1946 *Present :* **Howard C.J. and de Silva J.**

PERERA, Appellant, *and* PEIRIS, *et al*, Respondents.

84—D. C. Colombo, 15,069.

Defamation—Publication of defamatory statement in newspaper—Statement, an extract from the report of a Commission which was appointed by Governor—Pleas of Absence of animus injuriandi, *Justification and Privilege—Ordinance No. 25 of 1942, ss. 5, 6.*

The plaintiff sued the first and second defendants, who are the printer and owner respectively of the *Ceylon Daily News*, for defamatory libel in respect of the following statement published in their newspaper : " Dr. M. G. Perera (the plaintiff) who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The statement was an extract from the report of the Commissioner who had been appointed by the Governor in pursuance of a resolution passed by the State Council that a Commission should be appointed to inquire into charges of bribery and corruption made against its members.

It was established (*a*) that the plaintiff was a stranger to the first defendant who authorized the publication and that there was no evidence that the defendants in publishing the report were actuated by express malice, (*b*) that the Bribery Commissioner's report was sent to the first defendant as a Sessional Paper, free of charge, by the Government Printer, (*c*) that the report concerned a matter of public interest eagerly awaited by readers of the *Daily News*, (*d*) that the extracts selected for publication quoted the Commissioner *verbatim*.

Held, that the defendants had proved conclusively that the circumstances in which publication took place negatived the existence of *animus injuriandi* and, on that ground alone, they were entitled to succeed.

Held, further, (i.) that the truth of the statement in conjunction with the fact that what was published was for the public benefit established the defence of justification. The question as to whether what was published was a matter of public interest was not a question of pure fact and the finding of the trial Judge, on that point, could be reversed by the Appellate Court if it was based on wrong inferences drawn from truthful evidence ;

(ii.) that the publication was subject to a privilege which could be negatived only by proof of express malice ;

(iii.) that the provisions of section 5 and 6 of Ordinance No. 25 of 1942 could not in any way affect the operation of the defence of privilege in favour of the defendants.

Per Howard C.J.—" From the principles elaborated by me it is manifest that the question as to whether a statement defamatory *per se* is true does not in Roman Dutch law assume the importance that it does in English law. In Roman-Dutch law the burden is on the defendant, whether the statement is true or false, to prove that he had no *animus injuriandi*."

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the head note.

1——J. N. A 59991-554 (3/46)

N. Nadarajah, K.C. (with him *C. Renganathan* and *G. T. Samarawickreme*), for the plaintiff, appellant.—The words published by the defendants are clearly defamatory of the plaintiff. The trial Judge has, however, although he answered almost all the issues in plaintiff's favour, dismissed plaintiff's claim on the ground that the libel was published on a privileged occasion. He has held that the proceedings of the Bribery Commissioner were those of a judicial tribunal and, therefore, the publication of the Commissioner's report was privileged. It is submitted that the Bribery Commission constituted under the Commissions of Inquiry Ordinance (Cap. 276) and Ordinance No. 25 of 1942 cannot be regarded as a judicial tribunal. It was nothing more than a fact-finding Commission appointed to advise the Governor. The Commissioner's report was not meant for the public. The case of *O'Connor v. Waldron* [1] is directly in point. See also *Queen Empress v. Tulja* [2]; *Royal Aquarium & Summer & Winter Garden Society v. Parkinson* [3]; *Fracis, Times & Co. v. Carr* [4]; *Dankoluwa Estates Co., Ltd. v. The Tea Controller* [5].

Even if the Bribery Commission can be regarded as a judicial tribunal, the privilege given to a newspaper to publish reports of the proceedings is of a conditional nature—*Nathan's Law of Defamation in S. Africa (1933 ed.) 241; Mc Kerron's Law of Delict (2nd ed.), 187–188.*

The trial Judge has assessed the damages on wrong principles. The plaintiff is entitled to substantial damages.

H. V. Perera, K.C. (with him *N. M. de Silva* and *C. E. L. Wickremesinghe*), for the defendants, respondents.—The sum of Rs. 5 awarded by the trial Judge as damages due, if plaintiff can succeed in law, is adequate in view of the pleadings and issues.

There is not the least doubt of the *bona fides* of the defendants. Absence of *animus injuriandi* is a complete defence, under the Roman-Dutch law, in an action for defamation—*Maasdorp's Institutes of S. African Law, Vol. 4, p. 143 (4th ed.)*; De Villiers on Injuries, pp. 189, 193, 203.

The truth of the statement published is not disputed. The fact, therefore, that the defendants published it for the public benefit absolves them from all liability. The defendants are entitled to succeed on the ground of justification. The defendants owed a duty to the public and the public were much interested in the matter which was published. The trial Judge's finding on the issue of justification does not depend on the credibility of witnesses and can, therefore, be revised—*The King v. Charles* [6]; *Montgomerie & Col., Ltd. v. Wallace-James* [7].

The proceedings of the Bribery Commissioner can be regarded as judicial proceedings—*Rex v. Electricity Commissioners* [8].

Nadarajah, K.C., in reply.—Sections 6 (1) and 6 (2) of Ordinance No. 25 of 1942 definitely prohibit the publication of the names and evidence of the witnesses who appeared before the Commissioner.

Animus injuriandi has a special meaning in the law of tort. It is not necessary to prove any ill-will or spite on the part of the defendants,

[1] *L. R. (1935) A. C. 76.*
[2] *I. L. R. (1887) 12 Bombay 36 at 41.*
[3] *L. R. (1892) 1 Q. B. 431.*
[4] *(1900) 82 L. Times 698.*
[5] *(1941) 42 N. L. R. 197.*
[6] *(1907) 1 A. C. R. 125.*
[7] *L. R. (1904) A. C. 73.*
[8] *L. R. (1924) 1 K. B. 171 at 207.*

and it is quite immaterial what the motive was or that the object the defendants had in view was a laudable one—De Villiers on Injuries, pp. 27–29 ; Mc Kerron on Delicts (2nd ed.), pp. 56–57.

In English law proceedings *in camera* cannot be published, particularly when there is an express prohibition by enactment—*Scott v. Scott* [1]; Gatley on Libel and Slander (2nd ed.), pp. 329, 330, 333. The scope and limits of privilege as defence are discussed in *Adam v. Ward* [2].

Cur. adv. vult.

February 12, 1946. HOWARD C.J.—

The appellant in this appeal is the plaintiff who appeals from a judgment of the District Court, Colombo, dismissing his action claiming Rs. 50,000 for defamatory libel with costs. The first defendant is the printer and publisher and the second defendant the owner of the *Ceylon Daily News*. In their issue of May 25, 1943 (P 1), the defendant published the report of Mr. L. M. de Silva, K.C., the Commissioner appointed by the Governor in pursuance of a resolution by the State Council of Ceylon that a commission should be appointed to inquire into charges of bribery and corruption made against its members. The appellant's action was founded on the following words which are an extract from Appendix C of the Bribery Commissioner's report (D 2) :

> " Dr. M. G. Perera (the plaintiff) who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

In his plaint the appellant alleged that these words imputed dishonesty to him and implied that he gave false evidence before the Bribery Commission which evidence was taken *in camera* and that they are therefore defamatory of him. He further maintained that he has suffered in his reputation as a member of the medical profession practising at Colombo and in his business of distilling arrack and estimates the damages suffered by him at Rs. 50,000. In their defence the defendants state that they published the statement complained of which is a true extract from Appendix C to the Report of the Bribery Commission and that the statement concerns the appellant. The defendants, however, deny that the words have the meaning attributed to them by the appellant. They are, therefore, not defamatory. The defendants also deny that, by the publication of the said words, the appellant has suffered in his reputation as a professional man or as a man of business. Further answering the appellant's claim the defendants state :—

> (*a*) That they published an accurate report of Appendix C which is part of the finding of the Commissioner which was a judicial tribunal empowered by the Governor in August, 1941, to inquire into the question of whether gratifications have been promised, given or paid to members of the State Council and that the said publication was therefore privileged.

[1] *L. R. (1913) A. C. 417 at 425, 451.*

[2] *L. R. (1917) A. C. 309.*

(*b*) That the said report was issued by the Government of Ceylon as a Sessional Paper and was available for purchase at the Government Record Office and the said publication was therefore privileged.

(*c*) (1) That part of the said extract consists of comment on a matter of public interest.

(2) That so far as the words complained of consist of statements of fact, they are in their natural and ordinary meaning true in substance and in fact and in so far as they consist of expressions of opinion they are fair and *bona fide* comments on matters of public interest and the said statements were published *bona fide* for the benefit of the public and without malice.

The case went to trial on a number of issues. Those relevant and material to this appeal were answered by the learned District Judge as follows :—

(1) The words complained of were defamatory of the plaintiff.

(2) (*a*) The words " Dr. M. G. Perera who gave evidence . . . . " is a statement of fact.

(*b*) Those words are true in substance and in fact, but it was not for the public benefit that that fact should be published.

(*c*) The words " Dr. M. G. Perera . . . . was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did ", are expressions of opinion by the learned Commissioner.

(*d*) Those words are true in substance and in fact, but it was not for the public benefit that they should be published.

(3) (*a*) The defendants made no comments and the matter is not a matter of public interest.

(*b*) The statement was published *bona fide* for the benefit of the public and without malice.

(4) (*a*) The report was issued as a Sessional Paper.

(*b*) Any person could purchase a copy of the Report.

(*c*) The report was not published on a privileged occasion.

(5) (*a*) The defendants published what was a fair and accurate report or part of a report of a judicial proceeding.

(*b*) The evidence of the plaintiff before the Bribery Commission was taken *in camera*.

(*c*) The publication was a privileged one.

Having regard to his findings in (1) the District Judge held that a plea of justification must fail. On the replies set out in (2) he held that the defence of fair comment on a matter of public interest was not established. On the answers set out in (4) he held that publication did not take place on a privileged occasion. But on the answers to (5) he held that the alleged libel was published on a privileged occasion. He therefore entered judgment for the defendants.

Mr. Nadarajah, on behalf of the plaintiff, has challenged the ruling of the learned Judge on (4) and also his assessment of the damages. Mr. Perera, on behalf of the defendants, whilst maintaining that the District Judge was correct in his assessment of the damages and in holding that the words complained of were a fair and accurate report of a

judicial proceeding has also argued that the findings of the District Judge on the questions of justification and publication on a privileged occasion were not in accordance with the law.

I propose first of all to deal with the defence of justification. The learned Judge has found that the words complained of are defamatory but are true in substance and in fact, but it was not for the public benefit that they should be published. There can be no question that the words in themselves are defamatory. Mr. Nadarajah has not queried the finding of the learned Judge that the words are true in substance and in fact. This finding is based on the Bribery Commissioner's Report. The only question that arises is whether the learned Judge was right in holding that it was not for the public benefit that they should be published. He has rightly held that the law to be applied is the Roman-Dutch law of defamation which differs in some aspects from the English law. The law of defamation is discussed in Nathan's Common Law of South Africa (1906 Edition) in Vol. III., p. 1588 *et seq*. Defamation is there classified as an *actio injuriarum* which is the generic name for the remedy which applied to torts in which *injuria* was a constituent element. It is requisite to every *injuria* that the element of malice should be present, or as it is generally called, the *animus injuriandi*. Such malice may be expressly shown to exist or it may be inferred from the language used. If malice is expressly shown to exist, or is inferred from the nature of the language used, it lies upon the defendant to show that the act was not done maliciously, that is, to prove that it was committed in circumstances which rebut the presumption or inference of malice. Thus in an action for libel the falsehood of the statements injurious to the character of the plaintiff which have been published by the defendant is sufficient to prove an *animus injuriandi* as is required to render the defendant liable in damages, unless he shall be able to prove some special circumstance sufficient to negative the presumption of the existence of such *animus injuriandi*, and to prove that in publishing injurious statements not consistent with truth he was actuated by some motive which is in law held sufficient to excuse the error into which the defendant has fallen. In *Bennett v. Morris* [1] De Villiers C.J. drawing attention to the differences from the English law says that the ground upon which the action for defamation rests is the *injuria*. No action lies for such injury, as such, unless the defendant was actuated by the *animus injuriandi*. Again it was remarked in *Botha v. Brink* [2] "The rule of the Roman-Dutch law differs, if at all, from that of the English law in allowing greater latitude in disproving malice. Under both systems the mere use of defamatory words affords presumptive proof of malice, but under the Roman-Dutch law the presumption may be rebutted not only by the fact that the communication was a privileged one—in which case express malice must be proved—but by such circumstances as satisfy the Court that the *animus injuriandi* did not exist." If, therefore, defamatory words are proved to have been used, whether they are true or not, the law presumes that they were used with an *animus injuriandi* or with malice and the burden of disproving the malice is thrown on the

[1] *10 S. C. at p. 226.* [2] *Buch. 1878 p. 130.*

defendant. The presumption of malice is rebutted where the truth of the words used is pleaded and proved, if it is proved that the publication was for the public benefit. In this connection see *Dippenaar v. Hauman* [1]. The same principles are formulated in other text books on Roman-Dutch law. Thus in the (1909) edition of Maasdorp's Institutes of Cape Law, Vol. IV., p. 99–100, the following passage occurs :—

> "*Prima facie* evidence of malice being implied from the mere publication of words which are in themselves defamatory, and general damage being regarded as the natural consequence of such publication, it will be for the defendant, if he wishes to escape liability, to plead circumstances which negative the presumption of malice, or which may, in some few cases, justify their publication, even where there has been actual malice present. With this object in view, he may set up one or other of the following defences :—
>
> (1) That the words complained of are privileged, or were uttered or published on a privileged occasion.
> (2) That the words were true in substance and in fact, and that it was for the public benefit that they should be published.
> (3) That the words were a *bona fide* comment upon the public acts of a public man.
> (4) That the publication took place under other circumstances which negatived the *animus injuriandi*."

In De Villiers' Translation of Book 47, Title 10 of Voet's Commentary on the Pandects with annotations the following passage is to be found in Section XX. on page 189 :—

> "Next, with regard to the person who is alleged to have occasioned an injury, the fact that he had entertained no intention to injure (*animus injuriandi*) is a good ground for his not being held liable in an action of injury. The fact that such intention was absent is to be gathered from the circumstances of each particular case ; for an intention of this kind has its seat in the mind, and in case of doubt its existence should not be presumed ; moreover, it cannot reveal itself or be proved in any other manner than by the nature of the occurrence being taken into account, in conformity with the principles already laid down in the Title " De Dolo Malo ".

Again in Mc Kerron on the Law of Delict, second edition, p. 165, it is stated as follows :—

> " Falsity is not a necessary ingredient of liability for defamation Although it is customary for the plaintiff to allege in his declaration that the statement complained of was false, such allegation would appear to be mere surplusage, since the onus of proving the truth of the statement rests on the defendant, and furthermore, according to the better view, truth in itself is not a sufficient defence.
>
> It is commonly said that *animus injuriandi* is an essential element of liability for defamation. In the Roman-Dutch law, as in the Roman law, it is not open to doubt that *animus injuriandi* was regarded as the gist of an action for defamation. Although it is true that where the

[1] *Buch. 1878 at p. 139.*

words complained of were in themselves and in their ordinary meaning defamatory of the plaintiff, the existence of *animus injuriandi* was presumed, it was always open to the defendant to rebut the presumption by leading evidence to show that in fact he had no intention of injuring the plaintiff."

From the principles elaborated by me it is manifest that the question as to whether a statement defamatory *per se* is true does not in Roman-Dutch law assume the importance that it does in English law. In Roman-Dutch law the burden is on the defendant whether the statement is true or false to prove that he had no *animus injuriandi*. Has he negatived the *animus injuriandi* in the present case? It is necessary to consider the circumstances in which the statement was published. The Bribery Commissioner was appointed by the Governor under a Commission dated August 13, 1941, under the Commissions of Inquiry Ordinance (Cap. 276) with the following terms of reference :—

(*a*) "Whether gratifications by way of gift, loan, fee, reward, or otherwise, are or have been offered, promised, given or paid to members of the existing State Council, with the object or for the purpose of influencing their judgment or conduct in respect of any matter or transaction for which they, in their capacity as members of that Council or of any Executive or other Committee thereof, are, have been, may be, or may claim to be, concerned, whether as of right or otherwise; and

(*b*) Whether such gratifications are or have been solicited, demanded, received or accepted by members of the existing State Council as a reward or recompense, for any services rendered to any person or cause, or for any action taken for the advantage or disadvantage of any person or cause, or in consideration of any promise or agreement to render any such services or to take any such action, whether as of right or otherwise in their capacity as members of that Council or of any Executive or other Committee thereof."

The Commission was appointed in pursuance of a resolution to that effect passed by the State Council of Ceylon on May 15, 1941. To supplement the provisions of the Commissions of Inquiry Ordinance a special Ordinance intituled the Special Commission (Auxiliary Provisions) Ordinance, No. 25 of 1942, was enacted on July 13, 1942. Section 9 gave immunity to the Commissioner in the following terms :—

"The Commissioner shall not, in respect of any act or thing, done or omitted to be done by him in his capacity as Commissioner, be liable to any action, prosecution or other proceeding in any civil or criminal Court."

For the purposes of this case sections 5 and 6 worded as follows are the only other material provisions :—

"5. The Commissioner may, in his discretion, hear the evidence or any part of the evidence of any witness *in camera* and may, for such purpose, exclude the public and the press from the inquiry or any part thereof.

6. (1) Where the evidence of any witness is heard *in camera*, the name and the evidence or any part of the evidence of that witness shall not be published by any person save with the authority of the Commissioner.

(2) A disclosure, made *bona fide* for the purposes of the inquiry, of the name or of the evidence or part of the evidence of any witness who gives evidence *in camera* shall not be deemed to constitute publication of such name or evidence within the meaning of sub-section (1)."

On April 3, 1943, the Commissioner made his report (D 2) to the Governor. Appendix "C" to this report contained the statement on which the plaintiff's action was based. Paragraph 2 of the Report gives the Commissioner's view of the task assigned to him under the terms of reference and is worded as follows :—

"2. Certain members of the public, some of whom gave evidence before me, were under the impression that it was part of the task assigned to me under the terms of reference not merely to find whether or not incidents of the character described therein have taken place, but also, in the event of my finding that they have, to suggest what action should be taken and generally to make comment. It is clear that Your Excellency has constituted me a pure fact-finding Commission and that I would be travelling outside the limits of the authority conf rred on me if I proceeded to do anything more. I have accordingly refrained from dwelling upon the political, legal or moral aspects of the incidents, which in the following paragraphs I have found to have occurred, and refrained also from making suggestions for the prevention of similar incidents in the future."

It is manifest that the Commissioner regarded himself merely as a fact-finding Commission, and that he had no authority to suggest what action should be taken. In paragraph 40 of the Report the Commissioner, whilst stating that the question whether the report is to be published or not is not a matter for him, requested that Appendices H, HH, HI, and P be not published because in the absence of proof it would not be fair or proper to publish the names of the Councillors involved. On May 18, 1943, the Government Printer was requested by D3 from the Acting Secretary to the Governor to print the report as a Sessional Paper. The Government Printer was also requested to publish the Sessional Paper simultaneously with the text of a bill connected with the report to be introduced into the State Council. This bill, which was passed by the State Council and became law on June 7, 1943, enabled the State Council by resolution to expel from the Council any member found by the Commissioner to have come within the ambit of the terms of reference of the Commission. The Government Printer followed these instructions and printed 472 copies of the report altogether. 222 copies, of which one was sent to the respondents, were circulated and 250 were sold. Subsequently a further 225 copies were printed and circulated. In giving evidence Mr. Orion de Silva stated :—

(*a*) that the Sessional Paper was sent to the *Daily News* free of charge by the Government Printer on May 19, 1943 ;

(*b*) that the events leading up to the appointment of the Commission was a matter of considerable public interest and the report was eagerly awaited by the public ;

(*c*) that all portions of public interest were published in a series of extracts from May 20 to 28 ;

(*d*) that he selected the extracts for publication ;

(*e*) that the Commissioner was quoted *verbatim ;*

(*f*) that the appellant was a stranger to him and he was not actuated by personal animosity.

The appellant gave evidence and was cross-examined at very considerable length. His evidence amounted in large measure to a vitriolic attack on the Commissioner's *bona fides* and suitability for the onerous duty which had been imposed upon him. The appellant was not able to adduce any evidence of express malice on the part of the respondents. What then are the circumstances in which publication took place ? These circumstances are the fact that—

(*a*) the appellant was a stranger to the first respondent who authorised the publication and that there is no evidence that the defendants in publishing the report were actuated by express malice ;

(*b*) the report was sent to him as a Sessional Paper free of charge by the Government Printer ;

(*c*) the report concerned a matter of public interest eagerly awaited by readers of the *Daily News ;*

(*d*) the extracts selected for publication quoted the Commissioner *verbatim.*

The respondents have, in my opinion, proved conclusively that the circumstances in which publication took place negative the *animus injuriandi.* On this ground alone they are entitled to succeed.

I am also of opinion that the defence prevails on other grounds. The learned Judge has found that the statement published by the respondents is true in substance and in fact. This conclusion of fact has not been queried by Mr. Nadarajah. Moreover it would appear from page 14 of the Record that the question of the truth of the statement was not contested by Mr. Amarasekere who appeared for the appellant in the lower Court. The learned Judge, however, has found that the respondents fail in their proof that what was published was for the public benefit. The learned Judge also states that what the public was interested in was not the manner in which this plaintiff gave evidence, but as to whether their representatives in the State Council had accepted bribes. I find it a matter of some difficulty to understand this finding of the learned Judge. It is true of course that the interest of the public was in the question as to whether their representatives had accepted bribes. But as ancillary and complementary to that question, the public are interested in knowing what evidence or proof establishes the fact that a representative has accepted a bribe or on what evidence he has been exonerated on such a charge. Or in other words on what evidence the Commissioner has founded his report. In my opinion that evidence is manifestly a matter in which the public is interested and its publication was for the public

benefit. It brought home to the public the care with which the Commissioner had investigated each particular charge. I would also refer to the case of *Graham v. Ker* [1]. In his judgment De Villiers C.J. stated that as a general principle he took it to be for the public benefit that the truth as to the character or conduct of individuals should be known. The public was interested in knowing on what testimony the report was made. In this connection I have considered whether it is open to this Court to disturb the finding of the learned Judge on this matter. The latter was sitting as a Judge and Jury. In which capacity did he decide this question? Light is thrown on the question by the judgments of the House of Lords in *Adam v. Ward* [2] At pp. 331–332 Lord Dunedin states as follows :—

"The second matter is more serious. In order to dispose of the question of privilege he put to the jury certain questions, of which three were as follows: Was the publication—that is, the document published—of a public nature? Was the subject-matter of that publication by defendant matter about which it was proper for the public to know? Was the matter contained in the letter proper for the public to know? To all of which the jury returned a negative answer, and upon that the learned Judge said: "Upon these findings I hold that the publication was not a privileged publication nor a publication on a privileged occasion." It is clear that so far as the questions go they assume that the foundation of the duty or right which was invoked to support the privilege was that the matter discussed was one of public importance; whereas the true foundation in this case was the duty of the Army Council to make publicly known their vindication of General Scobell's honour. But apart from that and in view of what I have already stated as to the provinces of Judge and Jury, I entirely agree with the learned Judges of the Court of Appeal, who held that these questions were for the Judge and not for the Jury. If there is some fact left in controversy which must necessarily be determined one way or the other, to allow the Judge to view the complete situation and thus enable him to decide whether the occasion was privileged or not, it would be right for the Judge to ask the Jury to determine that fact. But to put to them questions such as these and then on the findings to find privilege or the reverse is simply to ask the Jury to decide for him the question which it is his duty, and not theirs, to determine."

Again on pp. 333–334 Lord Atkinson states :—

"The learned Judge who tried the case might possibly have ruled, on the question of law, whether or not the occasion on which the alleged libel was published was a privileged occasion but for the answers he had received from the Jury in reply to questions as to certain things the existence of which went to make the occasion of the publication privileged. He did not leave the question of privilege or no privilege to the Jury, but he did leave to the Jury the question as to the presence or absence of the elements which go to create privilege. For instance

[1] *9 Cape Supreme Court Reports 185.* [2] *(1917) A. C. 319.*

the question "Was the subject matter of the publication by the defendant matter about which it was proper for the public to know?" And the question "Was the matter contained in the letter proper for the public to know?" It is to be regretted that the remarks of Willes J. in *Henwood v. Harrison*[1] were not brought to Darling J's notice. Willes J., a most learned, laborious, and accurate Judge, after stating that since the declaratory Act of 1792 (32 Geo. 3, c. 60) the Jury are the proper tribunal in civil as in criminal cases to decide the question of libel or no libel, said: "But it is not competent for the Jury to find that, upon a privileged occasion, relevant remarks made *bona fide* without malice are libellous." He then proceeds: "It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the Jury. A Jury, according to their individual views of religion or policy, might hold the Church, the Army, the Navy, Parliament itself, to be if no national or general importance, or the liberty of the Press to be of less consequence than the feelings of a thin-skinned disputant".

It is clear from these judgments that the question as to whether what was published was a matter of public interest was not a question of pure fact to be decided by the trial Judge on evidence adduced by witnesses whose credibility was a matter particularly his concern. The right of this Court to interfere with this decision of the learned Judge is I think manifest from the decision of the House of Lords in *Montgomerie & Co., Ltd. v. Wallace-James*[2]. Lord Halsbury in his judgment states that even with regard to questions of fact the original tribunal is in no better position to decide than the Judges of the Appellate Court where no question arises as to truthfulness and where the question is as to proper inferences to be drawn from truthful evidence. This case was cited by Wood Renton J. in *The King v. Charles*[3]. In that case the learned Judge stated that "question of fact" is a compendious expression comprising three distinct issues. In the first place, what facts are proved? In the second place, what are the proper inferences to be drawn from facts, which are either proved or admitted? And in the last place, what witnesses are to be believed? It is only in the last question that any special sanctity attaches to the decision of a Court of first instance. In the present case the matter under consideration cannot come under the third issue. The decision of the learned Judge has therefore no sanctity. I hold that he was wrong and what was published was for the public benefit.

The learned Judge has also held that the publication was not privileged by reason of its issue by the Government of Ceylon as a Sessional Paper. In England reports, papers, votes and proceedings published by or under the authority of either House of Parliament are absolutely privileged by virtue of the Parliamentary Papers Act, 1840, S. 1. Moreover by the Law of Libel Amendment Act, 188, S.4, the publication at the request of any Government Department of any report issued for the information

[1] *L. R. 7 C. P. 606, 628.* [2] *(1904) A. C. 73.*
[3] *1 Appeal Court Reports 126.*

of the public shall be privileged unless it shall be proved that such publication or report was published maliciously. But these provisions being statutory enactments do not apply to Ceylon. It has, however, been held in South Africa that the publication of a fair report of Parliamentary or judicial proceedings is privileged, even though it may contain imputations against the character of third parties though these may not be parties to the proceedings reported, provided the reports are impartial and accurate—*Pickard v. S. A. Trade Protection Society and others.* [1] A similar privilege has been extended to the proceedings of Harbour Boards and other public bodies—*Smith & Co. v. S. A. Newspapers Coy.* [2] In the course of his judgment in this case Villiers C.J. at page 316 states :—

> "The matter was of considerable public interest, and one which the newspapers would fairly be expected to report upon in due course. The question therefore arises whether a fair and impartial report of the proceedings is actionable by reason of its casting an aspersion on the conduct of the plaintiff."

And at p. 317 as follows :—

> "In this colony the question has never before been raised, and the Court has now to fall back upon the general principles of the Dutch law for a solution of the question. One of these principles is that an injurious statement or publication is not actionable unless there is *animus injuriandi* the existence of which must be gathered from the circumstances. (See Voet, 47.10.20.) If the "circumstances attending the publication of an ordinary report of a judicial proceeding are sufficient to exonerate the publisher, I fail to see why a fair and impartial report of the proceedings at a meeting of a public body like the Harbour Board in regard to a matter of public interest should expose the publisher to an action for libel at the suit of a person whose conduct has been unjustly condemned at such meeting."

The principles outlined by Villiers C.J. in this case with regard to the publication by a newspaper of the proceedings of a Harbour Board apply in my opinion to the publication of the report of the Bribery Commissioner —a matter of considerable public interest on which the newspapers could fairly be expected to report in due course. In this connection also I would refer to Maasdorp Vol. IV., pp. 104–108. In my opinion the principle enacted in the cases I have cited and referred to in Maasdorp would apply to the publication by the defendants of the report of the Bribery Commissioner. Express malice has been negatived, hence the publication was privileged.

Inasmuch as I have held that the publication of the report by the defendants was privileged, it is not necessary to consider whether the learned Judge was right in holding that the proceedings of the Bribery Commissioner were those of a judicial tribunal. If that finding is correct, *a fortiori* the publication of the report was privileged. In *Allbutt v. General Council of Medical Education and Registration*[3] it was held that a report of the proceedings of the General Council stands, having regard

[1] *22 S. C. 94.* [2] *23 S. C. 310.*

[3] *23 Q. B. D 400.*

to the nature of the tribunal, the character of the report, the interests of the public in the proceedings of the Council and the duty of the Council towards the public on principle in the same position as a judicial report. Lopes L.J. giving the judgment of the Court stated that it would be stating the rule too broadly to hold that to justify the publication of proceedings such as these the proceedings must be directly judicial or had in a Court of Justice. The difficulties of deciding what is a " Court " is apparent from the judgments of the Court of Appeal in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*[1]. It is, however, clear from the judgments of their Lordships in that case that in England the proceedings of the Bribery Commissioner would not be regarded as those of a Court so as to confer upon the publication of its report by a newspaper absolute privilege. I am, therefore, of opinion that the decision of the learned Judge on this aspect of the case was not correct. But, as I have already said, the matter is of small import inasmuch as the publication was subject to a privilege only negatived by proof of express malice.

There remains for consideration the question whether the provisions of sections 5 and 6 of Ordinance No. 25 of 1942 in any way affect the operation of the defence of privilege in favour of the defendants. Mr. Nadarajah maintains :

(1) Section 6 prohibits the publication of the name and evidence or any part of the evidence of any witness heard *in camera* ;
(2) The name of the plaintiff has been published without the consent of the Commissioner ;
(3) The law has been contravened and therefore the defendants cannot claim the benefit of the privilege.

I am of opinion that this argument is without substance. The Commissioner has in his report to the Governor invited the latter to publish the report apart from the Appendices specified. Those Appendices do not include " C ". Hence by inference the Commissioner must be taken to have authorised the publication of Appendix " C " Moreover sub-section (1) of sction 6 forbids the publication of the name and the evidence or any part of the evidence. In my opinion publication is not prohibited of the name, but of " the name and the evidence or any part of the evidence ". The name and the evidence or any part of the evidence has not been published. In giving this interpretation I have not been unmindful of sub-section (2) which suggests the meaning for which Mr. Nadarajah contends.

In view of the decision at which I have arrived the question as to whether the learned Judge was right in his assessment of damages does not call for consideration. But in view of the truth of the publication and the absence of any *animus injuriandi* on the part of the respondents I would not be prepared to say that his assessment was wrong.

For the reasons I have given the appeal is dismissed with costs.

DE SILVA J.— I agree.

Appeal dismissed.

[1] *(1892) 1 Q. B. 431.*