappropriate their goods in addition to his stipend. I have referred at some length to *Campbell's* case because I have often heard the Lord President's dictum quoted and made the foundation of a fallacious argument, as happened in the present case. For these reasons I think that the Judge properly refused to give the direction asked for, and that the first exception was ill-founded.

The second exception was against the Judge's refusal to direct the jury in the following terms—"In respect that Mrs Haldane as an old-age pensioner was 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." This direction, when expanded so as to be intelligible, meant that the jury should have been told to disregard as irrelevant the evidence to the effect that Mrs Haldane was both able and willing to pay for her own medical attendance and medical treatment, and to the effect that on the occasion referred to she had employed the pursuer to attend upon her as his private patient. The jury ought to have been directed that, even although they held it proved that in fact Mrs Haldane was the pursuer's employer on the occasion referred to in the letter scheduled to the issue, the Parish Council must in law be deemed to have been his employer because Mrs Haldane happened to be an old-age pensioner; that the Parish Council had an interest and a duty to consider and dispose of any complaints as to the manner in which the pursuer treated such of his private patients as were also old-age pensioners, and accordingly that the defender was privileged in addressing her complaint to that body. Obviously no such direction could properly have been given by the presiding Judge, and no other direction bearing on the question of privilege was asked for. We heard from the defender's counsel a very full and able although quite irrelevant discussion in regard to the law of privilege in its application to the facts of the present case. It would not in my opinion conduce to the ends of justice to express any opinion whatsoever on that subject. The defender has, in her pleadings and in her evidence, committed herself to a very definite position, and the Court ought not to help her to extricate herself from it in the event of the case being tried before a new jury. In this connection I think it right to say that I am not prepared to affirm that, apart from the unjustifiable attack upon the pursuer's general character and conduct, to which I shall afterwards refer, there was not evidence which the jury was entitled to consider to the effect that the defender acted maliciously when she wrote the letter complained of. For the foregoing reasons I am of opinion that the second exception, like the first, being ill-founded, the bill of exceptions falls to be refused. [*His Lordship dealt with a question which is not reported.*]

There remains the question whether the amount of damages awarded by the jury was so excessive as to make it necessary as a matter of justice that we should set aside the verdict. I consider the libel a serious one and that the jury was entitled to award substantial damages in respect of it. I have, however, come reluctantly to the conclusion that the amount awarded was exorbitant and excessive. It is plain that the jury was induced to make this award by what I agree with them in considering to have been a most unjustifiable and wholly unsuccessful attack upon the pursuer's general conduct and capacity as a medical man which was made by the defender's counsel in the course of the trial. I do not think it necessary to consider whether there was evidence which entitled the jury to come to the conclusion that this attack was personally authorised by the defender, and, if so, that it constituted an additional item of evidence that she acted maliciously when she wrote the letter complained of. [*His Lordship then dealt with the question of the amount of damages, holding that the amount awarded by the jury was excessive.*]

LORD ANDERSON—[*After dealing with questions which are not reported*]—An interesting question was raised as to the defender's responsibility for the conduct of the case by counsel. The classical statement as to the legal position of a counsel with reference to his client is to be found in the judgment of Lord President Inglis in the case of *Batchelor*, 1876, 3 R. 914, 13 S.L.R. 589. This judgment makes it plain that while no special contract as to how the duties of counsel are to be discharged is entered into between the client and him, the client may nevertheless be bound by what is done by counsel.

The mode of conducting a cause resorted to by counsel may therefore involve a client in certain responsibilities, as, for example,

in expenses occasioned by improper and abortive procedure. I am, however, unable to hold that the defender can rightly be charged with malice because of the acts of her counsel. Malice is a state of mind, and this cannot be imputed to a litigant vicariously by reason of the actings of counsel or agent. It would have been a different matter if it had been proved that the defender had instructed or had been privy to the line of defence adopted, but there is no evidence that the defender was aware of the manner in which counsel proposed to conduct the defence. If, then, the jury took into account in assessing damages the manner in which the case was conducted (as I think it is obvious that they did), I am of opinion that they were wrong in so doing. [*His Lordship then dealt with the question of damages, holding that the amount awarded by the jury was excessive.*]

The bill of exceptions deals with two directions which I refused to give to the jury. The first direction proceeds upon an hypothesis which is negatived by the facts proved in evidence, and I do not think there is a duty on a judge to put a direction of that sort to the jury, it only tends to confuse them. The incorrectness of the statements contained in the letter consisted in (1) the admitted errors as to the dates on which the pursuer was asked to visit and did visit Mrs Haldane; (2) the erroneous impression conveyed as to bed-sores; and (3) the mistakes as to the number of cases in 1912 and 1913.

The main objection to this direction arises on the last two clauses thereof. It is not the case that the pursuer's whole action is based on the averment that the statements in the letter are false. On the contrary, a reference to condescendence 3 shows that what the pursuer complains of is the representation or innuendo made by or contained in the letter, and the issue approved by the First Division puts to the jury the representation complained of. Accordingly, if I had given the direction craved I should have withdrawn from the jury what the First Division had ordered me to put to them and should thus have completely failed in my duty.

The defender on this part of the case founded on *Campbell* v. *Ferguson*, 1882, 9 R. 467, 19 S.L.R. 404. The opinion of Lord Shand makes it clear that the ground of decision in that case was that the statements in the letter complained of would not support a defamatory innuendo and that therefore there was no issuable matter. The contrary has been decided in the present case by the judgment of the First Division.

I am accordingly of opinion that the first exception fails.

With regard to the second exception, it is to be noted that it refers not to the pursuer's duty but to that of the Parish Council. Even if the Parish Council had the duty suggested, it does not follow that any duty was owed by the pursuer. On the contrary, the evidence shows that a duty on his part only arose when he received a card from the patient or instructions from the inspector.

Assuming, however, that a duty on the part of the Parish Council implies a duty on the part of its medical officer, I am unable to affirm the general proposition embodied in the direction that the Parish Council has a duty towards every old-age pensioner. The intention of the Old-Age Pensions Acts was to prevent the deserving aged poor from coming within the operation of the Poor Law or to remove them from the ranks of pauperism if they were already there. The direction sought is in conflict with the statutes and with the circular of the Local Government Board which was founded on.

An old-age pensioner, like any poor person who is not a pensioner, may demand, and if he is unable to pay is entitled to receive medical or surgical assistance from the Parish Council. The Old Age Pensions Act of 1908, section 3 (1) (*a*) (i), provides that receipt of such medical or surgical assistance will not disqualify for an old-age pension. In the general case, however, the old-age pensioner requires to provide his own doctor, and in the ordinary case the presumption is that he does so.

The circular of the Local Government Board refers to exceptional cases, as it opens with this statement—". . . in most cases the circumstances of these old-age pensioners will be such as to relieve the parish council and the inspector of poor of all solicitude regarding them. . . ." The exceptional cases to which the Local Government Board asks the inspector to direct his attention are (so far as medical relief is concerned) cases in which the pensioner "is in need of such assistance and is unable to pay for it." In such a case the inspector is instructed by the Board to offer relief. But Mrs Haldane's case was not of this character, and proper inquiry on the part of the defender would have enabled her to ascertain that this was so.

It therefore appears to me that I was right in refusing to give the direction as it is framed, but the Dean of Faculty submitted an alternative argument on this exception which has to be considered. He argued that as the defender had reasonable grounds for believing that the pursuer as medical officer had a duty towards Mrs Haldane the occasion was privileged. His contention was, that as the defender had taken all reasonable means of informing herself as to the facts, and as the information received indicated that she had a duty to intervene, she was privileged in her intervention. The defender did not exhaust the available sources of information. She might have sought information from the Inspector of Poor, Mrs Haldane, or the pursuer, but she contented herself with what had been told her by Mr Badger and the nurse.

I am of opinion that there is no material before the Court to enable this argument of the Dean of Faculty to be disposed of. It is not the question raised by the second exception and it does not appear to me to be involved in that exception or to arise out of it. The Dean of Faculty really took excep-

tion to a direction not having been given to the following effect—"In respect that the defender had reasonable ground for believing that the pursuer was attending Mrs Haldane as medical officer, the occasion was privileged"—a direction which I was not asked to give.

I think it right to say, however, that had such a direction been asked I should have refused to give it on the short ground that the mental attitude of a defender can never make an occasion privileged which in point of fact is not so. 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. This was a question which it was my duty to determine, and I directed the jury that on the evidence Mrs Haldane was a private patient of the pursuer, and that accordingly the occasion was not privileged. I remain of opinion that the view I took as to the effect of the evidence was right, and that the consequent direction which I gave to the jury was sound in law.

The authorities quoted at the debate seem to confirm the views I have expressed. The judgments in the case of *Stuart* v. *Bell*, [1894] 2 Q.B. 341, are important, and they lay it down that an occasion is privileged (*a*) if the communication was made in the discharge of some social or moral duty, or (*b*) on the ground of an interest in the party making or receiving it. Applying these principles to the present case I am unable to hold that the defender had any duty or interest to interfere in the matter of a doctor's mode of treating his private patient, and the chairman of the Parish Council had no interest to receive the defender's communication on this topic. Lindley, L.J., makes it plain that the duty or interest must exist as matter of fact and not merely of belief, for at p. 349 he says this—"Both the defendant and Stanley say that the defendant acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend on the defendant's belief, but on whether he was right or mistaken in that belief."

The case of *Hebditch*, [1894] 2 Q.B. 54, is a direct authority against the Dean of Faculty's contention. That case decided that in order that the occasion upon which a defamatory statement is made may be privileged it is necessary that the person to whom such statement is made as well as the person making it should have an interest or duty in respect of the subject-matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty. Davey, L.J., expresses the whole matter in a single sentence—"The question whether the occasion on which such publication takes place is privileged depends, in my opinion, on the question whether there is in fact an interest or duty in the person to whom the libel is published. I cannot think that the mistake of the defendant in addressing the communication to the wrong person, or his belief, however honest, that the person to whom it is published has a duty or interest in the matter, can make any difference with regard to the question whether the occasion is privileged."

I am therefore of opinion that the proposition of the Dean of Faculty to the effect that a reasonable belief that an occasion is privileged is equivalent to the occasion being privileged in point of fact is unsound in law, and that accordingly the second exception also fails.

The Court disallowed the exceptions and minute of *res noviter*, made the rule absolute, set aside the verdict of the jury, and granted a new trial.

Counsel for the Pursuer — Watt, K.C.— King Murray. Agents—Patrick & James, S.S.C.

Counsel for Defender—Dean of Faculty (Clyde, K.C.) — Guild. Agents — Guild & Guild, W.S.

Tuesday, February 1.

FIRST DIVISION.

[Lord Dewar, Ordinary.

SMELLIE *v.* CALEDONIAN RAILWAY COMPANY.

Contract—Conditions—Breach—Failure to Give Facilities Stipulated for—Remedy—Waiver—Arbitration Clause—Basis of Payment—Quantum meruit—Bar.

The pursuer in a petitory action, a contractor, by tender and acceptance dated 29th March 1899 agreed to build a railway line for the defenders, a railway company. The work was to be completed in March 1901. Work was begun in March 1899. The formal contract was signed in October 1900, and the work was completed in 1906. The pursuer brought his action in February 1913, alleging that, owing to the faults and failures of the defenders the work done was entirely different from the work contracted for, that certain facilities which were a condition-precedent of his consent to the bargain had not been given to him, and that he was entitled to be paid on the principle of *quantum meruit*. Prior to the raising of the action the pursuer never in any way indicated to the defenders that he repudiated the contract, but continued to do the work and rendered accounts therefor at the contract rates and in terms of the contract, and accepted payments on that basis. The contract contained an arbitration clause of great width, providing for arbitration in the case of any dispute as to the