

interlocutor: Find further in fact (1) that the lay-days allowed by the charter-party for loading and discharging the cargo in question amounted to 8 days and 23 hours; (2) that the loading and discharging of said cargo occupied 12 days and 10½ hours, being 3 days and 11½ hours in excess of the said lay-days; (3) that of that excess 1 day and 1½ hours was caused by the want of trucks into which the said cargo had to be delivered: Find in law—(1) that on a sound construction of said charter-party the defenders are not liable for demurrage for any delay to the discharge of said cargo occasioned during the currency of the lay-days by the want of trucks; (2) that the defenders are liable to the pursuers for demurrage at the stipulated rate of 16s. 5d. per hour for a period of 2 days and 10½ hours, which amounts to the sum of £48, 10s. 10d. sterling: Therefore decerns against the defenders for payment to the pursuers of said sum of £48, 10s. 10d. with interest as concluded for: Find the pursuers entitled to expenses in the Sheriff Court and in this Court, but as regards the latter only to two-thirds of the same as taxed," &c.

Counsel for the Pursuers and Respondents—Salvesen, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for the Defenders and Appellants—Ure, K.C.—Younger. Agents—J. B. Douglas & Mitchell, W.S.

Friday, November 18.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

M'EWAN v. WATSON.

Reparation—Slander—Breach of Confidentiality and Defamation by Medical Man—Statements Made when under Examination in Witness-Box—Absolute Privilege of Witness.

In an action of damages against a medical man for (a) breach of confidentiality, and (b) defamation, the pursuer proposed two issues based on statements made by the defender when under examination as a witness.

Held that statements by a witness in the witness-box, pertinent to the subject-matter of the case in which he is being examined, are absolutely privileged, and *issues* disallowed.

Reparation—Slander—Breach of Confidentiality by Medical Man—Disclosure of Matters Ascertained in Course of Confidential Employment—Statement that Person is "Bent upon Inducing Premature Labour"—Desire Criminally to Procure Abortion Innuendoed—Issue on Slander Allowed—Issue on Breach of Confidentiality Disallowed.

The pursuer in an action of damages against a medical man for breach of confidentiality and defamation averred

that she had confidentially consulted the defender as a medical expert with a view to an action for judicial separation to be brought by her against her husband; that two years later, in the course of the action, the defender, in spite of being reminded that he had already been consulted by the pursuer in the matter of the action, examined the pursuer as a medical expert on behalf of her husband; that the defender voluntarily told the pursuer's husband and his legal advisers, and afterwards publicly disclosed in the witness-box, certain matters which he alleged he had ascertained as the result of his prior examination of the pursuer as well as the contents of private notes taken by him at the time containing the following statement:—"It seems they" (the pursuer and her family) "are all bent upon inducing premature labour so as to free the patient of any permanent reminder of this marriage, and if possible obtain a separation"—meaning that the pursuer was desirous criminally to procure abortion; and that the defender's statements were false and slanderous, and were made in breach of confidentiality, and maliciously and without probable cause. The defender pleaded privilege.

The Court (*diss.* Lord Young) allowed an issue for defamation, *holding* that the statements of the defender concerning the pursuer as inuendoed were slanderous, and that malice should not be inserted in the issue; and *disallowed* an issue for breach of confidentiality, in respect that, in so far as an actionable breach of confidence was averred, the alleged wrong was covered by the issue allowed for defamation.

Opinion (*per* Lord Justice-Clerk and Lord Trayner) that it depends on circumstances whether a disclosure by a medical man to others of information obtained by him in his professional capacity as to a patient is an actionable wrong.

Mrs Jessie Prentice Jones or M'Ewan, residing at 2 Greenbank Road, Edinburgh, wife of Thomas M'Ewan, electrical engineer, residing at 14 Warrender Park Crescent, Edinburgh, on 1st March 1904 raised an action against Sir Patrick Heron Watson, Knight, Doctor of Medicine, Edinburgh, in which she sued for two sums of £2500 sterling for breach of confidentiality and slander respectively.

The pursuer averred as follows:—She and her husband were married in December 1900. She shortly thereafter became pregnant and fell into bad health, and owing to her husband's conduct towards her she in September 1901 went to reside with her father Mr James Jones at Dalmeny. Soon afterwards she instructed her agents to take the necessary steps for securing a judicial separation, and it was deemed advisable to obtain expert medical opinion upon her condition with the view of ascertaining how far it had been brought about by the treatment she had received from her husband.

On or about 22nd October 1901 one of the partners in pursuer's agents' firm called upon the defender, stated that his firm were acting for the pursuer in the matter of the projected litigation, and fully explained to him the whole circumstances of the case, the nature of the proposed action, and the various points upon which the defender's professional services and advice were desired. The defender accepted said employment, and agreed to place his professional services at the pursuer's disposal, in the knowledge and on the footing that said employment was private and confidential, and that his professional services were required for her guidance in the matter of the proposed action. On 24th October 1901 the defender proceeded to the pursuer's father's house at Dalmeny and examined the pursuer. "(Cond. 6) In the course of his examination it was explained to the defender that the pursuer had at one time on medical advice taken stimulants and morphia in order to relieve pains from which she suffered greatly, but that she had for some time discontinued doing so as she had been advised that it was harmful. . . . These explanations were made and these facts were disclosed to the defender, as he was well aware, solely for his information as the pursuer's confidential adviser, and on the understanding that they would be treated by the defender as confidential. As the result of his examination the defender recommended that the pursuer should be sent to a nursing home until her confinement was over."

The defender, as the result of his examination, indicated to the agents of the pursuer that his opinion was adverse to the pursuer in reference to the proposed action.

On 13th December 1902 the pursuer raised an action of separation and aliment against her husband concluding for custody of the child which had been born in the preceding February. Proof was led before Lord Low on July 14th and 15th, and October 22nd, 23rd, and 24th, when several medical witnesses were examined on behalf of the pursuer. The defender was not asked to give evidence on her behalf. The case was continued till 5th and 6th November. On 20th October the pursuer's agents while arranging with the defender's agents for her examination by the defender's medical witnesses learned that the defender was to be one of them and to be present at the examination. On 21st October a member of the pursuer's agents' firm met the defender outside the pursuer's house and reminded him that he had already been consulted by the pursuer as regarded the action and that he had attended her professionally, and had had private meetings with the pursuer's agents at which the pursuer's case had been confidentially discussed. The defender, however, in spite of what he had been told, examined the pursuer along with other medical witnesses. Shortly after making said examination the defender reported the result of his examination of the pursuer, his opinion on the case, and the nature of the evidence which he was prepared to give against the pursuer, to the agents for the

pursuer's husband. He also, at or about the same time, voluntarily gave information to the said parties as to certain matters which he alleged he had ascertained as the result of the prior examination of the pursuer, when he had been employed and attended the pursuer as her private and confidential medical adviser, and made to them the statements set forth *infra* in Cond. 11. The defender also, at or about the same time, voluntarily showed to the pursuer's husband, and to his legal advisers, or communicated to said parties, the contents of certain private notes hereinafter mentioned, alleged by the defender to have been made by him at the time of his previous examination of the pursuer, and alleged by him to embody the facts concerning the pursuer which he had then learnt, and the result of his said examination. The defender had no permission or authority from the pursuer, or anyone representing her, to disclose to any of said parties any facts which he had learnt as the result of the examination made by him, or of communication made to him, when confidentially employed by the pursuer as before mentioned, and was quite well aware that had such permission or authority been asked it would have been refused. All said matters were made known to the pursuer's husband and his agents and counsel, with the express object that they might utilise same in opposing the pursuer's claim for separation by engaging the defender to give evidence in said action, and deponing thereto.

"(Cond. 11) The defender was accordingly requested by the pursuer's husband, or those acting on his behalf, to give evidence with a view to contradicting or minimising the effects of the evidence led on her behalf. He agreed to do so, and on 24th October 1903, at a diet which had been fixed for hearing the remaining evidence in the case, he was examined as a witness for the pursuer's husband. The defender was not cited as a witness, but gave his evidence voluntarily. In the course of his evidence the defender deponed to certain matters which he alleged that he had learnt on the occasion of his professional visit to the pursuer in October 1901; and he also, at his own hand and without being called on, voluntarily produced a book which he said was his private note-book, containing the notes before referred to, alleged by him to have been made at the time. Said notes, a copy of which was lodged in process in said action, are in the following terms—'Oct. 25th. Drove out to Dalmeny Oil Works. Manager's daughter. Jessie Prentice M'Ewan, 16th Febr. 24th 1900. Marriage. Wednesday 19th Decr. 1900. Last period, 21st May. Sickness in April, but took breakfast; last time awful sickness in July 1901, when going with Nurse Blacklock to Boat of Garten with Mrs Harvey, Mr M'Ewan's aunt. Menstruation commenced æt. 12, always regular, but always painful, and required to be in bed, and took whisky and water. Opiates first by direction of Dr Grimond ordered opiate (4 years ago). Injecting $\frac{1}{4}$ grain morphia did for the

whole time. In end of last March took morphia when annoyed, probably took 2 (½ gr. tabloids). Advised shd. be sent to a nursing home till after her confinement over, to wean her from morphia, &c., and separate her and her husband, and also her own family, till after the birth of the child. This view not pleasing to patient nor to her father (who has married a second wife), and it seems they are all bent upon inducing premature labour, so as to free the patient of any permanent reminder of this marriage, and if possible obtain a separation.' The said notes were read or the contents of said notes were stated in Court by the defender in the course of his evidence. A copy of the notes of evidence, containing the evidence given by the defender, will be produced in the course of the process, and is referred to. The said evidence was intended by the defender to impress, and did in fact impress, the Lord Ordinary unfavourably to the pursuer's case, and but for said evidence she believes that she would have been successful in her action against her husband."

The pursuer averred that in disclosing to her husband and his agents facts relating to her health ascertained in October 1901, and in showing his notes and voluntarily giving evidence, the defender had committed a breach of confidentiality, damages for which she estimated at £2500.

She further averred (Cond. 13) that the passage in the defender's notes, *quoted supra*, beginning "Advised she should be sent to a nursing home," and ending "if possible obtain a separation," was a gross slander upon her. "The said statement means, and was intended to mean, that the pursuer had indicated to the defender her desire, at the time of the defender's visit in October 1901, criminally to procure abortion, that she had endeavoured to obtain his assistance and co-operation to attain this end, and that her sole motive in so doing was to free herself of any permanent reminder of her marriage with her husband. The said statement was entirely unfounded, and was made and published by the defender maliciously. . . . The said statement further falsely and calumniously represented that the pursuer was a person so addicted to the use of morphia and other drugs that she required special treatment to cure her of the habit. . . . All the said statements were made by the defender maliciously and without probable or any cause."

The damage suffered by her owing to the slander she also estimated at £2500.

The pursuer pleaded, *inter alia*—"(1) The defender having wrongfully and in breach of his duty to the pursuer as her professional adviser, or otherwise of the implied terms of his employment by her, disclosed to third parties confidential matters as condescended on, to the loss, injury, and damage of the pursuer, the pursuer is entitled to compensation therefor. (2) The defender having slandered the pursuer as condescended on, the pursuer is entitled to decree for the loss thereby sustained by her. (3) The statements libelled having been made by the defender voluntarily, and the defender in communicating informa-

tion to Mr M'Ewan and his agents having been in breach of the confidential employment condescended on, the defender's plea of privilege falls to be repelled. (4) In any event, the false and calumnious statements made by the defender as condescended on having been made by him maliciously and without probable cause, the pursuer is entitled to reparation as concluded for."

The defender pleaded, *inter alia*—"The defender's statements libelled are privileged."

The pursuer proposed the following issues:—" (1) Whether, on or about 22nd October 1901, the pursuer employed the defender as her private and confidential medical adviser, to advise her as to her state of health, and in the matter of an action of judicial separation proposed to be instituted by the pursuer against her husband Thomas M'Ewan, and in pursuance of said confidential employment communicated to the defender the evidence proposed to be led on her behalf, and submitted herself, on or about 24th October 1901, to an examination by the defender at her father's house in Dalmeny; and whether the pursuer, having raised an action of separation and aliment against the said Thomas M'Ewan, which was defended by him, the defender, in breach of said confidential employment, on or about 22nd, 23rd, or 24th October 1903, voluntarily disclosed to the said Thomas M'Ewan, to William Robson, S.S.C., Edinburgh, his law-agent in said action, and to the counsel engaged therein on his behalf, or to one or more of them, matters relative to the pursuer and her state of health, ascertained in the course of said confidential employment, and the nature and result of the examination of the pursuer made as aforesaid, to the loss, injury, and damage of the pursuer? (2) Whether, on or about 24th October 1903, in the course of the trial of the said action, the defender, in breach of the said confidential employment, voluntarily gave evidence on behalf of the said Mr M'Ewan, and publicly disclosed the matters mentioned in preceding issue, to the loss, injury, and damage of the pursuer? (3) Whether, on or about 22nd, 23rd, or 24th October 1903, the defender falsely and calumniously stated to the said Thomas M'Ewan, to the said William Robson, and to the counsel engaged in said action on behalf of the said Thomas M'Ewan, or to one or more of them, of and concerning the pursuer, that the pursuer at the time of the defender's said examination in October 1901 was bent upon inducing premature labour, so as to free her of any permanent reminder of her marriage with the said Thomas M'Ewan, meaning thereby that the pursuer was desirous criminally to procure abortion, or used words of like import and effect, to the loss, injury, and damage of the pursuer? (4) Whether, on or about 24th October 1903, the defender voluntarily gave evidence as a witness on behalf of the said Thomas M'Ewan in the course of the trial of said action, and falsely and calumniously stated in open court of and concerning the pur-

suer that the pursuer at the time of the defender's said examination in October 1901 was bent upon inducing premature labour, so as to free her of any permanent reminder of her marriage with the said Thomas M'Ewan, meaning thereby that the pursuer was desirous criminally to procure abortion, or used words of like import and effect, to the loss, injury, and damage of the pursuer?"

On 12th July 1904 the Lord Ordinary (KINCAIRNEY) disallowed the second and fourth issues, and approved of the first and third issues.

Opinion.—"This is undoubtedly a case of much interest and legal importance. It regards the obligation of a medical man who has been consulted by a party contemplating a litigation with a view to that litigation, and who has made, with a view to the litigation, a medical examination of the party consulting him, not to disclose the results of the examination or the information confided to him.

"The case arose out of an action brought by the pursuer against her husband for judicial separation on the ground of cruelty affecting her health, and she consulted the defender as a medical man with a view to that action. She avers that she or her agents laid before the defender copies of her precognitions, and that the defender, on the pursuer's instructions, examined her medically with a view to the action.

"It is not averred that the defender advised or encouraged the action for judicial separation, but it is averred that the action was raised and was defended by the pursuer's husband, and that a long proof was taken, in which the defender was not examined as a witness for the pursuer. The pursuer further avers that the defender reported the result of his examination of the pursuer to the agents for her husband, and 'voluntarily gave information' to them 'as to certain matters which he had ascertained as the result of his examination of the pursuer,' and the pursuer avers that the defender then shewed to the agents of the pursuer's husband certain private notes which he had made embodying the result of his examination of the pursuer, and containing matter defamatory of the pursuer.

"The pursuer further avers that the defender gave evidence 'voluntarily' in the proof on behalf of the pursuer's husband and against her, and that he produced at the proof a notebook containing the notes made by the defender as to his examination of the pursuer, which were read in Court. The notes are printed in the record, and their general purport appears from the issues. They are said to have been defamatory of the pursuer, and to impute to her among other things an endeavour to procure abortion.

"I think that the result of the action for judicial separation is not given on record, but I understand that it was adverse to the pursuer, and that the pursuer ascribes its adverse result to the evidence of the defender and to his disclosure of what he ascertained by his examination of the pursuer.

"The pursuer states that the defender

accepted employment from the pursuer 'on the footing that the employment was private and confidential, and that the defender's professional services were required for her guidance in the intended action,' and that the defender had no authority to disclose the facts he ascertained in the course of that confidential employment.

"The pursuer states that the defender's defamatory statements were made maliciously. But there are no averments on record of any circumstances from which malice could be inferred; and in truth the idea of actual malice seems preposterous and not in the case at all.

"The defender does not plead *veritas*, nor does he distinctly aver that any duty devolved on him to disclose any part of the pursuer's conduct.

"The pursuer has lodged four issues; the first and second are founded on the defender's breach of confidentiality, the first alleging that breach by disclosure to the pursuer's husband, his law-agent, and counsel; the second breach of confidentiality by his evidence at the trial.

"The third and fourth issues are issues for defamation by imputing to the pursuer, as innuendoed, an attempt to procure criminal abortion; the disclosure in the third issue being to the defender's husband, his agent, and counsel, and the fourth being disclosure in the witness-box.

"I suppose that the private disclosure averred would be disclosure in precognition, but that is not averred by the pursuer, and I am not at liberty to assume it.

"The defender pleaded in the first place that this duplication of the issues was illegitimate; that there was only one fact averred, and that there should not be more than one issue, or two issues at most; for which position he cited *Hassan v. Paterson*, 26th June 1885, 12 R. 1164, 22 S.L.R. 775; and *Ferguson v. Colquhoun*, 1862, 24 D. 1428. These cases are the same, but I do not think they apply. They are cases each regarding a single slander twice uttered, the one in presence of the police, and therefore privileged, the other before the police arrived, therefore—it was argued—not privileged. I doubt whether these cases should be extended, and I do not think they apply. Here I see nothing objectionable in the multiplication of issues. For I think there was sufficient difference in the time when and the circumstances in which the words objected to were spoken, in private and at the trial, to warrant a separate issue for each occasion; and further, it seems to be legitimate to put breach of confidentiality in one issue and defamation in another. No doubt the same act may have caused both injuries; still it is possible that the issue for defamation might fail, as if the defamation were not proved, and the issue put on breach of confidentiality might succeed; or the jury might possibly not be satisfied about the confidentiality but clear about the defamation, and I think the pursuer was justified in providing against such a contingency; or the damages might be totally different. I think the question is

really one of convenience and of precaution against miscarriage; and I think that if the issues should not be thought objectionable in themselves there would be no sufficient reason for reducing their number. There are therefore four issues to be considered.

"I think the issue which is most easily disposed of, and which may therefore be taken first, is the fourth; and I have little difficulty in disallowing it. It is an issue for defamation by evidence given in a court of justice on oath, not said to be impertinent to the subject under inquiry. Now I think that nothing is more clearly settled than that in such a case the protection of a witness is absolute; and it is of no consequence whether it is true or false, *bona fide* or malicious. The leading case on the point is *Dawkins v. Lord Rokeby*, 7 E. and 1. 744, 8 Q.B. 255. To the same effect are *M'Intosh v. Weir*, 2 R. 877; *Williams v. Umphray*, 17 R. 905; and *Seaman v. Netherclift*, 1876, 2 C.P.D. 53. Indeed no point is better settled.

"I do not see any sufficient ground for disallowing the third issue, which is also for defamation. It may be that the issue refers to the precognition of the defender for the pursuer's husband, but the pursuer has not said so, and I do not see that that can be assumed. Even if it did refer to the defender's precognition, I have no doubt that there is no absolute privilege attached to words spoken in precognition, and I am not prepared to say that they are privileged at all. I do not think that malice must be added to this issue on the pursuer's record; but the privilege of the defender may possibly appear at the trial.

"I think that the second issue is covered by the principle which affords absolute privilege to whatever evidence is given in Court by a witness pertinent to the question under inquiry, and that it also must be disallowed.

"The greatest difficulty is about the first issue, but I have come to the conclusion that it must be allowed. The authority for it is *A B v. C D*, December 13, 1851, 14 D. 177. No other Scotch authority was quoted, and there seems to be none. But it is quite in point, and I think conclusive; and, sitting in the Outer House, I consider that I must follow it. I do not mean to say that I doubt it; but only that I think I require to follow it in any case. The pursuer also referred to the report in the *British Medical Journal*, 28th March 1896, pp. 815 and 882, of the well-known case in which Lord Playfair was defender. I have studied the phraseology of the issue, and the words seem to be very carefully and cautiously chosen. I do not think the pursuer is bound to put more in the issue, and I think that issue should be approved of.

"The result is that I approve of issues first and third, and disallow the issues second and fourth."

The defender reclaimed, and argued—The Lord Ordinary was right in refusing the two issues which dealt with the defender's utterances in Court. It was well settled that the statements of a witness in the witness-box were privileged, the reason

being that public policy demanded that witnesses should be able to speak without fear of consequences—*Dawkins v. Lord Rokeby* (1875), L.R. 7 (H.L.) 744, L.R., 8 Q.B. 255; *Munster v. Lamb*, 1883, 11 Q.B.D. 588; *Seaman v. Netherclift*, 1876, 2 C.P.D. 53; *Williams v. Umphray & Robertson*, June 11, 1890, 17 R. 905, 27 S.L.R. 742; *Rome v. Watson*, March 10, 1898, 25 R. 733, 35 S.L.R. 561; Dickson on Evidence, sect. 1669; *Leslie v. Grant*, 1760, 5 B. Supp. 874; Odgers on Libel and Slander, 3rd ed., 214-217. The protection would be futile if it did not also extend to statements made in precognition, and upon this ground both issues allowed by the Lord Ordinary should be refused. Taking the issues allowed separately, the issue on breach of confidentiality fell to be disallowed on the preliminary ground that it was lacking in specification, as were also the statements on record upon which it was founded—the "matters" alleged to have been disclosed by the defender ought to have been specified, since it was obvious that many disclosures by a doctor might be legitimate, or at anyrate not actionable. Apart, however, from this preliminary objection, a doctor was bound to answer the questions put to him—*The King v. Duchess of Kingston*, 1776, 20 State Trials, 572; Dickson on Evidence, sect. 1688; and the pursuer should have objected at the time, it being for her, and not the witness, to plead confidentiality. The Lord Ordinary had proceeded upon *A B v. C D*, December 13, 1851, 14 D. 177, but that case was quite different, the disclosure there being to a third party, while here it was a confidential statement to a husband, and apart from special contract there was no duty on a physician to refrain from telling a husband matters relating to his wife. On the second issue allowed, viz., that based on slander, the words complained of did not bear the innuendo put upon them. There was nothing in the defender's note to suggest that the pursuer was desirous of obtaining abortion by criminal or anything except legitimate means. In any event, malice must be put in the issue, and at most one issue allowed for the trial, the whole wrong, if there was a wrong, being one—*Hassan v. Paterson*, June 26, 1885, 12 R. 1164, 22 S.L.R. 775; *Ferguson v. Colquhoun*, July 19, 1862, 24 D. 1428. The case was one which should at anyrate be sent to a judge and not a jury.

Argued for the respondent—He ought to have all four issues. The defender by accepting employment *ipso facto* bound himself to secrecy, and by disclosing what he had learned committed an actionable wrong—*A B v. C D*, *supra*; *Taylor v. Blacklow*, November 8, 1836, 3 Bingham, New Cases, 235; *Brown's Trustees v. Hay*, July 12, 1898, 25 R. 1112, 35 S.L.R. 877; *Robb v. Green* (1895), 2 Q.B. 315; *Lamb v. Evans*, 1893, 1 Ch. 218, Playfair's Case, *British Medical Journal*, March 28, 1896, pp. 815 to 882; *Gibb v. Barron*, July 1, 1859, 21 D. 1099. In the circumstances disclosure to the husband was worse than to a third party. Any privilege which might attach to a wit-

ness attached only to compellable witnesses and not to a skilled witness voluntarily giving evidence—*Dawkins v. Lord Rokeby*, *supra*—and was not absolute, applying only to statements which were pertinent to the cause and made without malice—*Trotman v. Dunn*, 1815, 4 Campbell's Reports, 211; *Moore v. Terrell*, 1838, 4 B. & Ad. 870, see p. 876, footnote; *Shedden v. M'Elwee*, 1887, 6 American State Reports, 821; *Mackintosh v. Weir*, July 3, 1875, 2 R. 877; Dickson on Evidence, sects. 1669, 1684, 1667. The privilege of a witness, moreover, extended only to statements made in the box and not to precognition—*Seaman v. Netherclift*, *supra*. Were this otherwise a person could escape the consequences of slanderous statements made by him by repeating them in the witness-box. Moreover, the statements complained of were not extracted by questions in precognition but were volunteered. The words in the second issue were capable of bearing the innuendo put upon them, and as there were two wrongs, breach of confidentiality and slander, there must be two issues. It was an ordinary case for jury trial, and the Court would not interfere with the Lord Ordinary's decision—*Fearn v. Cowpar*, March 14, 1899, 1 F. 751, 36 S.L.R. 593; *The Edinburgh Railway Access and Property Company v. John Ritchie & Company*, January 7, 1903, 5 F. 299, 40 S.L.R. 244.

At advising—

LORD JUSTICE-CLERK—I entirely concur with the decision of the Lord Ordinary rejecting the proposed issues based upon evidence given by the defender in the witness-box in a judicial proceeding. Nothing is, I think, more clearly settled in our law than this, that a witness is absolutely privileged in giving his evidence pertinent to the issue, and cannot be subjected in damages for slander for what he says in the court of justice.

As regards the two issues which the Lord Ordinary has approved in the case of Mrs M'Ewan, I am unable to agree with him in allowing the first of the two issues. It is evident that information which a medical man obtains as to a patient in his professional capacity is confidential and ought not to be disclosed to others. At the same time it must depend upon circumstances whether any disclosure made to others is a wrong for which compensation may be sought by an action of damages in a court of law. And it would be necessary that a pursuer proposing to take an issue should be most specific in putting in issue the matters said to have been disclosed, of which it was alleged that the disclosure was an actionable wrong. The form of the issue proposed in this case is such as I have never seen. The question asked is only whether there were disclosed "matters relative to the pursuer and her state of health." I do not think that any such issue should be allowed. It is also objectionable, because if allowed it might enable the pursuer to bring forward the alleged slander dealt with in the second of the approved issues. This might plainly lead to injustice, for it

might lead to issues being given twice for the same wrong.

As regards the second issue allowed by the Lord Ordinary, and the relative issue in the other case, I am of opinion that these must be allowed. The words of alleged slander complained of seem to me to be such as fairly to bear the innuendo that the pursuer puts upon them, and if the innuendo were made out to the satisfaction of the jury under the directions of the judge at the trial, there would be a case for damages.

I have only to add that I do not see at present any sufficient ground for inserting a statement of malice in the issue. It is possible that a question may arise on that matter at the trial, but in my judgment the case ought to be sent to trial on the issues as adjusted by the Lord Ordinary.

LORD YOUNG—I agree with the Lord Ordinary when he says that this is a case of much interest and legal importance. That your Lordship also thinks so I infer from the observations which you have made upon the established rule of law that everyone giving evidence in a court of justice, being admissible as a witness, and answering the questions which are properly put to him, which those allowed by the Court are presumed to be, is privileged, and that it is in the interests of justice, and the public for whom justice is administered, that he should not give his answers under any apprehension of being liable to an action of damages should his evidence be defamatory of anyone, whether a party to the action or not. The ground upon which that rule of law is founded your Lordship has explained, and it is indeed obvious. It is in the interests of the public that the truth should be ascertained in a court of justice, and that witnesses should give their evidence without any such apprehension or fear.

Your Lordship is of opinion that the second issue should be allowed here, because it does not relate to the statements made by the defender in the witness-box, but to the information previously given by him to the party who called him as a witness. I think the interests of justice and of the public in its administration apply to the one as well as to the other. It would be no encouragement to the fearless speaking of the truth in the witness-box to say to the witness—"You need be under no apprehension of an action of damages for what you shall swear in the witness-box, but keep in view that you are liable to such action if you have beforehand informed the party who calls you of the facts which you can testify, and to testify which you are called."

Now, what are the facts in this case? The case does present, as I have said, agreeing with the Lord Ordinary, questions of very general interest and importance, but still like most cases it has its own specialities and peculiarities, of which the chief here is that the whole matter arises out of a disagreement between husband and wife. The wife believed, I assume honestly, that she had been ill-used by her husband so as to affect her health, and that to such extent that she could not endure its

continuance, and therefore left his society and residence and went to reside with her father at some distance. Then, with a view to obtain separation from her husband and her support from him without the necessity of living with him and submitting to the continuance of the ill-usage, it occurred to her, or she was advised, that her proper course was to raise an action of separation and aliment. With a view to that she was advised to resort to the defender, who is a well known and indeed very eminent member of the medical profession in Edinburgh, and that with the view of ascertaining and getting his testimony, should his medical opinion prove favourable to her, that the condition of broken-down health in which she undoubtedly was was attributable to such ill-usage as she alleged her husband had subjected her to, and was not attributable to any other cause. Sir Patrick Watson visited her in order to examine her person, and ascertain from her the facts connected with the matters upon which she desired his medical opinion and advice. He did examine her person, and questioned her as to matters about which she might not have given information without questioning, the result being as noted at the time in Sir Patrick's professional note-book—[His Lordship read *Sir Patrick Heron Watson's note of October 25th 1901*]. As these are the notes which Sir Patrick Watson made on and at the date of his examination and interview, no one can doubt that these notes were made privately, and with a view to reminding him, should his services be again required, regarding what he had seen and heard, the impression thereby made upon him, and the advice which he gave. Now, I cannot see any impropriety, and indeed I feel sure that there was none, in his making those notes with regard to what had passed and what he had been told of the lady's habits and the impression made upon him and the advice he gave, that she should go to a nursing home until the birth of her child, that being in his opinion the best for her health, and so also the best for the child, of which she was pregnant, and the impression made upon his mind by the way in which they took that advice, viz., that they were not anxious that the gestation should be prolonged by sending her to a nursing home to be attended to there.

The action of separation and aliment is brought by the wife against her husband. She was, of course, at liberty to call Sir Patrick Watson as her witness, to give the result of his examination, and the opinion which he had thereupon formed, and he would have been called, no doubt, as her witness if he had not most distinctly given both her and her father to understand that his opinion was not favourable to her view, and that he attributed her condition, not to the alleged cruel treatment by her husband, but to her own infirmity and bad state of health produced or aggravated by the way in which she had for a long while been living—using opiates and alcoholics largely and constantly. It so happened that about two

years after the examination of the pursuer and his interview with her Sir Patrick Watson was resorted to professionally by her husband. He avers, and probably nobody will doubt the truth of the averment, that when resorted to by the husband, and asked by him to examine the pursuer, he accepted the employment and made the examination without any recollection of having examined the pursuer before and upon her own employment, but that he was informed then that this was the lady he examined two years before. He is then asked by the husband—“Well, what passed between you and my wife then? My wife resorted to you for advice upon her then condition; tell me what was that condition, and what passed between you and my wife regarding it.” I cannot think it doubtful that Sir Patrick Watson acted not only legally but with perfect propriety in giving the husband information of what had passed between him and his wife, but it is, I think, unnecessary for us to decide that if the view be sound which I take of the subsequent examination of Sir Patrick as a witness, although called not by the wife but by the husband in the action of separation and aliment. Was he in that action an admissible witness for the husband? We must hold that he was, for his evidence was admitted by the Judge, and we cannot hold that the less conclusive because no objection was taken to his admissibility. The only parties interested were the husband and the wife, and they were respectively represented by presumably competent law-agents and counsel. The Judge does not always or even usually interpose any objection to the competency of a witness. Nor does he generally, although perhaps not so infrequently, suggest an objection to the competency of questions put to a witness. If the parties are agreed, and the Judge interposes no objection, then the evidence given by that witness is competent evidence. Now, it is stated, and not disputed upon record here, that all the evidence which Sir Patrick gave was in answer to questions which were not objected to by either party or by the learned Judge. I must therefore hold that in that action between husband and wife Sir Patrick Watson was a competent witness, and that what he was asked and what he gave evidence upon was legally admissible evidence upon which the Court could and must proceed in determining the facts according to which the case before the Court was to be determined.

It was contended that although no action at the instance of Mrs M'Ewan can be sustained against Sir Patrick Watson for having given that evidence—I will speak about her father by-and-bye—an action may be brought against him for having given the information which led to him being called as a witness. There is no averment or suggestion that any statement was made previous to the trial, or previous to the examination of Sir Patrick as a witness, other than that of the facts which he was asked about and gave his evidence about in the witness-box. He furnished the husband with the note

which he made, and which I have already read. I have also already said that he, in my opinion with perfect propriety, informed the husband of the note which he had made of the interview with his wife, and the opinion which he had then formed and still retained—whether my opinion is right upon that or not, he in point of fact furnished the husband with the note, and it must have been produced in process before he was examined upon it in the witness-box and before it was put in evidence. [LORD TRAYNER—No. It was handed to him.] It was before both parties—was before the wife and her advisers as well as before the husband and his advisers, and was before the Judge. It may be assumed that Sir Patrick was entitled to refuse if asked to give information privately in precognition or otherwise, although, as I have said, he acted with perfect propriety in giving it. No one is bound to submit to precognition by a litigant or intending litigant. I have already pointed out that the professional note-book was legal evidence—regularly and without objection judicially admitted without reference to information by precognition or otherwise prior to the trial. It is therefore obvious that had there been no such prior information the notes would have been produced and the testimony of their writer regarding the facts noted given publicly in open Court exactly as they were. How the Judge would or ought to have dealt with an objection by the witness had he seen fit to state any, either to produce the notes or answer all or any of the questions put to him about them, we are not called upon to decide. I have indicated, I hope sufficiently, my opinion that the husband was legally entitled to all the evidence which he obtained and adduced regarding the examination of his wife by the medical man to whom she resorted in the circumstances, as to which there is no doubt, or indeed dispute.

What I have said refers principally at least to the action at the instance of the wife against Sir Patrick Watson. Her father, it is or may be suggested, is in a different position. I cannot see any ground for that. The rule and the reason for it which your Lordship referred to, and to which I have made so frequent reference, of privilege against any action of damages for defamatory facts sworn to by a witness in Court, apply not only to the parties in the action before the Court but also to any outsider. A witness is not liable to an action of damages for an answer to a question relevant to the case in which he is examined—is not liable to a third party any more than to a party in the action. If that were not so, then, to a large extent at least, the reason for the rule would be frustrated. Therefore I can see no distinction between the wife and her father with respect to this action against Sir Patrick Watson, and my opinion upon the whole matter is, that there is here no relevant case against Sir Patrick Watson, and I think it only just and fair to him to state, so far as my opinion goes, that nothing

which he is alleged to have done or said was improper.

LORD TRAYNER—I agree with the Lord Ordinary in thinking that the second and fourth issues proposed by the pursuer cannot be allowed. They refer to statements made by the defender when under examination as a witness. I think it well settled that what is stated by a witness in the witness-box is absolutely privileged, except in the case where the witness gives expression to a calumnious statement altogether irrelevant to the subject-matter of the case in which he is being examined, or to the questions put to him. The present defender's statements do not fall within that exception.

I further agree with the Lord Ordinary in thinking that the pursuer is entitled to the third issue. What is there complained of is a statement made by the defender of and concerning the pursuer, which (as innuendoed by the pursuer) is clearly admissible; and the innuendo does not appear to me unreasonable. On the contrary, I think the statement complained of is quite capable, and reasonably capable, of being read as meaning what the pursuer avers the defender did mean.

I am, however, for disallowing the first of the issues proposed by the pursuer, and which the Lord Ordinary has allowed. It is founded on a breach of confidence. But I cannot say that every breach of confidence is actionable. A medical man called in to advise a patient is well advised when he declines to say even that he has been consulted, but it depends on what he says whether his statement is actionable or not. It may be indiscreet but not actionable. For example, if a medical man said to A that he had been called in to see B, and on being asked by A what was the matter with B, he replied that he was labouring under a severe cold—that would not be actionable. On the other hand, if he stated that B was labouring under some malady, the consequence of misconduct, that would or might be actionable. In the present case, if you exclude the part of the defender's statement which as innuendoed is slanderous, there is nothing in it which can be regarded as an actionable breach of confidence. In coming to the conclusion that this issue should be disallowed I am not influenced to any extent by the consideration that the statement complained of was made to the pursuer's husband. In the position in which the pursuer and her husband stood towards each other—and that in the knowledge of the defender—I think the defender had no right to make to the pursuer's husband any statement which he could not justifiably, or without incurring liability for damages, have made to a stranger.

LORD MONCREIFF—As all your Lordships have done, I considered this case most anxiously. I agree that no issue should be allowed as to the evidence given by the defender in Court. The privilege of a witness is absolute, and the pursuer at the trial did not even object to the defender's evidence on the ground of confidentiality.

The plea of confidentiality is the privilege of the client or patient, and if the client or patient does not object the witness is entitled and bound to disclose what was communicated to him in confidence.

But the Lord Ordinary has allowed two issues in respect of statements made not on oath. The first is based on an alleged breach of confidentiality, the damages claimed being £2500.

I am not prepared to hold that statements voluntarily given in answer to questions in precognition are necessarily privileged. But the pursuer was bound to specify and put in issue the statements complained of. She has not done so, and does not propose to do so; and I am not surprised, because apart from the alleged slander at the conclusion of the defender's notes there is nothing in them to warrant the large claim made. But the alleged slander forms the subject of the second issue on which also damages (£2500) are asked, and thus the two issues overlap. The pursuer is not entitled to double damages for the same wrong. I am therefore on that ground for disallowing the first issue allowed by the Lord Ordinary. At the same time the breach of confidentiality, if proved, may possibly have some bearing on the second issue allowed.

The second issue as to the alleged slander raises questions of considerable delicacy. I felt from an early stage of the discussion that a satisfactory decision upon them could not be arrived at without inquiry. The defender pleads that the communications which he made to the pursuer's husband and his legal advisers in October 1903 were privileged; and he may succeed in proving that they were. But at the present stage we must decide that question on the assumption that the pursuer will succeed in proving her averments. And on that assumption, having considered the authorities, I have come to the conclusion that a case of privilege is not disclosed on the pursuer's averments. The words complained of are undoubtedly calumnious. They are not said to be true in the sense that the pursuer and her father intended to produce premature labour for the reason alleged. *Veritas* is not pleaded. If the pursuer had averred that the defender at once communicated his suspicion to the pursuer's husband, a case of privilege might perhaps have been held to be disclosed on the ground that such a communication must be presumed to have been made to prevent the commission of a crime of which it was the husband's right and interest to be warned. But she does not aver that, and it is admittedly not the case. The defender did not communicate his suspicions until two years later, and then, according to the pursuer, in circumstances which *prima facie* do not infer privilege.

The defender, however, may succeed at the trial in showing that he had a right and a duty to make the disclosure. This will depend mainly at least upon the evidence as to what took place at the first interview between the defender and the pursuer and her father. If the defender can prove that

what was said upon that occasion, or what he observed was such as to induce a reasonable belief in the truth of his suspicion, it may go a long way to establishing a case of privilege even although, as we must assume, the suspicion was unfounded.

If the defender succeeds in satisfying the Court that the communication was privileged the pursuer cannot succeed without proving that the communication was made maliciously. Personal malice is not averred or suggested and the first thing the Judge will have to decide is whether the pursuer has made averments which entitle her to a proof of malice. If he holds that she has not, the defender will be entitled to a verdict. If he holds that she has, the question of malice will be left to the jury.

I should have preferred that these delicate questions should be tried by a Judge without a jury. But the pursuer does not agree to this course; and the Lord Ordinary, a Judge of long experience, has selected trial by jury. We do not, according to practice and decisions in both Divisions of the Court, interfere with a Lord Ordinary's discretion as to the mode of inquiry in the absence of very exceptional circumstances.

I therefore reluctantly agree with the majority that the second issue allowed by the Lord Ordinary should be allowed as it stands and the case go to trial.

The Court pronounced this interlocutor—

“Disallow the first issue proposed for the pursuer, to which extent alter the said interlocutor reclaimed against; *quoad ultra* adhere to the said interlocutor reclaimed against; Approve of the remaining issue as altered and adjusted, appoint same to be the issue for the trial of the cause, and remit to the said Lord Ordinary to proceed as accords: Finds neither party entitled to expenses since said 12th July last.”

[Mr James Jones, the father of Mrs M'Ewan, on 1st March 1904 brought a separate action proceeding on similar averments against Sir Patrick Heron Watson for damages for slander. Lord Kincairney allowed an issue in the same terms as those in the issue on slander in Mrs M'Ewan's case, *mutatis mutandis*. A reclaiming note for Sir Patrick Heron Watson in this action was also before the Court and dismissed.]

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