[IN THE PRIVY COUNCIL]

1948 *Present :* **Lord Uthwatt, Lord Morton of Henryton, Lord Mac Dermott, Sir John Beaumont**

M. G. PERERA, Appellant, *and* A. V. PEIRIS *et al.*, Respondents

Privy Council Appeal No. 2 of 1947

S. C. 84—D. C. Colombo, 15,069

*Defamation—Report of Bribery Commission—Public interest—Privilege—Malice—*Animus injuriandi *of Roman Dutch law—Ordinance No. 25 of 1942—Sections 6 and 10.*

In Roman Dutch law *animus injuriandi* is an essential element in proceedings for defamation and where the words used are defamatory, the burden of negativing *animus injuriandi* is on the defendant. If malice in the publication of a particular report of any body is not present and the public interest is served by the publication, such publication must be taken, for the purposes of the Roman Dutch law, as being directed to serving that interest and will be privileged and the *animus injuriandi* will be negatived.

Held, further, that the publication of the name of a witness was not a breach of the provisions of section 6 (1) of Ordinance No. 25 of 1942.

APPEAL from a judgment of the Supreme Court. The judgment of the Supreme Court is reported in (*1946*) *47 N. L. R. 49.*

G. O. Slade, K.C., with *Stephen Chapman*, for appellant.—If any privilege could attach to the publication in a newspaper of a fair and accurate report of the proceedings before the Bribery Commissioner, it would attach only in so far, if at all, as they were open to the public. No privilege could thus attach to a report of any part of the proceedings which the Commissioner decided to hold *in camera*, and *a fortiori* to any part, the publication of which was not authorised by the Commissioner. If the publication was not made by the respondents with the authority of the Commissioner under Section 6 (1) of Ordinance No. 25 of 1942, it would be an offence under Section 11. The Commissioner did not authorise the publication. The view of the Supreme Court that the respondents had his "implied authority" has no basis and is incorrect. The Commissioner in his report states that the question of publication is not for him, clearly indicating that he was not authorising publication of his report or any part of it. D3 shews clearly it was the Governor who authorised the publication. There is no evidence to shew that the Governor had any over-riding power to authorise publication. Section 6 has to be read in conjunction with Section 10 (*b*). Publication of the name or the evidence or any part of the evidence of any witness heard *in camera*, save with the authority of the Commissioner, is illegal. The view of the Supreme Court is inaccurate, for it leads to the position that the words "of the name" are mere surplusage.

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In any event, this Commission of inquiry was not a judicial or *quasi*-judicial proceeding, so as to clothe with qualified privilege a fair and accurate report in a newspaper of its finding and proceedings, even if publicly heard.

[Mr. Slade at this stage stated that express malice is not being alleged by him, nor was it alleged in any of the lower Courts. His argument would be that a qualified privilege did not in law arise at all.]

No privilege, however, can under any circumstances attach to a report of judicial or *quasi* judicial proceedings which are not publicly heard. There was no *lis* nor was the evidence *inter partes*. As such these proceedings are neither judicial nor *quasi*-judicial; they are more in the nature of an administrative inquisition. The Commissioner was in a position similar to that of a Medical Referee, who, it was held in *Smith v. National Meter Co., Ltd.*[1] did not function as a judicial tribunal. See also *O'Connor v. Waldron*[2].

The Supreme Court was right when it held that the Bribery Commission did not function as a Court.

Even granted that the Bribery Commission functioned as a Court, no immunity would attach to a report of proceedings not held in open Court.

The respondent has also pleaded that it published the defamatory words in pursuance of its duty as a newspaper to inform the public of matter which the public was interested in knowing; this is untenable. For a valid plea of this defence, the defendant must show that he had an interest or duty (legal, moral or social, of perfect or imperfect obligation) to make the communication and that the person to whom it was made had a corresponding interest or duty to receive it. Can it be said that a newspaper as such has a duty even of imperfect obligation to publish news? Its duty does not go beyond the duty of a private individual to publish. In the present case, even on the assumption that the public had an interest in knowing the defamatory matter, the respondent had no interest or duty in disseminating it to the public at large. The cases where this defence has been upheld show, with two exceptions, that the publication was either to a defined or a limited number of persons, in whom an interest or duty clearly inhered. Neither of the two cases in English law, *Allbutt v. General Medical Council*[3] and *Adam v. Ward*[4], where privilege attached to a publication at large, concerned a newspaper. In these cases, privilege attached on grounds peculiar to each case, and not on the ground of a duty or interest in making a publication at large.

It is however submitted that in the present case, the defamatory words did not relate to a matter in which it could rightly be said the public were interested. They are not germane to the Commissioner's finding of the particular members of the State Council guilty of bribery. As such, the communication of the defamatory words is not protected even on the assumption that the Report was published on a privileged occasion.

[1] *(1945) K. B. 543*
[2] *(1935) A. C. 76.*
[3] *(1889) 23 Q. B. D. 400.*
[4] *(1917) A. C. 307.*

In the defence of fair comment, every defamatory comment and every defamatory inference must be based on facts proved to be true. This defence cannot be relied on by the respondent, for it cannot arise unless the facts on which the comment is based are placed before Court and proved to be true. There is no evidence of the facts on which the comment was based ; in such a contingency, nevertheless, it is open to a party to prove that the comment is equivalent to fact, but he can do this only by raising the defence of justification. The defence of fair comment cannot therefore arise.

The Supreme Court has upheld the defence of justification. This defence was not pleaded ; it however became an issue in the District Court because apparently the plaintiff's Counsel himself raised it. The District Judge held that the words were true in substance and in fact on the ground that " a presumption of regularity attaches to the findings of the Commissioner, and, in the absence of proof to the contrary, this Court will hold that his findings are true and correct ". But he held that it was not for the public benefit that they should be published and so rejected this defence. In the Supreme Court, according to the judgment of the Chief Justice, Counsel for the appellant " has not queried the finding of the District Judge that the words are true in substance and in fact ", but apparently, instead, argued that the finding of the District Judge that their publication was not for the public benefit was right. The Supreme Court, however, differed from the District Judge and held that the publication of the words in question was for the public benefit and so upheld the defence of justification.

Despite this background, the defence of justification cannot arise in the absence of positive evidence that every defamatory fact and every defamatory imputation is true. The long line of cases where the defence of justification was taken shew unambiguously and without an iota of doubt that unless the defamatory facts and imputations are proved by evidence to the satisfaction of the Court to be true, this defence cannot be taken. A presumption on the absence of evidence cannot for the purposes of the defence of justification afford any basis for a finding that the facts are true. The Supreme Court was wrong in holding that the publication of the words in question was for the public benefit. Even if publication of the other parts of report was for the public benefit, publication of the statement relating to the appellant's conduct as a witness was not for the public benefit. In addition, an illegal publication cannot be for the public benefit.

The absence of *animus injuriandi* is not, in the Roman Dutch Law, today, a substantive defence in itself. It is only by establishing one of the recognised defences in a defamation action, namely, Justification, Privilege, Fair Comment, Jest, Compensatio, Rixa or in certain circumstances reproof by a superior, that a defendant can relieve himself of liability for the publication of defamatory words.

This is the view taken by the South African Courts in *Laloe Janoe v. Bronkhurst* [1] ; *Jooste v. Classens* [2] ; *Tothill v. Foster* [3] ; *Mankowitz v. Geyzer* [4].

[1] *(1918) T. P. D. 732.*
[2] *(1916) T. P. D. 168*
[3] *(1925) T. P. D. 857.*
[4] *(1928) O. P. D. 138.*

The ruling of the Supreme Court that the absence of *animus injuriandi* afforded a substantive defence in itself is contrary to the Roman Dutch Law as it exists today.

On the issues of damages, the District Judge misdirected himself. An assessment of Rs. 5 is unsustainable. The District Judge has rightly refused to award contemptuous damages of one cent; he has on the contrary assessed damages at a figure, which gives no indication of the principles he had adopted in so assessing it. The Supreme Court, in view of its findings on the other issues, did not give its mind to this issue. In the circumstances, a new trial on the issue of damages is necessary.

D. N. Pritt, K.C., with *Sir Valentine Holmes, K.C., R. K. Handoo* and *C. E. L. Wickremesinghe*, for the respondents.—In the Roman Dutch Law of defamation the existence of the *animus injuriandi* is an essential pre-requisite of liability. This proposition represents the unanimous view of the various commentators on the Roman Dutch Law and also of the contemporary text books on the subject. It was therefore open in the Roman Dutch Law to a defendant to negative liability by proving the absence of *animus injuriandi* on his part. Voet in *De Injuriis* (47.10.20) states "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 for 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 a case of doubt its existence should not be presumed". (de Villiers' Translation, p. 189.)

The Roman Dutch Law, therefore, gave a defendant a very wide scope in rebutting a presumption of *animus injuriandi*. It was open to him to rebut it in anyway he could; it was a matter of evidence. In fact what are today regarded as the established defences in defamation are, in their origin, various different ways of negativing *animus injuriandi*. With time, however, they developed into stereotyped defences whereby a presumption of *animus injuriandi* could be rebutted. The scope of some of them like privilege and fair comment are fairly clearly defined, but that of the others, like rixa, compensatio, jest and mistake, is less clear. This development has been taking place over the last fifty years or more and is still taking place. The absence of *animus injuriandi* still exists as general category providing a substantive defence in itself. The Roman Dutch Law, under the rule of absence of *animus injuriandi*, still retains the capacity to extend a defence into a sphere not covered by any of the established defences.

In Ceylon—and this is a case governed by the Roman Dutch Law as developed in Ceylon—the defence of the absence of *animus injuriandi* exists as a vital, living force. This defence has been uniformly and consistently adopted by the Supreme Court of Ceylon in *Silva v. Raman Chetty* [1]; *David v. Bell* [2]; *Cantlay v. Vanderspar* [3]; *Gulich v. Green* [4]. The position at present in South Africa was stated in the following words by the Appellate Division in *Basner v. Trigger* [5]. "It has not

[1] *(1895) 1 N. L. R. 225.*
[2] *(1913) 16 N. L. R. 318.*
[3] *(1914) 17 N. L. R. 353.*
[4] *(1918) 20 N. L. R. 180.*
[5] *(1946) A. D. 94.*

yet been finally decided in our law whether the already established defences which rest historically on the negativing of *animus injuriandi* are today exhaustive. If it is certain that they are, it would seem to be unnecessary and pedantic to continue to employ the expression '*animus injuriandi*' in defining the delict of defamation. It would only be useful to retain the expression as part of the definition, if the possibility exists that a defendant may set up as a defence the absence of *animus injuriandi* without bringing himself within any established defence."

Originally in the earlier cases, the South African Courts had no doubt that the absence of *animus injuriandi* afforded a substantive defence. *Vide Bennet v. Morris* [1]; *Botha v. Brink* [2]; *Dippenaar v. Hauman* [3]; *Smith & Co. v. S. A. Newspaper Co.* [4]. Later on, in two provinces, the Transvaal and the Orange Free State, a different view was taken. In *Laloe Janoe v. Bronkhurst* [5] De Villiers, J.P., expressly disagreed with the rule in *Botha v. Brink* (viz., that presumption of *animus injuriandi* could be rebutted " by such other circumstances (examples of which are given in Voet 47.10.20) as satisfy the Court that *animus injuriandi* did not exist") on the ground that it was based on a misreading of this passage in Voet. De Villiers, J.P., went on to add " But if one refers to section 20 in the passage from Voet, upon which the learned Chief Justice relies, one sees that the only cases where that can come in, in the absence of justification or privilege, is where there is either a mistake or where the statement was made as a joke or where compensation can be relied upon. Short of that, a party using defamatory language of another must either justify or must show that it was a privileged occasion."

This interpretation of Voet 47.10.20 by De Villiers, J.P., is clearly inaccurate. In this passage Voet first of all states the general principle that absence of *animus injuriandi* is a valid defence, and that the fact of its absence is to be gathered from the " circumstances of each particular case ". Voet then enumerates a series of topical illustrations (some of them now obsolete) in exemplification of this principle. Nowhere in the whole of 47.10.20 is there the suggestion that these illustrations were exhaustive of the circumstances in which the absence of *animus injuriandi* could be proved.

The next case of *Tothill v. Foster* [6] is based on the view taken by De Villiers, J.P., in *Laloe Janoe v. Bronkhurst*, and the passage cited above is adopted with approval by Curlewis, J.P. *Mankovitz v. Geyzer* [7], does not discuss the relevant cases. *Jooste v. Classens* [8] does not limit in any way the view that the absence of *animus injuriandi* affords a substantive degree.

Even if these cases are regarded as manifesting a trend towards denying the availability of the defence of absence of *animus injuriandi*, it is a trend manifested only in two provinces and not in the whole of South Africa.

[1] *10 S. C. 226.*
[2] *Buch. (1878) p. 150.*
[3] *Buch. (1878) at 139*
[4] *(1906) 23 S. C. 313.*
[5] *(1918) T. P. D. at 165.*
[6] *(1925) T. P. D. 857.*
[7] *(1928) O. P. D. 138.*
[8] *(1916) T. P. D. 727.*

The other defences in this case would then be seen as basically manifestations of the absence of *animus injuriandi* though, as they exist today, their scope and the manner of their application provide strong evidence of the great influence of the Common Law of England on their development.

Sessional Paper No. 12 of 1943—The Report of the Bribery Commissioner—is a document that bears a two-fold character; on the one hand, it is a sessional paper, and on the other it is the Report of the Bribery Commissioner. Regarded in either way, its publication is not illegal.

The Report of the Bribery Commissioner was the document which the Commissioner sent to the Governor. When the Governor published it as a sessional paper, it acquired a different character; it became a public document issued by the Governor. It came no longer within the terms of the Special Commission (Auxiliary Provisions) Ordinance, No. 25 of 1942. The defence of privilege can be founded on this fact. Regarded as the Report of the Bribery Commissioner, its publication by the respondent did not contravene the provisions of Section 6 (1) of Ordinance No. 25 of 1942. The Governor must be presumed to have had the authority of the Commissioner to publish his report. It was the Governor who appointed the Commissioner to inquire and report. Had the Commissioner published his report his act acquires legality on the presumption of his giving himself authority. Is it unreasonable to presume when his master who appointed him published his report, " the servant " gave his master the requisite authority ?

Further, section 6 (1) was valid only as long as the Commissioner was *functus officio*. On his ceasing to be so, on forwarding his report to the Governor, the prohibition in Section 6 (1) no longer applies.

In any case, as the Supreme Court held, Section 6 (1) does not prohibit publication of the name of a witness. Finally, the publication would be exempt under Section 6 (2) as having been made " *bona fide* for the purposes of the inquiry ". The phrase " purposes of the inquiry " would include the immediate purpose of inquiring and reporting whether gratifications were given or taken, as well as all matters necessary to serve the ends of the inquiry. The publication was to justify in the eyes of the public the finding of the Commissioner and this is an ultimate purpose of the inquiry.

Regarding the defence of justification, there were findings by both the District Court and the Supreme Court that the defamatory words were true. The Supreme Court too has on record the admission of the appellant's counsel that the words were true.

Sir Valentine Holmes, K.C., continued for the respondents.—It is submitted that the publication in question is privileged both in the Roman Dutch Law and also in the English Common Law. At the present day in English Common Law, the defences in libel and slander are generally classified under certain broad categories, but it is usually lost sight of that these categories are based on cases, which are the manifestations of the principles of the Common Law, as they evolved.

In the middle of the 18th century the answer to the question " What are the defences in the Common Law ? " would have been " Justification", in the sense that the circumstances of publication showed that the private interest of the individual had to surrender to the public interest.

In the beginning of the 19th century the answer was (*a*) Truth, (*b*) Existence of circumstances negativing the presumption of malice but rebuttable by proof of actual malice, and (*c*) Existence of circumstances in which the presumption of malice was negatived but the plaintiff was not allowed to prove actual malice.

This change in the last half of the 18th century evoked considerable controversy as to whether truth in itself was an adequate defence. One view was that public benefit, along with truth, was necessary to constitute a defence. But this controversy was decided in civil proceedings (with a contrary decision in criminal proceedings) in favour of truth alone.

It is from about the 19th century that Judges first began using the term " privilege " (though they confess it is an inapt term), in the sense of the existence of circumstances negativing the presumption of malice. See *Gilpin v. Fowler* [1]. Judges were then faced with the difficult task of having to state what would be the circumstances in which the presumption of malice would be negatived. They proceed on two lines :

(1) Of corresponding duty and interest : see *Toogood v. Spyring* [2]; *Harrison v. Busch* [3] ; and

(2) Circumstances when the publication was made for the public benefit in the public interest. See *Flint v. Pyke* [4], which, incidentally, is the first case where judges explained how reports of judicial proceedings were privileged.

These two principles went together hand in hand. They were not considered contrary to each other, though it so happened that the first principle was met with more frequently in case law. The second principle was adopted in *Cox v. Feeney* [5]. In *Wayson v. Walker* [6], fair comment is seen appearing out of privilege. They both sprang out of " circumstances negativing malice ". *Henwood v. Harrison* [7] comes very close to the facts of the present case. It dealt with a publication made by the Queen's Printer on the direction of the Lords of the Admiralty and publicly sold. In *Merrivale v. Carson* [8], the headnote states that in that case the Court of Appeal disapproved of *Henwood v. Harrison*. This headnote is not correct. The Court of Appeal expressly stated in the later case of *Thomas v. Bradbury* [9] that it did not disapprove of *Henwood v. Harrison*. See also *Allbutt v. General Medical Council* [10]. Spencer Bower in his Law of Actionable Defamation (2nd Ed. p. 127) collects these cases and cites them as illustrative of this second principle, which in his terminology affords a defence on the ground that the matter published was " fit and proper that the

[1] *(1854) 9 Exch. 615 at 623.*
[2] *(1834) I. C. and M. R. 181.*
[3] *(1855) 5 E. and B. 344.*
[4] *(1825) 4 B. and C. 473.*
[5] *(1863) 4 F. and F. 13.*
[6] *L. R. 4 Q. B. 73.*
[7] *L. R. 7 C. P. 606.*
[8] *(1887) 20 Q. B. D. 275.*
[9] *(1906) 2 K. B. 627.*
[10] *(1889) 23 Q. B. D. 400.*

public be informed thereof". This principle continues to live in the English and in Ceylon Law; in neither is there a "closed shop" regarding privilege.

The fact that a proceeding is not a judicial proceeding does not mean that publication of a report of such proceedings has not a qualified privilege attached to it. Howard C.J.'s view is wrong. He has confused the question of absolute privilege to proceedings in a Court of Justice with qualified privilege to reports of such proceedings. Whether the proceedings before the Bribery Commissioner were a Court or not, a newspaper report of them would have a qualified privilege.

The facts of the present case, viz., that the taking of bribes was common talk in Ceylon, that the State Council wanted the allegations probed, that the Governor appointed a Commissioner, that the State Council gave statutory powers to him (Ord. 25 and 26 of 1942), that the Commissioner investigated the allegations and issued a report, and that a bill was passed to exclude from the State Council members found guilty by the Commissioner, all indicate that not merely the Commissioner's findings, but how he arrived at them, were matters of burning importance to the public.

Slade, K.C., in reply.—If the view is accepted that the absence of *animus injuriandi* affords a substantive defence, then the untenable position would arise that proving belief in the truth of a defamatory statement, even though it is in fact untrue, would afford a complete defence; a defendant could then avoid liability by proving that he honestly believed a statement to be true. In law, a newspaper has no duty to publish anything; it has no general duty to inform the whole public of Ceylon that a witness gave false evidence. In this case, only the Commissioner had a duty and a right to so inform the Governor.

Cur. adv. vult.

October 13, 1948. *Delivered by* LORD UTHWATT.—

This is an appeal from the judgment of the Supreme Court of Ceylon affirming the dismissal by the District Court of Colombo of an action brought by the appellant Dr. M. G. Perera in which he claimed damages for defamatory libel from the respondents who are the printer and owners of a newspaper called *The Ceylon Daily News*. The libel complained of appeared in the issue of that paper of the 25th May, 1943, and consisted of an extract from the published report of a Commissioner who had been appointed under statutory powers to enquire into certain matters. The extract ran as follows:—

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

The respondents took all defences. They denied that the words were defamatory—a formal defence in the circumstances. The other defences were not formal. They pleaded justification in the sense that the statement was true and that its publication was for the public benefit. Fair comment was pleaded. Privilege was relied on upon two grounds, first, that the proceedings before the Commissioner were judicial proceedings and the extract was part of an accurate report of those

proceedings, and second, that, apart from the supposed judicial nature of the proceedings, the circumstances were such that the publication in the newspaper of the Report was made on a privileged occasion. Neither the pleadings, the issues settled in the course of the proceedings, nor the conduct of the case at the trial, in any way limited the field of defence open to the respondents.

On the settlement of the issues in the action it was made clear that the appellant did not set up express malice with a view to destroying any qualified privilege that might exist.

The action arose in the following circumstances. It appears that in 1941 there were rumours in Ceylon that bribes had been offered to and accepted by members of the State Council. On the 13th August, 1941, the Governor, pursuant to a resolution passed by the State Council on the 15th May, 1941, set up a Commission of Inquiry under the Commissions of Inquiry Ordinance (No. 9 of 1872). Under the terms of the appointment Mr. de Silva, K.C., was appointed the Governor's Commissioner for the purpose of inquiring into and reporting upon the following questions :—

(*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 instrument of appointment then contained the following direction by the Governor :—

" And I hereby authorise and empower you to hold all such inquiries and make all such investigations into the aforesaid matters as may appear to you to be necessary ; and I do hereby require you to transmit to me a report thereon under your hand as early as possible. "

To assist the Commissioner in this particular inquiry a further Ordinance (No. 25 of 1942) was passed which empowered the Commissioner to hear the evidence or any part of the evidence of any witness *in camera*. Sections 5, 6 (1) and (2) and 10 (*b*) of the Ordinance run thus :—

" 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).

10. Nothing in this Ordinance shall—

(*b*) prohibit or be deemed or construed to prohibit the publication or disclosure of the name or of the evidence or any part of the evidence of any witness who gives evidence at the inquiry, for the purpose of the prosecution of that witness for any offence under Chapter XI of the Penal Code."

The Commissioner duly held his inquiry, and on the 3rd April, 1943, the Commissioner made his report to the Governor. In light of the claim to privilege, the general nature of the Report and the circumstances in which it was produced are of importance. It appears from the Report that the Commissioner by public advertisement and otherwise made wide appeals to persons who were in possession of relevant information to place that information before him. Despite the immunity given to witnesses by the Ordinance, the public response was small and of the 124 witnesses examined only 12 were volunteers. All the evidence was taken *in camera*. There were made to the Commissioner allegations of gratification in respect of matters which came before open Council and in respect of matters which came before the Executive Committee. The chief items in respect of which complaints were made were :—

(1) appointments to various offices ;
(2) nominations to Municipal and Urban Councils and
(3) decisions on policy, the repercussions of which resulted in advantage or disadvantage to private parties.

The Commissioner states in his report (para. 16) that suggestions were made against 19 Councillors. In some cases, he states, the allegations were made upon slender material. He found that eight members, whom he was able to identify, had received gratifications. Among that number were three European members who had taken gratifications openly. He also came to the conclusion that there were in all probability four other members whom he had not been able to identify who received gratifications. In other cases he found room for strong suspicion. He stated that there was a widespread belief that the number of Councillors who received gratifications was much greater than the number he had found so to do. On consideration of the evidence, the reading of debates in the Council and articles in the Press he had no doubt that this belief was honestly held, but he thought that popular belief was exaggerated.

The Commissioner in the main body of the Report dealt with the broad results of his inquiry, reserving details to appendices. In each

appendix he states the witnesses examined on the particular subject matter, makes his comment, summarises the evidence and gives his finding.

Among the matters investigated by the Commissioner was an affair which he called the " Arrack contract gratification Incident ", and it is in connection with his treatment of this affair that the appellant appeared on the scene. The appellant, it should be stated, was, among other activities, engaged in distilling arrack. He complied with the Commissioner's request to attend, and his evidence was taken *in camera*. The arrack incident is dealt with by the Commissioner in paragraph 18 of his Report and in Appendix C.

Paragraph 18 and Appendix C were as follows :—

" 18. *Arrack Contract gratification incident.*—There was evidence before me that in 1939 contractors to the Government for the supply of arrack decided to pay to the same four members a sum of about Rs. 2,000 for the purpose of having their contracts extended without competition from outside. There is evidence, which I believe, that money for this purpose was paid to one of the members, now dead, Mr. C. Batuwantudawe, but there is no evidence that it was paid by him to the others. I did not for this reason call upon the members now alive to answer the allegation as it cannot be held against them that, with regard to this particular incident, they actually received the money. This matter is more fully discussed and reasons for my view given in Appendix C. "

" *Appendix C*

ALLEGATION OF PAYMENT OF GRATIFICATIONS TO MESSRS. C. BATUWANTUDAWE, E. W. ABEYGUNASEKERA, E. R. TAMBIMUTTU, AND H. A. GUNASEKERA FOR THE PURPOSE OF SECURING THEIR SERVICES IN THE EXECUTIVE COMMITTEE OF HOME AFFAIRS IN THE MATTER OF THE EXTENSION OF A GOVERNMENT CONTRACT.

Witnesses examined.—Messrs. M. F. P. Gunaratne, D. E. Seneviratne, W. F. Wickremasinghe, M. G. Perera, C. M. Rodrigo, and A. J. Siebel.

Allegation.—These witnesses gave evidence with regard to the alleged payment of gratifications to four Councillors, Messrs. C. Batuwantudawe, E. W. Abeygunasekera, E. R. Tambimuttu, and H. A. Gunasekera, for the purpose of securing their services in the Executive Committee of Home Affairs. Certain contracts held by distillers for the supply of arrack to Government were due to expire on 30th April, 1939. The allegation was that money was paid to the Councillors mentioned in order to secure their support to a proposal that the contracts should be extended without calling for tenders. The proposal itself was put forward by the Excise Commissioner for reasons which I need not go into. It was ultimately adopted by Government.

Finding.—My finding upon this matter is that without a doubt a sum of Rs. 2,000 was paid by the distillers to Mr. Batuwantudawe. The distillers earmarked this sum for payment to members of the

Executive Committee. They believed that portions of the sum would find their way to the other Councillors mentioned. One distiller at least thought that the money would be paid direct to them. Others received the impression that it would be paid through Mr. Batuwantudawe. Mr. Batuwantudawe is now dead and there is no evidence that he distributed money among the others. I do not think that any direct payments were made to them.

Comment.—In 1939 there were eight distilling plants in Ceylon, the proprietors of which were supplying arrack to Government. These suppliers consulted each other in matters of common interest and were loosely associated with each other as a body without a formal set of rules or any of the other formalities adopted by Associations proper. They regarded Mr. D. E. Seneviratne, proprietor of the Diyalagoda Distillery, as Treasurer, and Mr. W. F. Wickremasinghe, proprietor of the Anvil Distillery, as Secretary. They collected money from time to time as occasion required for meeting various expenses.

Mr. Gunaratne, the owner of Sirilanda Distillery, Kalutara, stated to me that either Mr. Wickremasinghe or Mr. Seneviratne or both came to see him and asked him for a contribution towards a fund from which the four Councillors mentioned were to be paid. Mr. Gunaratne says that Messrs. Wickremasinghe and Seneviratne (either or both) mentioned the names of the four Councillors and that he paid Rs. 500. There is no doubt about this payment. The only question is what the conversation was. Messrs. Seneviratne and Wickremasinghe deny that they mentioned the four names in the explicit manner deposed to by Mr. Gunaratne. After carefully weighing up the evidence I feel that none of these witnesses is deliberately stating an untruth. Mr. Gunaratne says that he was told by Messrs. Wickremasinghe and Seneviratne that Mr. Batuwantudawe was the go-between between them and the other members. Mr. Seneviratne states that he paid Rs. 2,000 to Mr. Batuwantudawe but that he paid no money to any of the other Councillors. It is common ground that there were informal conferences at which the distillers discussed various matters of importance to themselves. It appears that at these conferences the distillers sat in small groups for the purpose of informal discussion and that there was no meeting in the proper sense of that word. Mr. Seneviratne says that the names of the other Councillors were mentioned at these conferences as persons to whom Mr. Batuwantudawe would probably have to pay something. But he says that there was no definite arrangement with Mr. Batuwantudawe that they should be so paid. Mr. Wickremasinghe says that Mr. Seneviratne told him that Rs. 2,000 was paid to Mr. Batuwantudawe and that Mr. Seneviratne undertook to obtain the votes of the four Councillors mentioned through Mr. Batuwantudawe. He also states that at the time it was common talk that these four members took bribes. The clear impression which I have formed is that as a result of the general talk that these four members took bribes their names were mentioned at conferences and discussions, that the manner of approach to them, if agreed upon at all, was not agreed upon with any degree of precision but that the distillers believed that the money

would reach them. I believe that Mr. Seneviratne is speaking the truth when he says he paid Rs. 2,000 to Mr. Batuwantudawe and that it is also true that neither he nor Mr. Wickremasinghe nor anyone else paid any money direct to the other Councillors.

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

Mr. C. M. Rodrigo, the other witness referred to above, was a clerk of Mr. Gunaratne and was able to speak only to the conferences and not to anything that took place at them.

Mr. Siebel was merely an officer of a bank producing certain cheques before me.

April 3, 1943. L. M. D. DE SILVA."

The Governor having received the Report caused the Report to be printed as a Sessional Paper. The instructions given to the Government Printer were that it should not appear before the publication of a Government Gazette Extraordinary which was to contain a Bill to be introduced into the State Council connected with the Report. Those instructions were carried out, and simultaneously with the publication of the Report on 19th May, 1943, there was published in the Gazette the text of a Bill enabling the State Council to expel any member on the ground of the acceptance of a pecuniary reward or other gratification in connection with the performance of his duties as a member.

Two hundred and twelve copies of the Report were published for circulation, 250 for sale to the public and 20 for the Commissioner. The 250 available to the public were quickly sold at the Public Record Office. Two hundred and twenty-five reprints were immediately asked for and they became available on the 24th May. They, too, it appears, were also quickly sold.

The practice in Ceylon is that Government Sessional Papers are issued free of charge to the Press. That practice was followed in the present case, and the Sessional Paper was sent to *The Ceylon Daily News* among other newspapers. In the office of *The Ceylon Daily News* the view was taken that the Report was a matter of public interest. Practically the whole of the Report was published. Only those portions were omitted which in the opinion of the Associate Editor were not of public interest or which had been sufficiently covered by other portions of the Report which were published. The Commissioner was quoted *verbatim.* Included in the matter published was the whole of para. 18 exactly as it appeared in the Report with an immaterial alteration in the heading, and the whole of Appendix C except the first and the last two paragraphs. Some immaterial cross headings were inserted and two sentences (neither affecting the appellant) were printed in bold type. The publication of the Report began on the 18th May, 1943, and ended on the 25th May, 1943, paragraph 18 appearing on the 20th May and Appendix C on the 25th May. The newspaper did not make any comments of its own.

The appellant forthwith instituted these proceedings.

At the trial there appears to have been some confusion on the issue of justification. Some observations by the appellant's Counsel as recorded in the Judge's notes rather support the view that he admitted the peccant statement to be true. No evidence was called directed to prove the truth of the statement. The District Judge, however, did not, in his judgment, rely on any admission of Counsel as to truth, and decided that, in the absence of evidence to the contrary, there was a presumption that the findings of the Commissioner were true and correct. He accordingly held that what the respondents published was true in substance and in fact, but he took the view that the publication by the respondents was not for the public benefit. In the Supreme Court, to which the appellant appealed, his Counsel did not query the finding of the District Judge that the words were true in substance and in fact and appears so far as the issue of justification is concerned to have dealt only with the question whether the publication was for the public benefit. The Supreme Court answered this question in the affirmative.

The Supreme Court were clearly entitled to determine the case on the footing as to the truth of the statement conceded by the appellant's Counsel at the hearing before them. But a determination of the matter at issue on the ground of justification is obviously not satisfactory, for the District Judge's reasons for arriving at a decision that truth was proved are plainly wrong, and the reasons for the concession made by the appellant's Counsel in the Supreme Court are not apparent. Their Lordships, having arrived at the conclusion that the respondents are entitled to succeed on other grounds, do not propose to deal further with the issue of justification. They will assume the statement as to the appellant's conduct as a witness not to accord with the fact. Fair comment does not therefore arise for consideration and the only question is whether the publication was made on a privileged occasion, the absence of express malice being conceded. On the question of privilege the District Judge took the view that any privilege which might attach to the publication of the Report in the newspaper did not extend to the matter published as regards the appellant, as it was foreign to the duty which the newspaper owed to the public. The Supreme Court held that this publication was privileged.

Their Lordships will now turn to consider whether this view is or is not correct.

In Roman Dutch Law *animus injuriandi* is an essential element in proceedings for defamation. Where the words used are defamatory of the complainant, the burden of negativing *animus injuriandi* rests upon the defendant. The course of development of Roman Dutch Law in Ceylon has, put broadly, been to recognise as defences those matters which under the inapt name of privilege and the apt name of fair comment have in the course of the history of the common law come to be recognised as affording defences to proceedings for defamation. But it must be emphasised that those defences or, more accurately, the principles which underlie them, find their technical setting in Roman Dutch Law as

matters relevant to negativing *animus injuriandi*. In that setting they are perhaps capable of a wider scope than that accorded to them by the common law. Decisions under the common law are indeed of the greatest value in exemplifying the principles but do not necessarily mark out rules under the Roman Dutch Law. The "gladsome light of Roman jurisprudence" once shone on the common law: repayment to the successor of the Roman Law should not take the form of obscuring one of its leading principles.

Their Lordships' attention has not been drawn to any case under the Roman Dutch Law or the common law which exactly covers the point at issue. Both systems accord privilege to fair reports of judicial proceedings and of proceedings in the nature of judicial proceedings and to fair reports of parliamentary proceedings, and much time might be spent in an inquiry whether the proceedings before the Commissioner fell within one or other of these categories. Their Lordships do not propose to enter upon that inquiry. They prefer to relate their conclusions to the wide general principle which underlies the defence of privilege in all its aspects rather than to debate the question whether the case falls within some specific category.

The wide general principle was stated by their Lordships in *Macintosh v. Dun*[1] to be the "common convenience and welfare of society" or "the general interest of society" and other statements to much the same effect are to be found in *Stuart v. Bell*[2] and in earlier cases, most of which will be found collected in Mr. Spencer Bower's valuable work on Actionable Defamation. In the case of reports of judicial and parliamentary proceedings the basis of the privilege is not the circumstance that the proceedings reported are judicial or parliamentary—viewed as isolated facts—but that it is in the public interest that all such proceedings should be fairly reported. As regards reports of judicial proceedings reference may be made to *Rex v. Wright*[3] where the basis of the privilege is expressed to be "the general advantage to the country in having these proceedings made public", and to *Davison v. Duncan*[4] where the phrase used is "the balance of public benefit from publicity"; while in *Wason v. Walter*[5] the privilege accorded to fair reports of parliamentary proceedings was put on the same basis as the privilege accorded to fair reports of judicial proceedings—the requirements of the public interest.

Reports of judicial and parliamentary proceedings and, it may be, of some bodies which are neither judicial nor parliamentary in character, stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject matter dealt with in the particular report with which the Court is concerned. If

[1] *(1908) A. C. 390.*
[2] *(1891) 2 Q. B. 341.*
[3] *8 T. R. at p. 298.*
[4] *E. and B. at p. 231.*
[5] *L. R. 4 Q. B. 73*

it appears that it is to the public interest that the particular report should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purposes of Roman Dutch Law as being in truth directed to serving that interest. *Animus injuriandi* is negatived.

On a review of the facts their Lordships are of opinion that the public interest of Ceylon demanded that the contents of the Report should be widely communicated to the public. The Report dealt with a grave matter affecting the public at large, viz., the integrity of members of the Executive Council of Ceylon, some of whom were found by the Commissioner improperly to have accepted gratifications. It contained the reasoned conclusions of a Commissioner who, acting under statutory authority, had held an enquiry and based his conclusions on evidence which he had searched for and sifted. It had, before publication in the newspaper, been presented to the Governor, printed as a Sessional Paper and made available to the public by the Governor contemporaneously with a Bill which was based on the Report and which was to be considered by the Executive Council. The due administration of the affairs of Ceylon required that this Report in light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity.

As regards the newspaper the Report was sent to it by the authorities in the ordinary course. Nothing turns on any implied request to publish—that would in their Lordships' opinion be relevant only if malice were in issue. Their Lordships take the view that the respondents as respects publication stand in no better and no worse position than any other person or body in Ceylon. A newspaper as such has in the matter under consideration no special immunity. But it would be curious to hold that either the editor or the proprietor of the newspaper was disqualified by the nature of his activities from having the same interest in the public affairs of Ceylon as that proper to be possessed by the ordinary citizen. In their Lordships' view the proprietor and editor of the newspaper and the public had a common interest in the contents of the Report and in its wide dissemination. The subject matter created that common interest. To this it may, perhaps irrelevantly in law, be added that the ordinary member of the community of Ceylon would indeed conceive it to be part of the duty of a public newspaper in the circumstances to furnish at least a proper account of the substance of the Report.

Taking that view of the facts of the case, and applying the general principle their Lordships have stated, their Lordships are of the opinion that the immunity afforded by privilege attached to the publication by the respondents of this Report considered as a whole.

It remains to deal with two further matters. First, it was argued that assuming that the Report was published by the defendants on a privileged occasion the Report was divisible and that the statement relating to the appellant's conduct as a witness was not referable to any matter on which the privilege was founded. Malice, it will be

recalled, was not alleged. Their Lordships cannot accept this contention. The main matter of public interest was the question of the extent to which members of the Executive Council had accepted bribes, and, linked up with that, the value which might properly be attributed to the Report as one which covered the whole ground. No just estimation of the general position as to bribery or as to the value of the Report could be formed without knowledge of the grounds on which the Commissioner stated he had acted and of the difficulties which the Commissioner stated he had encountered in coming to a conclusion, or in failing to come, on particular topics, to a definite conclusion. Their Lordships have recited the facts which bear on the lines on which the Report was framed. It is in their Lordships' view clear that the statement as to the appellant was germane and appropriate to the occasion and does not fall to be distinguished in any degree from the other contents of the Report. Their Lordships would add that a view corresponding to that entertained by their Lordships here was expressed by Cockburn, C.J., in *Cox v. Feeney* [1].

Second, it was argued that the publication of the matter complained of was illegal in that it constituted a breach of section 6 (1) of the Special Ordinance and that therefore a defence based on privilege must fail. In their Lordships' opinion the publication was not a breach of that section. On this point they agree with the view of the Supreme Court as expressed by the learned Chief Justice when he said :—

> " 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. "

It is true that section 6 (2) and section 10 (*b*) both say :—

> ". . . of the name *or* of the evidence . . . ",

but this use of the disjunctive accords with the saving or qualifying nature of these provisions and in no way conflicts with the conjunctive form of the prohibition enacted by section 6 (1). Their Lordships can see nothing in the other terms of the Ordinance to justify any modification of the natural meaning of the words of that sub-section :—

> ". . . . the name *and* the evidence or any part of the evidence . . . . "

On the contrary it may well be said that the context points away from a disjunctive construction for section 6 (1) clearly relates only to evidence which is heard *in camera* and if, as section 5 contemplates, but part of a witness's evidence was so heard, that construction would have the strange effect of forbidding the disclosure of the witness's name while allowing publication of part of his testimony.

In the circumstances their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

[1] *4 F. and F. 13.*