1935 *Present :* **Maartensz and Koch JJ.**

SABAPATHY *v.* HUNTLEY.

*328—D. C. Avissawella, 1,635.*

*Defamation—Statements made against Medical Officer—Charges of professional incompetence and negligence—Made to Director of Medical and Sanitary Services—Communication to the Chairman of Planters' Association who was also Member of Medical Wants Committee—Privilege—Truth of statements a complete defence—Appeal—Question of fact—Decision of House of Lords—Evidence Ordinance, ss. 114 and 165.*

Plaintiff, the District Medical Officer in charge of a Government hospital, sued the defendant, a planter, for the recovery of damages arising from certain defamatory statements made by the defendant concerning the plaintiff.

The statements were made in a letter, which was addressed to the Director of Medical and Sanitary Services, a copy of which was sent to the Chairman of the Planters' Association of the District and was published in the newspapers as part of the proceedings of a meeting of the Association.

The Chairman of the Association was also a member of the Medical Wants Committee instituted under the provisions of the Medical Wants Ordinance, No. 12 of 1916.

The statements were also repeated by the plaintiff at an interview with the Director of Medical and Sanitary Services.

The statements charged the plaintiff with incompetence and negligence and with being perfunctory in the discharge of his professional work.

*Held,* that the statements were true in substance and in fact, and that truth was a complete answer to the action.

Where a plea of justification is raised to an action for defamation it means that the libel is true not only in its allegation of facts but also in any comments made thereon.

*Held, further,* that the statements to the Director at the interview were made on an occasion of qualified privilege but that the communication to the Chairman of the Planters' Association was not privileged.

Where a Judge examines a witness under section 165 of the Evidence Ordinance and the evidence given in answer to the questions is adverse to either party, leave should be given to that party to cross-examine the witness upon his answers.

Where a party is permitted to prove a document at a later stage of his case he should not be allowed to do so after his case is closed.

The principle laid down by the House of Lords in the case of *Powell v. The Streatham Manor Nursing Home* [1], viz., "Where the question at issue is the proper inference to be drawn from facts, which are not in doubt, the Appellate Court is in as good a position to decide the question as the Judge at the trial is", applied.

[1] *(1935) A. C. 243.*

THE plaintiff, the Government Medical Officer at Karawanella, in charge of the Government Hospital Instituted this action against the defendant, a planter, for the recovery of Rs. 50,000 damages resulting from certain defamatory statements made by the defendant concerning the plaintiff.

The defendant, who was the superintendent of an estate, and his wife met with a serious motor accident and was brought to the Government Hospital for treatment. After they were discharged from hospital the defendant wrote to the Director of Medical and Sanitary Services complaining of the professional treatment received by him and his wife at the hands of the plaintiff.

The statements contained in the letter, which the plaintiff alleged were injurious to his name and reputation, were as follows :—

(*a*) A statement which refers to the "negligence and incompetence of the District Medical Officer at Karawanella".

(*b*) A statement which refers to a "very perfunctory examination", meaning thereby that the plaintiff did work on the occasion in a very perfunctory manner.

(*c*) A statement which refers to the District Medical Officer whose one examination occupied only two or three minutes, meaning thereby that the plaintiff was negligent in his professional work.

The plaintiff further complained of certain statements of a similar character made to the Director at an interview.

A copy of the letter which contained the statements was also sent by the defendant to the Chairman of the Planters' Association of the District and was published as part of the proceedings of that body in the Public Press.

The defendant pleaded that the statements were true in substance and in fact and that he was justified in uttering them.

He further pleaded that they were published on a privileged occasion inasmuch as the Chairman of the Association was a member of the Medical Wants Committee created by Ordinance No. 12 of 1916, and that the plaintiff communicated with him in that capacity as well.

The defendant also pleaded that the statements were fair comment on matters of public interest.

The learned District Judge found in favour of the plaintiff on the issues framed and awarded him Rs. 10,000 as damages.

*Hayley K.C.* (with him *E. F. N. Gratiaen*), for defendant, appellant.—The trial Judge has misdirected himself on many points and has "failed to use or palpably misused the advantage of seeing the witnesses". All the circumstances are therefore present which would justify a Court of Appeal in reversing his findings of fact on the plea of justification. (*Powell v. The Streatham Manor Nursing Home*[1], *Mechanical and General Inventions Co. v. Austin*[2].)

The trial Judge was wrong in refusing the defendant's counsel the right to cross-examine the plaintiff's witness, Dr. Briercliffe, on new points elicited by the Judge himself after the witness had been re-examined. (*Coulson v. Disborough*[3], *Enoch v. Zaretzky, Bock & Co.*)

[1] (*1935*) *A. C. 243.*
[2] (*1935*) *A. C. 346.*
[3] (*1894*) *2 Q. B. D. 316.*
[4] (*1910*) *1 K. B. 327, at p. 333.*

Even if the defendant's plea of justification fails, the statements complained of were published on a privileged occasion, and the plaintiff has wholly failed to prove express malice. The defendant had a common interest with his fellow-members of the Planters' Association in the efficiency of the plaintiff as Officer-in-Charge of a District Medical Hospital established under the Medical Wants Ordinance, No. 9 of 1912, and maintained at the expense of the planting industry. (Vide *Jenoure v. Delmege* [1], *Adam v. Ward* [2], *Monckton v. British South African Co.* [3]. *Baird v. Wallace James* [4], and *David v. Bell* [5].) With regard to express malice the mere presence of reporters does not destroy the privilege. (*Pittard v. Oliver* [6], *Kleinhans v. Usmar* [7].)

The expressions of opinion contained in the statements complained of constitute fair comment. Any comment is "fair" if it does not exceed the limits beyond which "a fair man, even if prejudiced" would not go. (*Merrivale v. Carson* [8], *Crawford v. Allen* [9], and *Mc Quire v. Western Morning News* [10].)

The defendant is not in any event liable for the publication by the Press of the words complained of. There is no evidence that he requested the reporters to publish the defamatory statements. (*Parkes v. Prescott* [11].)

*R. L. Pereira K.C.* (with him *A. R. H. Canekeratne* and *P. Navaratnarajah*), for plaintiff, respondent.—A Court of Appeal should not interfere with findings of fact affecting the credibility of witnesses. (*Fradd v. Brown* [12].) Where there is a plea of justification, the whole libel must be justified. (*Odgers, 6th ed., at p. 154.*)

The defendant is liable for the publication of the defamatory statements by the Press. He knew that there was every reason to think that the reporters present would publish the proceedings, and he took no steps to prevent them from doing so. (*Spencer-Bower on Actionable Defamation, 2nd ed., p. 6.*)

The plea of privilege must fail. The "common interest" relied on must be that which the law recognizes. (*Odgers, 6th ed., p. 232.*) The Association was not in a position to investigate and deal with the defendant's complaint. (*Botteril v. Whitehead* [13].)

There is sufficient proof of "express malice" in that the defendant gave a wider publicity to the defamatory statements than was necessary (*Spencer-Bower p. 101*), and acted recklessly (*Finlay v. Knight* [14]).

*Cur. adv. vult.*

November 28, 1935. MAARTENSZ J.—

This is an action for the recovery of damages resulting from certain defamatory statements made by the defendant concerning the plaintiff.

The defendant appeals from an order of the District Judge awarding the plaintiff a sum of Rs. 10,000 as damages.

The events which led to the alleged defamatory statements being made took place on January 27, 28, and 29. The plaintiff was at that

[1] (*1891*) *A. C. 73.*
[2] (*1917*) *A. C. 309.*
[3] (*1920*) *A. S. A. D. 324.*
[4] (*1915*) *85 L. J. P. C. 193.*
[5] *16 N. L. R. 318.*
[6] (*1891*) *1 Q. B. 474.*
[7] (*1929*) *S. A. A. D. 121.*
[8] *20 Q. B. D. 275.*
[9] (*1917*) *S. A. A. D. 102.*
[10] (*1903*) *2 K. B. 100.*
[11] (*1869*) *L. R. 4 Exch. 169.*
[12] *20 N. L. R. 321.*
[13] *41 L. T. 588.*
[14] (*1935*) *S. A. A. D. 58.*

time the Government District Medical Officer at Karawanella and in charge of the Government Hospital in that district. The defendant was the Superintendent of Vincit estate in Ruanwella.

On January 27 about 5.30 P.M. the defendant and his wife met with a serious motor accident while they were returning home from Mr. Urquhart's bungalow on Panawatte estate. The car went off the road at a hairpin bend about half a mile from Mr. Urquhart's bungalow, travelled 15 or 20 feet down a slope, fell 12 to 15 feet over the edge of a cliff and turned upside down, pinning the occupants underneath. The hood was at the time folded back.

Mrs. Huntley could not be extricted till the car was lifted off her. The dispenser of Panawatte rendered first aid. Mr. Huntley's right arm was put into a sling, but Mrs. Huntley could not stand the pain of having her injured left arm in a sling. They were then driven in Mr. Urquhart's car to the plaintiff's bungalow. Mr. Urquhart went with them.

There is some conflict of evidence as to whether Mr. Urquhart of his driver drove the car, and as to what the plaintiff was doing when the Huntleys came to his bungalow. Neither matter is, in my judgment, material to the case.

The plaintiff was told of the accident and directed the Huntleys to go to the hospital which is about 300 yards away. The Doctor changed his clothes and came to the hospital about ten minutes later.

There is a strong conflict of evidence as to what took place at the hospital on the 27th. According to the defendant and his witness Urquhart, the plaintiff examined Mr. and Mrs. Huntley while they were seated in the car to ascertain whether they had sustained any fractures. Mr. Huntley whose right arm was painful was seated on the back seat on the left and Mrs. Huntley whose left arm was injured on the right.

The plaintiff got them to sit sideways and moved their injured arms upwards and sideways and forwards and said there were no fractures, or that no bones were broken and did not advise them to enter hospital.

Mr. Huntley then said they should be given anti-tetanic injections, and inquired whether the injections could be given in the car—to which the plaintiff replied "No, you must come to the hospital to get the injection" and added that thereafter they could go. Then the defendant consulted his wife. She said she was too ill to go home and they decided to stay at the hospital that night, and the plaintiff agreed.

The paying wards in the hospital are rarely used and a room had to be prepared which took about half an hour. When the room was ready the Huntleys were carried into the hospital, undressed and the anti-tetanic injections administered. The defendant denies that the plaintiff examined him and his wife in the ward by moving their arms and legs for the purpose of ascertaining whether there were any fractures.

There is also a conflict of evidence as to whether the plaintiff examined the Huntleys on the 28th and saw them on the 29th morning before they left the hospital which they did on the 29th morning. The evidence for the defence is that the plaintiff did not examine the Huntleys on the 28th but only inquired after their health and did not see them on the 29th, having bade them goodbye on the 28th evening.

The case for the plaintiff is that he made no examination in the car but examined the Huntleys carefully in the hospital, which they entered on his advice, taking 15 minutes over each of them and told them there were no signs of fractures or no evidence of fractures ; that he examined them again on the 28th both morning and evening and altered the treatment and discharged them on the 29th as they wished to go away. In discharging them he told them to continue to apply Icthyol and Belladonna and let him know if the pain did not subside in a week's timc. He told them there were no signs of fractures, and not that there were no fractures, because he was not sure that they had no fractures, which could not be discovered by a clinical examination ; for the same reason he asked them to let him know if the pain did not subside in a week's time. But he admittedly did not tell them that there might be fractures which he was unable to detect. Nor did he advise them to have an X-ray examination made.

The plaintiff therefore let the Huntleys leave the hospital under the impression that they had not sustained any fractures as a result of the motor accident. This was bound to be their impression whether the plaintiff told them there were no fractures or whether he told them there were no signs of fractures ; the lay mind could not possibly have gathered that the latter expression meant that the plaintiff was not sure whether they had sustained fractures or not.

On February 1 Mr. Huntley wrote letter P 11 which is as follows :—

Vincit,
1.2.33.

The D. M. O.,
Karawanella Hospital.

Dear Dr. Sabapathi,

I will be grateful if you would let me have your own Hospital bills *as soon as possible* for settlements as we sail so early.

We are both very much better and grateful for the way in which we were looked after at Karawanella.

Yours sincerely,
(Sgd.) G. Huntley.

I have quoted this letter as it was strongly relied on by the plaintiff as negativing the defendant's plea of justification and as evidence that the Huntleys required no further medical advice or treatment and the District Judge has adopted the plaintiff's view of the letter.

On February 7 the defendant had to come to Colombo to draw money from the bank to pay his labour force. As Mrs. Huntley was still in pain and wished to consult a doctor in Colombo, this opportunity was taken to consult Dr. A. M. de Silva, Senior Surgeon of the General Hospital, Colombo. Colombo is about 40 miles away from Vincit estate.

Dr. de Silva examined Mrs. Huntley and advised an X-ray examination. This examination revealed that Mrs. Huntley had sustained certain fractures. Thereupon Dr. Silva advised Mr. Huntley to have an X-ray examination made of himself and it was found that he had sustained a fracture.

The result of Dr. Silva's clinical examination and the Radiologist's X-ray examination cannot be expressed better than in Dr. Silva's report, P 12 dated February 25, 1935, to the Director of Medical and Sanitary Services (hereafter referred to as the Director) :—

CONFIDENTIAL.

General Hospital, Colombo,
25th February, 1933.

Re *Complaint against D. M. O., Karawanella.*

The Director of Medical and Sanitary Services,
Colombo.

Sir,

I have the honour to acknowledge receipt of your letter No. T. A. 1/398 of the 21st inst. with enclosure.

The facts regarding the cases of Mr. and Mrs. G. Huntley, as known to me, are the following :—

(i.) These two patients consulted me on February 7 in respect of injuries sustained in an accident on January 27.

(ii.) Clinical examination revealed the following :—

(*a*) Mr. Huntley—bruising, swelling, pain, tenderness and deformity of right shoulder region.

(*b*) Mrs. Huntley—pain, tenderness, deformity, and limitation of function of left shoulder joint ; pain and tenderness over left side of pelvis.

Definite diagnosis of the underlying injuries in either patient was not possible without the aid of X-ray examination, which I advised.

(iii.) X-ray report by Radiologist, General Hospital :—

(*a*) Mr. Huntley—fracture through surgical neck of right humerus with avulsion of the great tuberosity.

(*b*) Mrs. Huntley—

(1) impacted fracture of surgical neck of left humerus.

(2) linear fissure of the left ilium.

(iv.) Taking into consideration the interval of time that had elapsed between the accident and the time of examination of the patients by me (11 days) it is difficult for one to pronounce an opinion as to their condition at the time of the accident.

I am, Sir,
Your obedient servant,
(Sgd.) A. M. DE SILVA,
Senior Surgeon, General Hospital.
Colombo.

Dr. de Silva advised the Huntleys to take treatment in Colombo and they entered the "Frazer" Nursing Home where they had to remain some weeks. From the Nursing Home the defendant wrote the following letter D 10 to the Director :—

13th February, 1933.

The Director of Medical and Sanitary Services,
Colombo.

Dear Sir, I have to make a very strong complaint against the negligence and incompetence of the District Medical Officer at Karawanella.

On Friday the 27th ultimo after a very severe car smash on Panawatte estate my wife and I and the driver were conveyed by Mr. Urquhart of Panawatte estate in his car to Karawanella Hospital, neither of us being able to move.

We arrived at the Hospital at 8 P.M. and the D. M. O. after a very perfunctory examination pronounced definitely that no bones were broken and, without any suggestion whatever of an X-ray examination in Colombo, put us in charge of the Acting Matron in the paying ward and actually intimated that we might leave on the following morning.

We stayed two nights as my wife was too unwell to travel, the D. M. O. making no examination of any sort during that period.

On the 7th instant, being able to walk slowly, I took my wife who complained of severe pain in the shoulder into Colombo to see Dr. A. M. de Silva.

He at once ordered an X-ray photo which not only disclosed a fractured arm but a fracture of the pelvis as well and in my own case a fracture below the shoulder. Dr. A. M. de Silva will, I know, be pleased to furnish full particulars.

Mr. Urquhart of Panawatta estate can also corroborate my statement *re* D. M. O's treatment at Karawanella Hospital.

I cannot too strongly condemn the attitude of the D. M. O. whose one examination at night occupied only two or three minutes and thereafter took no interest in us whatever, merely prescribing lead lotion and the usual liniment and leaving everything to the Acting Matron. My driver was not even given an anti-tetanus injection, though I insisted on it for ourselves.

Both my wife and myself are amazed at such behaviour and hope you will take strong action in the matter.

Yours faithfully,
(Sgd.) G. Huntley.

The defendant sent a copy of this letter to Mr. Selwyn, the Chairman of the Kelani Valley Planters' Association (hereafter referred to as the Association). Mr. Selwyn brought the letter up before the Annual General Meeting of the Association held on February 23, 1933. A report of the meeting appeared in the "Ceylon Daily News" and the "Times of Ceylon" newspapers of February 24. D 10 was reproduced in full in both papers. The papers are marked P 1 and P 2. In the report in the "Times of Ceylon", P 2, Mr. Selwyn, is said to have stated that Mr. Huntley had sent him a copy of the letter and asked him to bring the matter up before the meeting.

According to the report it was resolved to endorse Mr. Huntley's letter and to communicate the resolution to the Director.

The Director had in the meantime referred the letter D 10 to Dr. A. M. de Silva for a report by a letter dated February 21 which is not an exhibit.

Paragraph iv. of the report already quoted is the reply, I take it, to a question whether the plaintiff could have or should have detected the fractures on January 27.

On March 1 the plaintiff volunteered letter P 3 to the Director to refute the statements made by Mr. Huntley in his letter D 10 which he had read in the "Daily News" of February 24. He enclosed with his letter a copy of Mr. Huntley's letter P 11.

On March 20 the Director wrote letter P 13 to the Secretary of the Association in which he quoted P 11 and Dr. Silva's opinion that definite diagnosis of the underlying injuries in either patient was not possible without an X-ray examination.

The Director mentioned that the plaintiff considered letter D 10 libellous and that he himself thought the charge could not be substantiated and suggested an apology. The reply to this letter was a deputation

from the Association consisting of Mr. Gillespie, the then Chairman of the Association, the defendant, Mr. Urquhart, and Mr. Nicholls, who discussed the case of Mr. and Mrs. Huntley with the Director.

The Director in consequence of this discussion wrote letter P 5 to the plaintiff dated April 8, 1933. It is as follows :—

No. T. A. 1/398

Office of the Director of Medical and Sanitary Services,
(P. O. Box No. 500),
Colombo, 8th April, 1933.

*Complaint against Dr. Sabhapati, District Medical Officer, Karawanella.*

Sir,

With reference to your Endorsement R 483 of 15th March, 1933, I have the honour to inform you that a deputation consisting of the Chairman, Kelani Valley Planters' Association, Mr. Nicholls, and Mr. Urquhart together with Mr. Huntley discussed with me the case of Mr. and Mrs. Huntley, on the 7th instant.

Certain of their statements do not agree with the third paragraph of Dr. Sabhapati's letter of the 1st March. Mr. Huntley stated and Mr. Urquhart confirmed what he said, that Dr. Sabhapati examined Mr. and Mrs. Huntley while they were still in the car.

During this examination Dr. Sabhapati felt and moved their arms and assured them that no fractures were present; and the examination in each case lasted only half a minute or so. The patients were afterwards assisted to get out of the car and into the Paying Ward in order that they might be given injections of anti-tetanus serum. Mrs. Huntley then said she was unable to go further and Mr. Huntley suggested that they should stay the night there. There was one bed in the ward and another bed was brought for Mr. Huntley. When the patients were in bed and some of their clothing had been removed, Dr. Sabhapati again examined them but this time he looked only for cuts and bruises and did not touch or re-examine the arms or shoulders of either patient for fractures. They consider, therefore, that Dr. Sabhapati did not make a sufficiently careful or reasonable examination on which to give the definite assurance (which he repeated on several occasions that no bones were broken. As these statements conflict with Dr. Sabhapati's account, I shall be obliged if you will request Dr. Sabhapati to explain the discrepancies.

I am, Sir,
Your obedient Servant,
(Sgd.) R. Briercliffe,
Director of Medical and Sanitary Services.

The plaintiff replied on April 15, P 6, that he did not examined the Huntleys in the car, that they were carefully examined after they were put in beds in the ward and that he recorded his diagnosis in the bed head tickets that " there was no evidence of fracture " and expressed the same opinion orally to the patients.

With this letter the plaintiff sent statements sworn to by Matron Cooper, de la Harpe, and Hassim the Town Arachchi.

The plaintiff subsequently applied for and obtained permission to file civil actions against Mr. Huntley and others mentioned in his letter.

The alleged defamatory statements were made in letter D 10 and at the interview with the Director on April 7.

D 10 it is alleged was published to the Association and the Press by the defendant sending a copy of it to Mr. Selwyn.

Paragraph 9 of the plaint is as follows :—

9. The following statements relating to and concerning the plaintiff, which are contained in the above letter and which the defendant wrote and published, are false, malicious, defamatory *per se* and injurious to the name, fame, and reputation of the plaintiff as a Medical Practitioner and as a Government Medical Officer, viz.,

(*a*) The statement which refers to " the negligence and incompetence of the District Medical Officer at Karawanella ".

(*b*) The statement which refers to " a very perfunctory examination " thereby meaning that the plaintiff did his professional work on the occasion in a very perfunctory manner.

(*c*) The statement which refers to " the D. M. O. whose one examination at night occupied only two or three minutes and thereafter took no interest whatever " thereby meaning that the plaintiff was negligent in his professional work.

Publication to the Director is alleged of the statements made at the interview.

Paragraph 11 of the plaint is as follows :—

11. The defendant has further made and published the following false, malicious and *per se* defamatory statements injurious to the name, fame, and reputation of the plaintiff at the defendant's interview with Dr. R. Briercliffe, the Director of Medical and Sanitary Services, on April 7, 1933, viz. :—

(*a*) The statement recorded by the said Dr. R. Briercliffe, and communicated to the plaintiff that the plaintiff " examined Mr. and Mrs. Huntley while they were still in the car ", thereby implying professional negligence on the part of the plaintiff.

(*b*) The statement recorded by the above Dr. R. Briercliffe and communicated to the plaintiff on the defendant's statement to him " that the examination in each case lasted only half a minute or so ", thereby implying professional negligence on the part of the plaintiff in the plaintiff's medical treatment of the defendant and Mrs. Huntley.

The plaintiff assessed his damages at Rs. 50,000.

The pleas in defence are embodied in the issues which are as follows :—

1. (*a*) Are the statements referred to in paragraph 9 (*a*) of the plaint defamatory of the plaintiff ?
   (*b*) Are the statements referred to in paragraph 9 (*b*) of the plaint defamatory of the plaintiff ?
   (c) Are the statements referred to in paragraph 9 (*c*) of the plaint defamatory of the plaintiff ?
2. Are the statements referred to in paragraph 11 (*a*) and (*b*) of the plaint defamatory of the plaintiff ?
3. Were the said statements or any of them false ?
4. Did the defendant publish or cause or aid the publication of the statement (*a*) to the Planters' Association, (*b*) to the " Times of Ceylon " and to the " Ceylon Daily News "?

5. (*a*) Were the statements or any of them published on a privileged occasion ?
   (*b*) If so, did the defendant act maliciously or lawfully ?
6. (*a*) (1) Is any of such statements a comment ?
   (2) And on a matter which is of public interest ?
   (*b*) If so, is it a fair comment ?

7. Damages.
8. Is the defendant responsible in law for the publication of these statements complained of ?
   (A) At a meeting of the Kelani Valley Planters' Association on February 23, 1933.
   (B) In the "Times of Ceylon" issue dated February 24, 1933.
   (C) In the issue of "Ceylon Daily News" dated February 24, 1933.

9. (*a*) Are the allegations of fact contained in the statement specified in paragraphs 9 and 11 of the plaint true in substance and in fact ?
   (*b*) If so, was the defendant justified in law in publishing the said allegations of fact or any of them to Mr. B. M. Selwyn, the Chairman of the Kelani Valley Planters' Association, and Dr. Briercliffe, respectively ?

The learned District Judge after setting out the facts as related by the defendant and the plaintiff said that the chief points for decision were the following :—

(1) When did the Huntleys arrive at the plaintiff's bungalow and when were they admitted to the hospital, at 6.45 P.M. or 8 P.M. ?
(2) Did the plaintiff examine them in the car while it was halted opposite to the paying ward, or did he examine them inside the paying ward after they were put in beds ?
(3) Did the plaintiff examine them very perfunctorily and did he after such examination tell the defendant that no bones had been fractured, that he and his wife were all right and that they could go home that night itself, or did he tell him that there were no signs of fracture and advise them to stay in the hospital ?
(4) Did the plaintiff take any interest in them from the time of their admission till their departure on 29th morning ?
(5) Were the bed head tickets of the Huntleys posted up on the 27th January night, or 28th January morning ?
(6) Was it the duty of the plaintiff to have advised the Huntleys on 27th January night to get themselves examined with the aid of X-ray?
(7) Did the conditions shown in skiagrams D 1, D 1A, D 2, D 2A, D 3 and D 3A exist when the Huntleys were in the plaintiff's hospital?

The learned District Judge found in favour of the plaintiff on all these questions.

It was contended in appeal that the learned Judge's findings of fact were erroneous, because—

(*a*) His reasons for rejecting the evidence for the defence and accepting the evidence for the plaintiff were unsound and in some cases not based on evidence in the record.

(*b*) In some cases his conclusions did not follow from the reasons given by him for arriving at these conclusions.

(c) He relied on documents (P 14 and P 15) which had been rejected and on evidence elicited by him from Dr. Briercliffe which he did not allow the defendant to test by cross-examination.

(*d*) He considered the evidence under the erroneous impression that defendant's counsel did not press the defence of justification.

(*e*) He misdirected himself as to the party on whom the burden of proof lay.

(*f*) He had formulated and decided questions which wholly or in part did not arise from the issues on which the parties went to trial.

It was also contended that there was evidence in the record upon which an Appeal Court could hold that judgment should have been entered for the defendant and it was urged that plaintiff's action should be dismissed.

These contentions necessitate a close examination of the evidence and the reasons given by the District Judge for entering judgment for the plaintiff for Rs. 10,000.

The District Judge was clearly wrong in referring to the documents P 14 and P 15 when considering the character of the Plaintiff in his professional capacity and in connection with the plea of privilege. P 14 and P 15 are copies of entries made in the Karawanella Hospital Visitors Book on December 28, 1932, and December 24, 1933. They were tendered in evidence by the plaintiff to prove that the visitors who made the entries expressed satisfaction with the way in which the hospital was run. These documents were objected to by defendant's Counsel and rejected by the District Judge. But plaintiff's Counsel purported to read them in evidence with other documents at the close of the trial.

The course adopted by plaintiff's Counsel did not supersede the order rejecting the documents and they should not have been considered by the District Judge.

As regards Dr. Briercliffe's evidence the learned District Judge did not in my judgment properly exercise the discretion vested in him by section 165 of the Evidence Ordinance when he refused to allow defendant's Counsel to cross-examine Dr. Briercliffe on evidence which the District Judge had himself elicited.

Dr. Briercliffe was called by the plaintiff to produce and prove certain documents and the statements made to him on April 7. He was not examined or cross-examined with regard to the plaintiff's professional character or as an expert to rebut or support Dr. de Silva's evidence. The District Judge, however, at the end of the cross-examination, examined Dr. Briercliffe at some length on these points but refused to allow defendant's Counsel to cross-examine him on the evidence which the District Judge has treated as adverse to the defence.

Section 165 certainly says that "neither the parties nor their agents shall be entitled . . . . without the leave of the Court to cross-examine any witness upon any answer given in reply to any such question" that is, question by the Court. But when a witness is examined by the Court and gives evidence adverse to one party that party should be allowed to cross-examine him. In England it was held, I quote from the head note, that,

"At the trial of an action the Judge has power to call and examine a witness who has not been called by either of the parties, and, when he does so, neither party has a right to cross-examine the witness without the leave of the Judge.

"If the evidence of the witness given in answer to questions put to him by the Judge is adverse to either of the parties, leave should be given to that party to cross-examine the witness upon his answers, but a general cross-examination ought not to be permitted". (*Coulson v. Disborough* [1].)

The rule laid down in paragraph 2 of the head note is applicable to a case where a Judge examines a witness under the provisions of section 165 of the Evidence Ordinance. I shall refer later to the contention that Dr. Briercliffe's evidence was in fact not adverse to Dr. de Silva's evidence.

As regards the burden of proof, in view of the course the trial took, I do not think the defendant can now urge the contention that the District Judge should have decided first whether the occasions were privileged and then decided on whom the burden of proof lay.

The plaintiff closed his case after calling the two reporters, whose reports of the proceedings of the meeting of the Association held on February 23 were published in the "Daily News" and "Times" of February 24, and tendering in evidence the newspapers P 1 and P 2 and the exhibits P 3, P 4, P 5, P 6, P 7, P 8, P 9 and P 10.

The District Judge was not asked to rule whether the occasions were privileged, but the defendant led evidence on all points taken in the answer.

The question whether the plaintiff should first prove whether the statements were false or whether the defendant should be first called upon to prove their truth is not very material in this case, as the statements with which the defendant is charged were made of his own knowledge. Odgers in his work on *Libel and Slander* at p. 284 says quoting from Lord Coleridge C.J. in the case of *Howe v. Jones* [2], "If the defendant is in a position to prove the truth of his statement, 'he has no need of privilege: the only use of privilege is in cases where the truth of the statement cannot be proved'".

As regards the District Judge's observation that Counsel for the defendant did not press the plea of justification in his address but chiefly relied on the pleas of fair comment and privilege, Mr. Gratiaen, who appeared for the defendant in the District Court, stated in appeal that he did press the defence and his statement was not disputed by Counsel for the plaintiff. The plea of justification was and is the main defence to plaintiff's claim, and if the District Judge approached the evidence

[1] *(1894) 2 Q. B. D. 316.*

[2] *(1885) 1 T. L. R., at p. 462.*

for the defence under the impression that the plea of justification had been abandoned he was bound to take an adverse view of the evidence for the defence.

Some of the questions formulated by the District Judge do not arise upon the pleadings or issues. Some of the questions involve more than one question of fact.

There was no issue as to the time when the Huntleys arrived at the hospital nor was it insisted by the defence that the time, 8 P.M., mentioned in letter D 10 was correct. But the District Judge finds that the defendant mentioned 8 P.M. purposely to substantiate his false statement that there was no proper diagnosis.

Counsel for the respondent at first said he attached no sinister significance to the time mentioned in D 10 but later qualified it by saying that it was inserted to make the Director think the rest of it was true. I cannot see how it could have that effect in the absence of any statement in the letter that the plaintiff left immediately after the examination of the patients, nor was there such a statement in the evidence for the defence. On the contrary the evidence for the defence is that the plaintiff was in the hospital a considerable time after he examined the Huntleys in the car.

The fifth question as to whether bed head tickets P 9 and P 10 were posted seems to me quite irrelevant and whether Mr. Huntley read them or not quite immaterial to the trial.

But the reason given by the District Judge that he must have read them because he had no other literature or any other amusement seems fantastic. If he had read them the defendant would probably not have made the mistake of saying in D 10 that he and his wife arrived at the hospital at 8 P.M.

The seventh question whether the dislocation and the fracture shown in skiagrams D 1-D 3A existed when the Huntleys were in the Karawanella Hospital was not pleaded, neither was it an issue in the case, nor was it plaintiff's case at the trial till plaintiff's Counsel said in the course of his address in reply "that plaintiff is not concerned with what happened to the Huntleys between January 29 and February 7".

The learned District Judge not only finds that there is no evidence that these injuries existed between January 27 and February 7, but also finds that "there is definite proof in P 11 that the injuries found on him (them) with the aid of X-ray did not exist on February 1, 1933 . . . . because the defendant wrote to the plaintiff 'we are both very much better and grateful for the way in which we were looked after at Karawanella'".

The existence of the fractures was not in dispute and the District Judge need not have addressed himself to the question of whether they existed or not while the Huntleys were in hospital. But his view of the credibility of the evidence for the defence was bound to have been affected prejudicially to the defendant, by his having misdirected himself as to the effect of the letter P 11. For if the Huntleys had no fractures when they were examined by the plaintiff the plea of justification must fail. If his diagnosis was right his examination must have been adequate, and there was no reason why he should advise the Huntleys to have an X-ray examination.

The District Judge next addressed himself to the question whether the fractures if they existed on January 27 and 29 were so patent that the plaintiff could have detected them. I cannot understand his doing so in view of his finding that there was definite proof that they did not exist on those dates. When considering this question he holds that the fracture of Mrs. Huntley's pelvis obviously did not exist because she did not complain of pain and was able to walk to the lavatory. The District Judge has again misdirected himself for she did complain of pain all over her body and Dr. de Silva was of opinion that Mrs. Huntley could have walked in spite of the fracture.

This question appears to have been considered by the District Judge as the result of a passage in the defendant's evidence at page 61 that he thought it was a simple matter for a doctor to have detected a fracture and therefore thought that he was negligent or incompetent when he failed to detect the fracture. This evidence was elicited in cross-examination ; it was not a part of Huntley's defence, nor was it an issue in the case as the statement was not made either in the letter D 10 or at the interview.

The District Judge in dealing with Dr. de Silva's evidence under this head observes that " it is a matter of regret that a doctor of his eminent position should have given evidence which is diametrically opposite to his report ". The District Judge says that evidence was given in chief but does not specify it. I have read and re-read the examination-in-chief but I cannot find any passage which is opposed to his report. Dr. de Silva after his clinical examination suspected there were fractures and advised an X-ray examination. He nowhere says that the fractures were patent. He says regarding Mr. Huntley, " judging from what I saw on the 7th I should think there must have been deep seated injuries which could have been detected by the doctor who then attended ". There is nothing in his report to negative that statement except that he could not say what their condition was at the time of the accident. It is one thing to say in evidence what one thinks, it is another thing to say in a report that the condition of the Huntleys ten days before was such that the doctor should have detected fractures.

I am accordingly of opinion that the learned District Judge made that observation owing to a misapprehension of the effect of Dr. de Silva's evidence and that there was no reason for making it or for rejecting Dr. de Silva's evidence.

Some confusion has arisen in the case from the number of questions which the District Judge has formulated and decided and from the form of those questions.

As the District Judge has himself observed in considering the plea of justification what the defendant had to prove was " that the three specific statements in the letter D 10 and the two statements at the interview are true ". The three specific statements in D 10 are—

(*a*) the statement which refers to " the negligence and incompetence of the District Medical Officer at Karawanella ",
(*b*) the statement which refers to " a very perfunctory examination " thereby meaning that the plaintiff did his professional work on the occasion in a very perfunctory manner,

(*c*) the statement which refers to " the D. M. O. whose one examination at night occupied only two or three minutes and thereafter took no interest whatever ", thereby meaning that the plaintiff was negligent in his professional work.

The two statements at the interview are—

(*d*) the statement that the plaintiff examined Mr. and Mrs. Huntley while they were still in the car,

(*e*) that the examination in each case lasted half a minute or so.

Besides the three specific statements in letter D 10 referred to in the plaint there is the statement that the plaintiff made no suggestion whatever of an X-ray examination in Colombo.

It is to my mind manifest that the defendant's main complaint, reading the letter as a whole, was that the plaintiff did not advise an X-ray examination. And I think that the chief question in the case is whether the plaintiff should have advised the Huntleys to have themselves examined by a radiologist.

The plaintiff admittedly did not give them that advice. The desirability of an X-ray examination is proved by the evidence of Dr. A. M. de Silva, First Surgeon of the General Hospital. He says, " In the case of injuries sustained by motor accidents the doctor must presume fracture until otherwise proved . . . . If a clinical examination disclosed no fracture I would not consider that the doctor was justified in informing that there was no fracture. I would not do so until the patient is X-rayed. Both for diagnosis and treatment of fracture X-ray is employed." Dr. de Silva's opinion is supported by the work on *The Science and Practice of Surgery* by Romanis & Mitchiner pp. 402, 403, and 404. There, after dealing with the clinical feature of fractures, it is laid down that an X-ray examination should always be carried out as soon as possible as it will assist by confirming or making the diagnosis by checking position during treatment and by giving definite ocular evidence should medico-legal proceedings intervene ; by the statement in *A System of Surgery* by Choyce p. 667 that " all signs and symptoms of fractures are comparatively unimportant in diagnosis as compared with the evidence given by the X-rays . . . . Every patient who has received a severe injury to the joints or limbs must be examined radiographically ; neglect of this rule is only justified if the necessary apparatus is inaccessible or the patient's general condition threatens a fatal issue.

" Radiograms are equally necessary to demonstrate the presence of a fracture, its nature, its progress under treatment and its ultimate condition." And by the statement of Rose & Carless in their *Manual of Surgery, p. 534*, that " radiography has proved of the greatest service in both diagnosis and the treatment of fractures. Many a case which would formerly have been called merely a sprain can now be demonstrated to be really a fracture ".

(I have quoted from the typed extracts from these works which were handed to the Court by Counsel for the appellant—the correctness of these extracts was not disputed.)

The learned District Judge arrived at the conclusion that the plaintiff was not bound to advise an X-ray examination mainly on the evidence of

Dr. Briercliffe—evidence which as I have said the District Judge elicited himself and did not allow the defendant to test by cross-examination.

Dr. Briercliffe said there was no departmental rule that states "it is the duty of the medical officer to advise forthwith X-ray examination on patients injured in motor accidents". I should be very surprised if there was, for the necessity for an examination must depend on the nature of the accident and the signs of facture seen at the clinical examination. The absence of such a rule does not affect the opinions I have quoted

Dr. Briercliffe goes on to say, "As a member of the medical profession I state that it should be left to his discretion to advise X-ray examination. If after reasonable grounds and careful examination he makes the correct diagnosis he need not advise an X-ray examination". No one can possibly dispute this opinion. For if a correct diagnosis is made that there are no fractures it would be an improper exercise of the discretion to order an X-ray examination. But what Dr. de Silva and the writers I have quoted say is that a correct diagnosis cannot be arrived at without an X-ray examination.

Dr. Briercliffe's evidence certainly does not go the length of saying that if a diagnosis cannot be made an X-ray examination is not necessary. The plaintiff does not say he made a correct diagnosis. What he does say is "I did not after examination exclude the possibility of fracture. I had an open mind as regards fracture. I thought if there was a fracture that I might be able to detect it in a week's time; it might be a little longer than that". He had stated earlier if the pain continued beyond ten or eleven days "I would have suspected an undetectable fracture, that is, a fracture that cannot be detected by clinical methods. In that case I would have suggested an X-ray examination". Again he said "If facilities are available at the spot for X-ray examination I agree that an X-ray examination should be undertaken as part of the routine".

According to this evidence the plaintiff was not sure of his diagnosis and would have advised an X-ray examination at once if there was an X-ray apparatus at the spot and would have advised an X-ray examination in Colombo if the pain had continued for 10 or 11 days.

The only X-ray apparatus in Ceylon is in Colombo about 38 miles away from Karawanella. The plaintiff did not advise an X-ray examination on January 27 and 28 because the Huntleys were suffering from shook and in pain and were not fit to travel. He gave various reasons for not advising an X-ray examination on the 29th. In examination-in-chief he said he did not advise the Huntleys to go to Colombo as they left the hospital expressing a desire to go to their bungalow; in cross-examination he said "on the 29th January nobody expressed the idea of going to Colombo; hence I did not think about it". Immediately after, he said, "Even after the 29th January I would't say without further examination that they would have been fit to go to Colombo".

The plaintiff although he "deferred judgment while the Huntleys were in hospital and adopted the treatment for undetected fracture and gave them medicines when they left with instructions to follow the same treatment and let him know", at no time told the Huntleys that he suspected fractures, or that he was not sure of his diagnosis. He withheld

this information although the defendant was admittedly anxious to know whether he and his wife or either of them had sustained fractures. The plaintiff's reason for withholding this information is because he does not "discuss with patients the methods of treatment and examination", and he did not tell the Huntleys the reason for asking them to report progress because "the reasons are more for the doctor than the patient". The plaintiff did not convey the information to the Huntleys after they left hospital because he received letter P 11 on February 2 and thought they were getting on well and took it "for granted that they were all right".

The reasons given by the plaintiff for not informing the defendant that he suspected that they might have sustained fractures are to my mind most unconvincing. I can understand the plaintiff letting the Huntleys leave hospital on January 29 without any intimation that they might have sustained fractures if his diagnosis was that they had not sustained fractures; but I find it impossible to believe that any doctor who suspected fractures would let the patients leave without telling them so. He should in my opinion have given them the information to impress upon them the necessity for keeping quiet and letting him know whether the pain and swelling continued for ten days. If the plaintiff's evidence is true he is, in my judgment, guilty of culpable negligence in not telling the Huntleys what he suspected and that they should let him know if the pain continued so that they might have an X-ray examination.

It is in my judgment perfectly clear that the plaintiff's diagnosis wa that there were no fractures and that he is taking advantage of the form in which his diagnosis was entered in the bed head tickets to set up this plea that he suspected fractures but did not tell the Huntleys of his suspicions.

My opinion is confirmed by the fact that in letter P 3 written by the plaintiff to the Director to refute the statements in the letter D 10, which he saw in the "Daily News" of February 24, he nowhere says that he did not pronounce definitely that there were no fractures, nor does he say that he suspended judgment and asked the defendant on the 29th to report how he and his wife were getting on. I regret I am unable to accept the plaintiff's evidence that his omission to do so was because he did not think it necessary to inform the Director of Medical and Sanitary Services that he had asked the Huntleys to let him know how they were progressing.

I have no hesitation in accepting Dr. de Silva's evidence that the plaintiff told him that he had informed the Huntleys that there were no fractures and that this was said to him before he forwarded his report to the Director. Dr. de Silva gave evidence on July 4, 1934, seventeen months after the incident, and it would have been surprising if he had been able to fix the month and part of the month in which the statement was made without reference to his report; and this report was not shown to him to enable him to fix the date. But he was always definite that the statement was made before he sent in his report. The report is dated February 25. The plaintiff's evidence is that he saw Dr. de Silva at his request, conveyed to him by Dr. Balendra. There was no reason

why Dr. de Silva should want to see the plaintiff, but there was every reason why plantiff should wish to see him. Plaintiff admitted in one passage of his evidence that he "thought about the possibility of the Director of Medical and Sanitary Services requesting Dr. de Silva to report on the matter".

The plaintiff stated that he charged Dr. de Silva with having committed a breach of professional etiquette in examining the Huntleys without a letter. But he would not say that Dr. de Silva was giving false evidence—he attributed the evidence to faulty memory. Dr. de Silva's evidence that plaintiff told him that he informed the Huntleys that there were no fractures cannot be disposed of in that way. The evidence was given in re-examination and either Dr. de Silva is speaking the truth or not. There is no reason why he should give false evidence The plaintiff's evidence that he charged Dr. de Silva with a breach of professional etiquette is unbelievable since the Huntleys were hospital patients, not private patients, who had left the hospital ten days before Dr. de Silva saw them.

The plaintiff's diary does not conclusively prove that the plaintiff did not see Dr. de Silva prior to February 25. It only corroborates his evidence that he came to Colombo on February 27.

The plaintiff's reason for letting the Huntleys leave hospital on the 29th morning although he suspected fractures is because they wanted to go home and he had no right to keep them. Ignorant villagers sometimes insist on leaving hospital against the advice of the doctors in charge; but the Huntleys are not ignorant villagers and would no doubt have stayed in hospital if they had been advised that they might have sustained fractures and that it was desirable they should remain. It seems to me incredible that the plaintiff would not have so advised them if he suspected fractures.

The inference drawn by the plaintiff from letter P 11 would not be unreasonable if his diagnosis was that there were no fractures. But I cannot understand how he could possibly infer that the patients were all right from a letter written by a layman, who had left the hospital under the impression that he had no fractures. In cross-examination the plaintiff said he "understood in the case of Mr. and Mrs. Huntley the swelling must be less and the pain slightly less". And with reference to letter D 10 he said, "I was not surprised when I read P 1 that fractures were discovered in Huntley. I was not surprised either to read that Mrs. Huntley sustained fracture in the pelvis". Statements entirely inconsistent with the inference he said he drew from P. 11 in examination-in-chief.

I have no doubt that the plaintiff's diagnosis was that there were no fractures, and I am of opinion that he should, considering the nature of the accident, have advised an X-ray examination on at least January 29. If the Huntleys could not travel forty miles on the 29th they could have done so a day or two later.

Accessibility is more a matter of means of communication than mileage. Forty miles in a car, and the Huntleys own a car, along the roads available between Vincit estate and Colombo is no obstacle to the Huntleys having themselves examined by a radiologist.

There appears to have been considerable controversy in the District Court as to whether the plaintiff told the defendant and Urquhart, as they say, that there was no fracture or whether he told them, as he says, that there were no signs of fracture. The plaintiff, however, admittedly did not qualify what he said by some such words as "I am not sure" or "there might be fractures", and the defendant would have been justified in saying that the plaintiff pronounced definitely that no bones were broken. It is clear from his letter D 7 dated January 28, 1933, that what the plaintiff told the defendant conveyed to his mind that there were no fractures, for in the last line of the letter he says "I am glad to report that there are no fractures". Earlier in the letter he says that he is in hospital and hopes to move back to the estate in the evening.

If the plaintiff's diagnosis was that there were no fractures, as I am of opinion it was, there is nothing improbable in his telling the Huntleys they could go back that night or telling them when Mrs. Huntley expressed a wish to stay the night that they could go back next morning.

The District Judge is of opinion that the plaintiff would not have told the Huntleys they could go home on the 27th because their stay would increase the revenue of the hospital, especially as there have been only two paying patients for a year in the hospital. There might have been some substance in this reason if the plaintiff's salary depended on the revenue of the hospital or the hospital is looked upon by the Government as a source of revenue, but that is not the case.

The defendant's evidence is rejected by the District Judge because he said in D 10 that the plaintiff told them they could go home next morning. But I cannot find anything in the evidence indicating that Huntley was asked to explain the discrepancy. D 10 was put to Urquhart on this point and he said the statement was not correct. It does not follow that the plaintiff did not make that statement at another time when Urquhart was not present.

Before leaving this part of the case I must point out that the District Judge was wrong in not allowing defendant's Counsel to put to the plaintiff passages from certain medical text-books merely because the plaintiff had not read them. *The Science and Practice of Surgery* by Romanis & Mitchiner had been relied on by Dr. de Silva, and it was unfair to the plaintiff not to give him an opportunity of saying what his opinion was with regard to the statement relied on by the defendant. According to the record no objection was raised by plaintiff's Counsel.

I shall now consider whether the defendant has proved the truth of the specific statements (*b*), (c), (*d*), (*e*).

[His Lordship after discussing the evidence proceeds :—]

For the reasons given by me I should have, if I was the trial Judge, dismissed the action on the ground that the defendant had proved the truth of the alleged defamatory statements.

Finally, the District Judge said, "I have thus shown that the alleged statements in the letter D 10 and at the interview with the Director of Medical and Sanitary Services are not true ; there is another reason that they are not true because if they are true why did the defendant write P 11 expressing gratitude. All these facts on which he later based his allegations must have been in his mind when he wrote P 11".

This inference from P 11 is obviously incorrect. The defendant was asked with regard to the expression of gratitude in P 11 and the condemnation of the plaintiff in D 10—" How do you reconcile these two statements ". His reply was, " The prescription and treatment for simple injuries in Karawanella Hospital were perfectly adequate. When I discovered that the injuries were so serious I could not think that the treatment was adequate ". In my opinion the defendant's answer amply and correctly explains why letter D 10 was written after he had written P 11 expressing how grateful he was for the treatment in Karawanella Hospital.

The learned District Judge has clearly misdirected himself in regard to the inference to be drawn from and the effect of letter P 11 which was rescued from a waste paper basket twenty-two days after it was received.

The learned District Judge has clearly erred on several points in this case. Counsel for the respondent contended that the judgment should nevertheless be affirmed as the District Judge had the advantage of seeing and hearing the witnesses.

The principles which should guide a Court of Appeal in an appeal from the decision of a Judge sitting without a jury were considered and laid down by the House of Lords in the case of *Powell and wife* (appellants) and *Streatham Manor Nursing Home* (respondents)[1].

The action was one for the recovery of damages caused to the plaintiffs by reason of injury to Mrs. Powell, resulting from the negligence of the respondent's servants or agents. The trial Judge, sitting without a jury, gave judgment for the plaintiffs-appellants.

Mrs. Powell had sustained an injury ; the question for decision was whether that injury had been caused by the doctor who performed an operation on Mrs. Powell or by a nurse in the service of the nursing home. On the material issues there was a conflict of oral testimony.

The trial Judge said regarding the evidence, " I wish to put my judgment on the fact that having heard all the witnesses I am satisfied Mrs. Powell's account of the occurrence is true and accurate and that the injury was sustained by the negligence of Sister Hyndman . . . ."

The Judge said as regards the evidence of the doctors that they had satisfied him by their evidence that no such accident occurred.

No claim was made against the respondents for more than two years after the appellant left the home ; even then, the first letter of claim did not complain of the injury which was the main subject of the action but of another injury the claim for which was dropped.

An explanation for the delay was given by the plaintiffs and the Judge said, " I have seen the witnesses and accept their evidence as to the delay ".

The Court of Appeal reversed the judgment of the trial Judge and the plaintiffs successfully appealed to the House of Lords.

The principles laid down in the judgments are summarized in the head note thus—

" Where the question at issue is the proper inference to be drawn from facts which are not in doubt, the appellate Court is in as good a position to decide the question as the Judge at the trial is.

[1] *(1935) L. R. A. C. 243.*

"But the appeal, although a rehearing, is a rehearing on documents (*i.e.*, notes of evidence) and not, as a rule, on oral evidence ; and where the Judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be ; and the appellate tribunal will generally defer to the conclusion which the trial Judge has formed ".

Lord Wright who delivered the main opinion in the case quotes with approval the opinion of Lord Sumner in *Hontestroom (Owners) v. Sagaporak (Owners)*[1]. The relevant passage from Lord Wright's opinion is as follows : "Lord Sumner states the antinomy which arises when the Court which is judge of fact has neither seen nor heard the witnesses and discusses how it is to be reconciled. He says, 'Of course, there is jurisdiction to re-try the case on the shorthand note, including in such re-trial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute : It is not, however, a mere matter of discretion to remember and take account of this fact ; it is a matter of justice and judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case'. He adds a little later the following further quotation from Lord Sumner's opinion : 'If his' (the trial judge's) 'estimate of the man' (the witness) 'forms any substantial part of his reasons for his judgment the trial judge's conclusion of fact should, as I understand the decisions, be let alone' "—pages 264 and 265.

The District Judge in this case has not apart from Matron Cooper and Hassim expressed his opinion of the estimate of the witnesses nor can his estimate of the witnesses be inferred. He has not, in the case of plaintiff and his witnesses except Matron Cooper and Hassim, considered the matters which negative their evidence and said that he accepts their evidence, or in the case of the witnesses for the defence considered the matters which support their evidence and said he rejects their evidence. He has on the other hand given his reasons for accepting the evidence of the plaintiff and his witnesses and rejecting the evidence for the defence, reasons which are in my opinion unsound ; and he has drawn from documents conclusions which cannot be supported, particularly as regards the effect of P 11.

He has based his judgment of plaintiff's professional character partly on documents P 14 and P 15 which he had rejected, and rejected the evidence of Dr. de Silva as to the necessity for an X-ray examination on evidence which he elicited himself from Dr. Briercliffe and did not allow the defendant to test by cross-examination. He has not considered the negative effect of the plaintiff's letter P 3 as regards plaintiff's evidence (1) that he suspected fractures and asked the Huntleys to let him know how they were getting on, (2) that he examined them on the 28th. Finally he has not considered the effect of letter D 7.

[1] *(1927) A. C. 37, 40.*

The only persons whom he can be said to have estimated as wtinesses are as I have already said Matron Cooper and Hassim. But his estimate of these witnesses is at variance with the fact that their evidence is inconsistent with their statements.

I am accordingly of opinion that this is not a case in which, to use the language of the head note, " we should defer to the conclusion which the trial Judge has formed ".

In my judgment the defendant has proved that the examination was made in the car—that it took only a few minutes—that the plaintiff pronounced definitely that no bones were broken or that there were no fractures, and that the plaintiff was negligent in not advising an X-ray examination, such negligence in my judgment amounts to incompetence.

The statement that the examination took half a minute is not in the circumstances actionable.

The District Judge having considered the issues of fact and stated his findings thereon went on to deal with the issues of law under the different heads of justification, fair comment, and so on.

Under the head of justification the District Judge correctly stated at the commencement that the defendant was bound to prove that the three specific statements in letter D 10 and the two statements at the interview are true. But he went on to say that the defendant must prove negligence and incompetence on the part of the plaintiff and that even if he acted on Dr. de Silva's opinion " there was no justification to send a copy of the letter to Mr. Selwyn to be brought up before the Association ". I cannot quite understand this statement. Appellant's Counsel argued that the District Judge had not properly appreciated the defence and that it showed his lack of experience at all events in trials of this nature. However that may be, in view of my finding that the defendant has proved the truth of the statements (*b*), (*c*), (*d*), and that (*e*) is not actionable, the only question is whether he was entitled to charge the plaintiff with negligence and incompetence.

The District Judge has held on the authority of *Bishop v. Latimer*[1], that one case of negligence or incompetence is not sufficient to raise a general charge of negligence and incompetence. The libel in the case cited by the District Judge was headed " How Lawyer B treats his clients " followed by a report of a particular case in which one client of Lawyer B had been badly treated. That particular case was proved to be correctly reported, but this was held insufficient to justify the heading which implied that Lawyer B generally treated his clients badly. In another case referred to by *Odgers* at page 151 the words complained of were that the plaintiff was a libellous journalist—proof that he had libelled one man, who had recovered from him damages, was held insufficient.

The effect of these decisions is that a general charge cannot be justified by a particular instance. But it is to my mind clear from the terms of letter D 10 that the defendant was not making a general charge of negligence and incompetence, but a charge of negligence and incompetence in connection with the treatment of himself and Mrs. Huntley.

[1] *4 L. T. 775.*

*Odgers* lays down (page 149) that if the jury are satisfied that the words are true in substance and in fact, they must find for the defendant, though they feel sure that he spoke the words spitefully and maliciously. On the other hand, if the words are false and there be no other defence, the jury must find for the plaintiff, although they are satisfied that the defendant *bona fide* and reasonably believed the words to be true at the time he uttered them. These observations apply equally to a trial by a Judge sitting alone.

The District Judge has dealt with the question of malice under a separate head and dealt at some length with the legal principles involved. But in this case, the defendant's statements are based on his personal knowledge of the facts.

The only question for decision is whether the defamatory words are true or false. If they are true malice is immaterial, if they are untrue that would as a rule be conclusive evidence of malice. (See judgment of McCardie J. in *British Railway Traffic & Electric Co. v. The C. R. C. Co.*[1])

If the occasion on which the defamatory statements were made is absolutely privileged, the plaintiff must fail—*Odgers p. 189.* If the occasion is one in which the privilege is qualified the plaintiff must prove that the defendant acted maliciously, he can do so by proving that the statements were false to the defendant's knowledge. In this case if the defendant's statements were false, they were false to his knowledge and he cannot shield himself behind the plea of privilege.

I have already held that the defendant has proved the truth of the alleged defamatory statements made by him and "he has no need of privilege" (*Howe v. Jones (supra)* ).

I propose however to deal with the question of privilege briefly out of deference to the arguments addressed to us. It only arises in regard to the publication of D 10 to Mr. Selwyn and at the meeting of the Association on February 23. The publication of D 10 to the Director is not pleaded by the plaintiff. The statements made to the Director at the interview on April 7 were undoubtedly made on an occasion of qualified privilege.

Whether the publication to Selwyn as Chairman of the Association was a privileged communication depends in my judgment on whether the publication to the Association was privileged.

Whether the meeting of the Association at which the letter D 10 was read out was a privileged occasion is a difficult question.

According to the evidence of the defendant there is a parent association for planters to which are affiliated district associations. The Association (The Kelani Valley Planters' Association) is a district association which takes interest in planting, roads, and hospitals of the district. The Karawanella Hospital is situated in an estate medical district within the area of the Association. Two visitors are annually appointed by the Association to visit Karawanella Hospital. They visit the hospital and report to the Association. Their observations after inspection, the defendant says, are conveyed to the Medical Department but he was unable to say through which channel.

[1] (*1922*) *2 K. B. at pp. 266–274. Odgers p. 284.*)

The parent association was incorporated by Ordinance No. 12 of 1916. The estates in the Kelani Valley district are worked with immigrant labour. The medical wants of immigrant labourers are provided for by Ordinance No. 9 of 1912.

It empowers the Governor to declare any district an estate medical district and to appoint district medical officers and provides for the establishment of hospitals for every medical district.

Sections 6 and 7 enact that :

6. It shall be the duty of a district medical officer for the purposes of this Ordinance—

(*a*) Upon the written request of a superintendent, to visit any sick labourer upon his estate ;
(*b*) To direct the removal to hospital of any such sick labourer whose removal he may consider necessary ;
(*c*) To attend upon all such labourers who at the direction of a district medical officer or otherwise may be admitted to hospital.

.'. It shall be the duty of every medical officer (being a duly qualified edical practitioner registered under section 12 and 13 of Ordinance ). 2 of 1905) for the purposes of this Ordinance from time to time—

(*a*) To visit the estates within his district, or any other estate which he may be specially directed to visit, and to inspect the sanitary condition thereof ;
(*b*) To examine the labourers on such estates for the purpose of ascertaining their condition of health, and whether they have been duly vaccinated ;
(*c*) To inspect all children under the age of one year resident upon such estates, and to give directions to the superintendent for their proper care and nourishment ;
(*d*) To direct the removal to hospital of any sick labourer whose removal he may consider necessary ;
(*e*) To draw the attention of the superintendent to any defect in the sanitary condition of his estate, and in the condition of health of the labourers ;
(*f*) If any estate has an estate hospital or dispensary, to inspect such hospital or dispensary ;
(*g*) To report to the Director of Medical and Sanitary Services on all or any of the above matters.

Section 9 provides that any superintendent shall be entitled—

(*a*) To medical attendance by a district medical officer upon any sick labourer upon his estate ;
(*b*) To the reception at a hospital (subject to the accommodation of the hospital) of any labourer who in the opinion of a district medical officer ought to be admitted to the hospital ;

Section 12 provides that it shall be the duty of every superintendent :

(*a*) To maintain the lines of his estate and their vicinity in a fair sanitary condition ;

(*b*) To inform himself of all cases of sickness on his estate, and to take such steps as he may deem best for the immediate relief of the sick ;

(*c*) To send any labourer to hospital when so required by a medical officer ;

(*d*) To send for the district medical officer in any case of serious illness or accident.

Section 10 prescribes the charges payable by the superintendent for medical services rendered under the Ordinance.

Chapter VI. creates a Medical Wants Committee to advise the Governor upon the matters specified in the Chapter. Three of the members of the Committee must be persons whose names are submitted to the Governor by the Planters' Association of Ceylon.

Chapter VII. empowers the Legislative Council to impose export duties on tea, rubber, coffee, &c., for the purpose of meeting the expenses of the administration of the Ordinance.

Mr. Selwyn was in the month of February, 1933, a member of the Medical Wants Committee and there was a suggestion that the communication of D 10 to him was privileged as he was a member of the committee and it was argued that the privilege was not affected by the letter being sent to him as Chairman of the Association.

In spport of the argument we were referred to the case of *Harrison v. Bush*[1]. In that case a complaint as to the conduct of a Magistrate was sent to a Secretary of State, who it was contended had no power to remove the Magistrate, that authority being vested in the Chancellor. It was held that in being presented to the Secretary of State the petition was really presented to the Sovereign who has undoubtedly power to set foot an inquiry through the proper channel and that this was enough to establish the *prima facie* immunity claimed for the publication.

The decision is in my opinion not applicable as the Committee and the Association are independent bodies without, as in the case cited, a common head to whom the communication was in effect addressed.

The suggestion is untenable as the defendant had no intention of complaining to the Committee.

It was argued as regards the Association that the members being governed by the provisions of the Medical Wants Ordinance were interested in having a competent and careful District Medical Officer in charge of the district and that therefore the Association was a body having an interest in the subject-matter of letter D 10.

The argument would have had more force if the complaint made by the defendant was in regard to the manner the plaintiff discharged the duties imposed upon him by the Medical Wants Ordinance. But that is not the case—the defendant's complaint was about a personal matter.

Counsel were not able to refer me to nor can I find any case in which the facts are analogous to the present case.

The general principle is that "If the communication was of such a nature that it could be fairly said that those who made it had an interest in making it, and those to whom it was made had a corresponding interest

[1] (*1855*) *5 E. & B. 344.*

in having it made to them . . . . the occasion is a privileged, one, and the question whether it was or was not misused is an entirely different one"—*Odgers p. 231.*

Such common interest might be pecuniary, professional or may arise from the joint exercise of any legal right or privilege as from the joint performance of any duty imposed or recognized by law.

The defendant was no doubt a person interested, but had the Association an interest in a matter personal to the defendant. The Association had no authority to investigate the charge and their interest if any in the complaint was too remote in my opinion to render the occasion privileged.

The occasion not being privileged the defendant cannot claim that he was not responsible for the reports in the newspapers because he did not invite the reporters to publish the letter. It is sufficient that he knew reporters would be present at the meeting.

The case of *Parker v. Prescott & another* [1], is not applicable to the facts of this case nor the case of *Kershaw v. Bailey* [2].

Appellant's Counsel argued that the first statement that the plaintiff was incompetent and negligent was comment and the second statement that the examination was perfunctory mixed comment and fact.

The second in my opinion is clearly a statement of fact and I am inclined to think that the first is also a statement of fact. But even if they are comments they must be comments on proved or admitted facts. If the defendant fails to establish the truth of the facts on which the comment is based the plea must fail even if the comment on the alleged facts is not unfair. Treating the statements as comments, the defendant in my opinion has proved the facts on which they are based and they are not in my opinion unfair. It is unnecessary for me to discuss whether the matter was one of public interest or not, in view of my finding that the plea of justification had been established.

I am of opinion that the dictum of Viscount Finlay in the case of *Sutherland v. Stopes* [3], is applicable to this case. It is as follows: "It is clear that the truth of a libel affords a complete answer to civil proceedings. This defence is raised by a plea of justification on the ground that the words are true in substance and in fact. Such a plea in justification means that the libel is true not only in its allegations of fact, but also in any comments made therein. The defence of fair comment on matters of public interest is totally different. The defendant who raises this defence does not take upon himself the burden of showing that the comments are true. If the facts are trully stated with regard to a matter of public interest, the defendant will succeed in his defence to an action of libel if the jury are satisfied that the comments are fairly and honestly made".

There are one or two points which I desire to refer to before concluding my judgment.

There is no evidence that the defendant was actuated by any personal animus against the plaintiff when he wrote D 10. The plaintiff says the defendant came once or twice to the hospital and he found him a courteous gentleman. The plaintiff did not suggest any reason why the defendant should have written letter D 10. The District Judge says that the letter

[1] *38 L. J. Ex. 105.* [2] *17 L. J. Ex. 129.* [3] *(1925) A. C. 47, at p. 62.*

was written because the defendant found he and his wife had to stay in a nursing home and might have to pay a heavy bill. In appeal respondent's Counsel suggested that D 10 was written with a view to getting compensation from Government. This suggestion is based on letter P 18 in which the defendant calls the attention of the Director to letter D 10 and says that he feels compensation is due to himself and his wife for the delay in their "cure" and the extra expense incurred. I think that in fairness to the defendant the suggestion should have been put to him at the trial but it was not. I do not think that the defendant has been shown to have had any other motive than dissatisfaction at the treatment he received at the hospital, resulting from the fact that the plaintiff's diagnosis was found to be incorrect, and the plaintiff's failure to advise an X-ray examination.

The District Judge appears to have rejected the suggestion because Dr. de Silva made no diagnosis and no definite pronouncement but directed the Huntleys to have an X-ray examination. If my inference is correct, the District Judge has lost sight of the fact that when D 10 was written the X-ray examination had been made and had revealed fractures.

The strictures passed by the District Judge on Dr. de Silva's examination of the Huntleys were I think unnecessary and without foundation —unnecessary because the plaintiff made no suggestion against the adequacy of the examination when Dr. de Silva was in the witness box, without foundation because they are based on statements of defendant in cross-examination that Dr. de Silva's examination "took only a very short time, by this I mean next to no time". He does not specify the time. Dr. de Silva said he examined Mrs. Huntley for fifteen minutes and Huntley for about five minutes. It is quite possible that the defendant considered this a short time or next to no time for his case, but it does not negative Dr. de Silva's evidence.

But however brief Dr. de Silva's examination was it was quite sufficient. He advised an X-ray examination which indicates that he diagnosed the possibility of fractures which could not be detected by a clinical examination and his diagnosis was confirmed by the X-ray examination.

There is in my opinion no reason for the District Judge's observation that Dr. de Silva's evidence in examination-in-chief is based more or less on what he has observed by reading the skiagrams and not on his personal observation. Hence his rejection of Dr. de Silva's evidence as to what he observed at his clinical examination cannot be sustained.

Dr. de Silva was cross-examined regarding the time he took over his clinical examination not to prove that his examination was inadequate but to prove that if the time he took was sufficient for a proper examination the time the plaintiff took to make his examination was equally sufficient.

Another point I have to touch on is the complaint that the District Judge admitted documents before they were proved. The District Judge was clearly wrong in admitting these documents subject to their being proved at another time.

I do not think that the defendant has been prejudiced by the indulgence granted to the plaintiff. But I would point out that section 114

of the Civil Procedure Code enacts that no document shall be placed on record unless it has been proved or admitted in accordance with the law of evidence for the time being in force, and section 67 of the Evidence Ordinance enacts that if a document is alleged to be signed . . . . by any person the signature . . . . must be proved to be in his handwriting.

In practice a party is allowed to prove a document at a later stage of his case, but except by consent he should not be allowed to prove it after his case is closed.

The attention of this Court and the District Court was drawn to many details regarding which (*a*) there were discrepancies in the evidence of the witnesses for the defence, (*b*) there was a conflict of evidence. Discrepancies such as; whether Huntley was examined by Dr. de Silva before the X-ray examination of Mrs. Huntley as stated by Dr. de Silva, or after the X-ray examination of Mrs. Huntley as stated by Huntley; whether Huntley was carried to the lavatory on the 28th morning by Urquhart alone as stated by Huntley, or by Urquhart and Nicol as stated by Urquhart and Nicol; whether Huntley's driver accompanied the Huntleys in Urquhart's car as stated by defendant, or went in the Panawatte estate lorry as stated by Urquhart; whether Urquhart's car was driven by Urquhart himself as stated in D 10, or by his driver as stated in the evidence.

I do not think the discrepancies affect the evidence on material points in the case. The witnesses were giving evidence some eighteen months after the event and it would be surprising if their recollection agreed on every detail.

The conflict of evidence is also in my opinion on points not material to the decision of the case. The matters referred to were; whether the plaintiff was reading by a lighted lamp when the car arrived at his bungalow as stated by Urquhart, or talking to the Town Arachchi without a lamp as stated by the plaintiff; whether Mrs. Huntley was lying in bed on the 28th morning as stated by the defence witnesses, or seated in a chair as stated by plaintiff and Miss Cooper; whether the defendant was carried to the car on the 29th as stated by him, or was helped to the car as stated by Matron Cooper; whether the defendant went to the lavatory as stated by him, or did not go at all as stated by Matron Cooper; whether the plaintiff wore flannel trousers on the 28th evening or trousers of another kind.

I have for the reasons given by me not thought it necessary to deal with all the matters referred to above.

The District Judge commented on the fact that certain witnesses the defendant might have called were not called. Two of them, Benjamin and Muttiah, were employees of defendant, the third Jayatilleke is Urquhart's driver. I do not see that any purpose would have been served by the defendant calling them. The fourth is a Scout of the Automobile Association of which defendant is a member and that would have discounted the effect of his evidence.

I have, I think and hope, discussed all the material points to which our attention was drawn by Counsel for the appellant and respondent at the agrument which took twelve days during which the evidence or most of it was read to us twice.

I agree with the District Judge that the statements specified in issues 1 and 2 are defamatory of the plaintiff and that they were published as set out in issue 4 and that defendant is responsible for the publication of the statements specified in issue 1 at a meeting of the Kelani Valley Planters' Association and in the "Times of Ceylon" and "Daily-News" of February 24, 1933.

On issue 5 I find that the statements made at the interview with the Director were made on a privileged occasion. I hold on the facts of this case that the publication to the Association was not made on a privileged occasion.

I find on issues 3 and 9 (*a*) that the statements were not false but true. in substance and in fact.

I answer issue 9 (*b*) in the affirmative.

I accordingly dismiss plaintiff's action with costs in both Courts.

KOCH J.—I entirely agree.

*Appeal allowed.*