Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

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VAN CUYLENBERG *v.* CAPPER *et al.*

D. C., Colombo, 24,477.

Defamation—Innuendo—Words libellous per se*—Pleas of justification and fair comment—Particulars in support of the pleas—Interrogatories—Question of fact decided by Judge without a jury—Function of an Appellate Court—Roman-Dutch Law of defamation—English Law—Damages—Costs.*

Held, that in an action for defamation where the words are libellous *per se*, no innuendo need be alleged or proved; where in such a case an innuendo is alleged, but the innuendo so alleged is "bad" in law, the plaintiff is entitled to rely on the defamatory meaning of the words themselves in support of his action. But where the words are not defamatory in themselves, and the plaintiff has attached to them a particular meaning by innuendoes, and fails to substantiate such innuendoes, his suit must fail.

Ramanathan v. Ferguson and another[1] referred to and commented on.

WOOD RENTON J.—Where in an action for libel the defendant pleads both justification and fair comment, the plea of fair comment only arises when the plea of justification has failed; and the two pleas should be kept distinct in the mind of the Judge trying the case.

Dakhyl v. Labouchere[2] and *Hunt v. Star Newspaper Co.*[3] referred to.

WOOD RENTON J.—A defendant pleading justification and fair comment in an action for libel must give or should be compelled to give particulars on which he means to rely to substantiate his pleas.

Arnold and Butler v. Bottomley and others[4] referred to.

The function of an Appellate Court dealing with questions of fact decided by a Judge without a jury discussed.

THIS was an action for defamation. The plaintiff, who is a proctor of the Supreme Court and proprietor and editor-in-chief of a newspaper called the "Ceylon Independent," claimed Rs. 20,000 from the defendants, the owner and the editor of a newspaper called the "Times of Ceylon." The libel complained of appeared in the "morning edition" of that paper of January 5, 1907, in an article entitled "From the Courts Verandah," and signed by "Outdoor Proctor." The words are fully set out in the judgments.

The District Judge (J. Grenier, Esq.) dismissed the plaintiff's action with costs.

[1] *(1884) 6 S. C. C. 89.*
[2] *(1908) 2 K. B. 325 n.*
[3] *(1908) 2 K. B. 309.*
[4] *(1908) 2 K. B. 151.*

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The plaintiff appealed.

Bawa (with him *E. W. Jayewardene*), for the plaintiff, appellant.

Elliott (with him *Hayley*), for the defendants, respondents.

Cur. adv. vult.

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This is an action against the owner and editor of the "Times of Ceylon" for damages for a libel published in the "morning edition" of that paper on January 5, 1907. The District Court dismissed the action.

The judgment under appeal is that of a Judge who has had long and honourable service both as a District Judge and as an Acting Judge of this Court. It is a very able and perfectly fair and impartial judgment, and I cannot see in it the least indication of any unjudicial tone or temper. The petition of appeal in criticising the judgment uses language which is disrespectful to the Judge, and is wholly unjustifiable. I am surprised that it should have been signed by the plaintiff's proctor and three well-known advocates. I think we ought to direct the Registrar to expunge from it the last sentences of paragraphs 11 and 15 and the whole of paragraph 13. My brother Wood Renton agrees with me, and we so order accordingly.

Some of the learned Judge's conclusions as to the alleged libellous statements I either agree with or accept, but I am sorry to say that I cannot assent to all of them.

The first statement which I need specify is that which is headed "B" in the plaint. It says: "If I had bought a doubtful claim in a doubtful way from a doubtful person and pressed it in a doubtful manner at Downing street, and had received doubtful encouragement, I should feel distinctly doubtful about ultimate success. So doubtful that, though I might fight it in Courts where it costs me nothing, but editorial tergiversation, in the way of lawyers' fees, I should hardly care to cross the seas with it, unless somebody else's money backed me and it." This the plaintiff says means "that he, in a dishonourable and questionable manner, purchased from a person of doubtful and bad repute a fictitious claim against the Government of the Island, and had further improperly employed illegitimate and dishonest means to obtain an official recognition of such claim at the hand of His Majesty's Secretary of State for the Colonies." It is proved that this statement refers to a purchase by the plaintiff of what is called the Dehigama claim, which was a claim brought by one Le Mesurier against the Government of Ceylon, and which the plaintiff had bought from the trustee in the bankruptcy of Le Mesurier. The innuendo which I have quoted does not refer specially to the words "though I might fight it in Courts where it costs me nothing but editorial tergiversation in the way of lawyers' fees." The defendants in their answer deny that

the words of the passages set out in the plaint bear the meanings placed on them in the plaint; and they say that the meanings of the words of the said passages are plain and clear on the face thereof, and that the statements therein are true. The meaning of the words I have last quoted is plain and clear; they can only mean that the fighting in Court of the claim which he had bought cost the plaintiff no fees, but only editorial tergiversation.

A great deal of the plaintiff's cross-examination was directed to this question of "editorial tergiversation," that is to say, it was directed to showing that he, as editor of his newspaper, the "Ceylon Independent," had on various occasions been guilty of tergiversation. And the plaintiff admitted that in the prosecution of the Dehigama claim in appeal in this Court he paid no fee to his counsel Mr. Dornhorst. But there is no evidence that there was any tergiversation which enabled him to avoid payment of any lawyers' fees, or which had that for its object. This statement is on the face of it defamatory, and upon the evidence it is certainly not true.

The defendants' counsel contends that upon the issues which were settled we must confine ourselves to the innuendoes; that we can only consider whether the statements complained of bear the innuendoes attached to them in the plaint; and that as it is not alleged in the plaint that the statement as to fighting in Courts "where it costs me nothing but editorial tergiversation in the way of lawyers' fees," has any particular meaning, we are debarred from considering whether it is true or not. The plaintiff however says, in paragraph 3 of the plaint, that the statements complained of in the article are false and malicious; the defendants in their answer say that they are true; and it appears to me that the issues cover, and were intended to cover, an inquiry whether the statements complained of, whether they had or had not the meanings attributed to them in the plaint, were defamatory of the plaintiff and false and malicious.

A great deal of the cross-examination of the plaintiff was, as I have said, directed to the question of his alleged "tergiversation." The Judge says, and I agree with him, that the word as used in this paragraph is capable of meaning that the plaintiff had at one time attacked or criticised a person and had subsequently praised that person for purposes of his own, and thus saved lawyers' fees in connection with the Dehigama litigation. He says that the defendants asserted that both Mr. Dornhorst and Mr. Charles Perera had at one time been vilified or abused in the columns of the "Independent," but that after the plaintiff had borrowed Rs. 2,000 from each of them the attacks ceased, and thereafter both these gentlemen were eulogized on several occasions. The Judge refers to attacks on Mr. Perera in the "Independent" from 1897 to February, 1902, and specially to one in 1897, which charged Mr. Perera, who was then a member of the Colombo Municipal Council,

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with abetting subordinate officials of the Council in extorting blackmail; he comments severely on the fact of the plaintiff borrowing Rs. 2,000 in March, 1903, from the man whom he had thus attacked; and he then refers to the fact that in May, 1903, there appeared in the "Independent" an article very laudatory of Mr. Perera.

With regard to Mr. Dornhorst, the last attack on him in the "Independent" was in January, 1900; after that there were no articles or correspondence affecting him; the loans of Rs. 2,000 to the plaintiff were in 1903; and the occasion when Mr. Dornhorst acted as counsel for the plaintiff without a fee was in 1905. The Judge does not find, and he could not have found, that there was any justification for the suggestion that the plaintiff saved the payment of the fee by his tergiversation. He finds, however, "that as regards the cases of Mr. Perera and Mr. Dornhorst, the charge," that is, of tergiversation, "has been reasonably made out, and that the factor which influenced the plaintiff in his conduct was the loan of Rs. 2,000 which each of them gave him, and which still remains unpaid."

I think it is impossible to support this finding as regards Mr. Dornhorst; I can find no evidence to justify it. And as regards Mr. Perera, it is founded mainly on the fact that attacks had been made on him in the "Independent" up to February, 1902, and that in May, 1903, two months after the loan, an article very laudatory of him appeared in the same paper. To my mind that would not be enough to justify the finding, if there were nothing more. But there is something more; there is the fact that the article of May, 1903, was published whilst the plaintiff was in England, and that the editor of the paper swears that he did not know until this action was commenced that the plaintiff had borrowed money from Mr. Perera, and that the plaintiff never asked him to change his attitude towards, or influenced him in his criticism of, Mr. Perera, and that they never even discussed the subject. I cannot think that the learned Judge's opinion as to the plaintiff's conduct towards Mr. Perera is warranted by the evidence.

"Tergiversation," like "turncoat," "traitor," and many other words of that kind, is a term of abuse, but not necessarily defamatory. Every man whose opinions are worth anything "tergiversates" sometimes quite honestly; upon learning some fresh facts, or seeing the old ones in a different light, he goes through the process which he calls changing his mind, but which, if the question on which he has done so is one of public interest, and he is a man who takes part in public affairs, his enemies call by some of these opprobrious names. But although it may not be defamatory to charge a newspaper editor with tergiversation, I must say that I think it defamatory to suggest that he was guilty of it for the purpose of getting a lawyer to act for him without fee. That suggestion is made in the

article of which the plaintiff complains, and it was altogether unfounded.

The next paragraph of which the plaintiff complains ends with these words: "To do that I should have to acquire almost as much wisdom as is needed to keep a newspaper running with no other help than much dishonesty and a good deal of impudent insolence, a sharp pair of scissors, and a vast quantity of paste." The plaintiff says in his plaint that this means that he had conducted his newspaper in a dishonest manner. The learned District Judge does not refer to this, except by his general finding that the innuendoes charged by the plaintiff cannot be justified on a fair and reasonable construction of the article complained of. It seems to me, however, to be beyond dispute that the words of that paragraph do bear the meaning which the plaint says they bear. And surely it is defamatory of a newspaper proprietor and editor to say of him that he runs his paper "with much dishonesty." And the Judge has not found, and the evidence would not have justified him in finding, that the statement is true. The appellant's counsel, however, say that the "dishonesty" spoken of is only the dishonesty of appropriating without leave or acknowledgment items of news or other matter from other papers, or the use of "scissors and paste," and that the Judge so understood it, and I think that the Judge did did so understand it. See pages 310 to 312 of the judgment. I should not have taken it to mean no more than that. But I do not think it is an impossible construction; the defendants in their answer say that the words do not bear the meaning which the plaintiff put on them, and I think we must accept the Judge's finding, which is not expressed but implied, that the words do not charge the plaintiff with conducting his paper with any dishonesty, except the dishonesty of taking over paragraphs from other papers and inserting them in his. And there is evidence of that kind of dishonesty in the article put in evidence, which appeared in the plaintiff's paper on June 17, 1901, which contains the following paragraph: "The impudent plagiarism in which our contemporary has for years been engaged, coupled with the barefaced way in which the source whence he obtained such news has been concealed, led to the institution of a system of reciprocity in this office, against which the editor expends his fruitless kicks, and this is the true explanation of the only single instance of commandeering cited in the recent screed. Some London news of undoubted interest to our readers did appear in our columns without acknowledgment. An acknowledgment was inserted by a member of our staff in mistake. It was fortunately, however, detected in time, and corrected in proof. We have simply treated the 'Times' as it has treated us." It is true that this article was not written by the plaintiff but by the editor, Mr. Coates; but the plaintiff, the owner of the paper, who was in Ceylon at that time, must take the responsibility of the

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views expressed in it. The article complained of ends with these words: "It is quite time that we learn to say what we think. To do so is the kindest thing one can do to those of our champions, who are deficient in rectitude as they are in rupees." The plaint says that this means that the plaintiff was a man devoid of honour and integrity of character. The learned Judge finds that it was no doubt a direct reference to the plaintiff, but that the defendants had not exceeded the bounds, as public journalists of fair and *bona fide* comment upon the plaintiff's conduct as a public man in relation to matters of public interest, and that the whole of the article complained of was printed and published *bona fide* and without malice, and for the benefit of the public and not otherwise. He held also that there are no words in the article which are libellous in themselves, and that no malice has been proved. To me it seems plain that the imputation that the plaintiff is deficient in both rectitude and rupees is libellous in itself; the words have the meaning which is attributed to them in the plaint, and, as the defendants say in their answer, their meaning is plain and clear on the face of them. Are they true or are they false? The Judge does not say that it is proved that the plaintiff is deficient in rectitude; he rather seems to think that the words were written in jest. I cannot think so. They seem to me to have been written in serious earnestness; and the defendants assert that they are true, and have tried to justify them. There is no adequate evidence to support a finding of dishonest "tergiversation" with regard to either Mr. Dornhorst or Mr. C. Perera, or the Pearl Fisheries Lease, or of anything dishonourable about the purchase of the Dehigama claim. The District Judge finds that if the meanings attributed in the plaint to paragraphs F and G of the impugned article are admissible, the truth of the statements contained in them has been established, that is, he finds that it is true that the plaintiff, being in indigent circumstances (in December, 1906), had promoted public meetings in order to obtain a sum of Rs. 5,000 to enable him to eke out an existence. The only evidence which I can see of his being in indigent circumstances in December, 1906, is that in March, 1903, the day before his departure to England, he borrowed certain sums amounting to Rs. 11,000 from Mr. Dornhorst and Mr. C. Perera and others, secured by a mortgage at 7 per cent. interest, on which about Rs. 3,000 was still owing at the date of the trial, and that one of the lenders, Mr. Ratnasabapathy, sued him for his Rs. 2,000 in March, 1906, and got judgment and issued a writ against him for it in January, 1907, when the debt was paid. And, on the other hand, there is the plaintiff's evidence in cross-examination (page 134), which, if true, shows that he was by no means indigent. The sting of the statement in paragraph F, however, is the suggestion that he promoted public meetings in order to obtain Rs. 5,000, which sum he tried to raise by starting what is called in the article the "Rupee

Fund." This fund was started by a circular letter dated December 24, 1906, by Mr. de Kretser and Mr. Abeyewardene, informing the persons to whom it was sent that it was proposed to present a testimonial to the "Independent" for the signal service rendered to the Ceylon public by its disinterested and powerful advocacy of the public interests; subscriptions limited to one rupee. The District Judge finds that the idea of starting the Rupee Fund originated with Mr. Abeyewardene, a proctor for whom he has much regard; the fund would be for the benefit of the plaintiff; Mr. Abeyewardene was not called on to give his evidence as to the circumstances under which he issued the circular; and there was evidence from which the Judge might fairly infer, as in fact he did, that the plaintiff "knew all about it." But it is a long way from that to the inference that he promoted public meetings in order to raise that fund. I cannot think that a "deficiency in rectitude" can fairly be inferred from this affair of the "Rupee Fund." And I cannot find anywhere in the evidence any justification for the charge of want of rectitude.

In considering whether we ought to accept or reject the finding of the District Judge on questions of fact, we have to inquire whether there is any evidence to support the finding, or, if there is some evidence, whether the finding is one which could fairly and reasonably be arrived at upon the evidence. It is only if we answer either of these questions in the negative that we ought to refuse to accept his decision.

In my opinion the suggestion that it cost the plaintiff nothing but editorial tergiversation in the way of lawyers' fees to fight the Dehigama claim in the Courts of Ceylon is defamatory; and there is no evidence that it is true. The suggestion that he is deficient in rectitude is also defamatory, and there is no adequate evidence to justify a finding that it is true. Neither of these suggestions can be said to be fair and *bona fide* comments on matters of public interest, and I find them to be malicious. I am therefore of opinion that the judgment of the District Court ought to have been in favour of the plaintiff. As to the amount of damages, I am not convinced that the plaintiff has suffered any pecuniary loss in consequence of the libel on him; and his counsel says that his object in bringing the action was not to put money into his pocket, but to vindicate his character. I do not think, therefore, that it is a case for giving heavy damages. We need not send the case back to the District Court for the purpose of fixing the amount; we have all the materials which the District Court would have for that purpose. I would allow the appeal, and give judgment for the plaintiff for Rs. 1,000 damages and the costs of the action and of this appeal.

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I desire to associate myself with every word that has fallen from my lord the Chief Justice in regard to the impropriety of many of

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the comments made in the petition of appeal on the learned District Judge of Colombo—a Judge enjoying the high esteem of every colleague who has had the privilege of working along with him on the Bench, and every line of whose decision in the present case shows the care and anxiety with which he had approached its determination. We have, however, to consider the case on its merits, apart from the language of the petition of appeal. Mr. Elliott urged us, in his argument on behalf of the respondents, to apply a principle, which, he contended, had been laid down by the Privy Council in the case of the *Australian Newspaper Company v. Bennett*,[1] and according to which a Court of Appeal is only justified in reversing the finding of a jury if the verdict is one at which reasonable men could not arrive. There are English decisions (*see Colonial Securities Trust Co., Ltd. v. Massey and others* [2] and *Coghlan v. Cumberland* [3]) in which the duty of an appellate tribunal, when it has to deal with cases tried by a Judge without a jury, is defined in somewhat different terms. But these decisions turn to a great extent on the special rules of English practice (*see R. S. C. O. 58, 4*), under which the Court of Appeal in England is expressly empowered to draw inferences of fact and to give any judgment and make any order, which ought to have been made in the Court below. There can be no doubt, however, but that it is mainly in regard to the credibility of witnesses that the appellate tribunals in England have declined to interfere with the results of trials in Courts of first instance, and that they have reserved to themselves full liberty to consider whether the inferences drawn by a Judge of first instance from truthful evidence are, or are not, warranted. In this connection I may refer again to the language used by Lord Halsbury, L.C., on this very point in the case of *Montgomerie & Co., Ltd., v. Wallace-James*,[4] a case in which the House of Lords over-ruled two concurrent judgments of the Courts in Scotland on a question of fact. Without in any way attempting to decide the question whether, and how far, an appeal to the Supreme Court in Ceylon is a re-hearing, or to throw any doubt on the settled jurisprudence of this Court in regard to the weight due to the findings of a Judge of first instance on all questions as to the credibility of witnesses, I think that we are entitled, and bound, to consider how far the facts of a case justify the inferences that are drawn from them. Moreover, where, as in the case before us, the trial Judge has first to direct himself as to the law, and then apply his direction to the facts, both the terms of the direction and the effect that it may probably have had upon the findings of fact have to be carefully taken account of.

The present action is one of defamation, and, except on one or two points, which I will note immediately in passing, the English and the Roman-Dutch laws on the subject, in so far as the latter is here

[1] *(1894) A. C. 284.*
[2] *(1896) 1 Q. B. 38.*
[3] *(1898) 1 Chancery 704.*
[4] *(1904) A. C. 75.*

involved, appear to be practically identical. The plaintiff has to show that the alleged defamatory statements were made, that they refer to him, that they are libellous either *per se* or in their special application to himself, and that they were made falsely and maliciously. The publication of a defamatory statement is *primâ facie* evidence of malice in the absence of privilege. If these *facta probanda* are established by the plaintiff, the burden of proof shifts to the defendant. He may meet the case against him by alleging and satisfying the Court that the statements in question (*a*) do not refer to the plaintiff, or (*b*) are not defamatory either in themselves or in their special reference to the plaintiff, or (*c*) although defamatory, are true in substance and in fact, and also—a point on which, in regard to civil proceedings, the Roman-Dutch law has gone a step further than the law of England—that their publication was for the public benefit (*see Durusamy v. Ferguson* [1]), or (*d*) although defamatory and not justifiable are *bona fide* and fair comment on facts which are proved, and the discussion of which is in the public interest. It would appear that, unlike English law, the pure Roman-Dutch law did not recognize inuendoes (*Nathan, III., s. 1574*). But both in South Africa (*Villiers, Roman and Roman-Dutch Law of Injuries, p. 14*) and in this Colony the practice of inserting innuendoes in the plaintiff's statement of claim, or plaint, in libel actions has been adopted. In the commencement of his judgment in the present action (p. 26/*204*) the learned District Judge makes use of the following language: "If, of course, the innuendoes charged by the plaintiff are not reasonably justified by the words complained of, they must be struck out as bad in law, and the plaintiff's action must fail." That is, admittedly, not the law of England; and, with all deference, I am not prepared to assent to the view that it is the law of Ceylon. It is clear, I think, that by English law, if the jury find that the alleged defamatory statement does not convey the meaning assigned to it in the innuendo, the plaintiff's action does not necessarily fail. He cannot, indeed, in the middle of a case, discard the innuendo in his pleading, and start a fresh one, which is not on the record. But he is entitled to abandon the innuendo pleaded, to fall back upon the words themselves, and to urge that, taken in their natural and obvious signification, without the aid of his unproved innuendo, they are defamatory and actionable, and that, therefore, his unproved innuendo may be rejected as surplusage (*see Simmons v. Mitchell*,[2] *Fisher v. Nation Newspaper Co.*[3]). It is only where the jury negative the innuendo and the words are not actionable in their natural and primary sense that judgment must pass for the defendant (*Bremridge v. Latimer* [4]).

[1] (*1879*) *Browne App. D. pp. viii. et seq.*
[2] (*1880*) *6 A. C. 156.*
[3] (*1901*) *2 Ir. R. 465.*
[4] (*1864*) *12 W. R. 878.*

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In support of the view that these rules of law are not in force in Ceylon, we were referred by Mr. Elliott to the case of *Ramanathan v. Ferguson and another*.[1] I have called for the record in that case (D. C., Colombo, No. 89,360) in order to see what the precise point was that arose for actual decision. The plaintiff in his libel first set out the alleged defamatory matter, and then attached to it certain specific innuendoes. The defendant pleaded to the innuendoes so stated. At the trial the learned District Judge held that the words in question were not capable of bearing the meanings which the plaintiff had assigned to them, but that they were capable of bearing other defamatory meanings, which had not been referred to in the pleadings, and which the defendants had had no opportunity of contesting at the trial. He gave judgment accordingly in favour of the plaintiff in respect of the defamatory matter, as he himself had interpreted it after the trial had closed. In appeal the Supreme Court set his judgment aside on the obvious and, if I may say so, proper ground that it was not competent for the District Judge to give judgment for the plaintiff by attaching to the publication in question defamatory meanings of which the plaintiff had not complained, and of which he had given no proof. So far as I can see that was the only point that had to be decided in the case of *Ramanathan v. Ferguson and another*.[1] But Chief Justice Burnside, who delivered the judgment of the Court in that case, the other Judge being Mr. Justice Dias, took occasion to express the view that the practice in Ceylon in regard to innuendoes must be held to follow that of the English Courts prior to the Common Law Procedure Act, 1852 (s. 61), and he held that, under the old English practice, where an innuendo was bad, it might be rejected, and the plaintiff might rely on the libellous meaning apparent on the face of the publication, but that, when it was good, the plaintiff must be bound by it, and fail in his suit if he did not establish his innuendo by proof. I would point out that even if Chief Justice Burnside's language on this point is anything more than *obiter dictum*, it would not support the argument which Mr. Elliott based on it, inasmuch as the finding of the learned District Judge in the present case is that the statements complained of are not capable in law of bearing the meanings which the plaintiff has assigned to them. The innuendoes, that is to say, are not "good," but unproved, but "bad"; and it would, therefore, have been open to the appellant, even under the English practice prior to 1852, to have claimed that they should be rejected as surplusage, and to have fallen back on the contention that they were defamatory *per se*. The cases cited by Chief Justice Burnside (*Harvey v. French* [2] and *Williams v. Stott* [3]) are conclusive on that point, and I may further refer in the same connection to the judgment of Mr. Justice Blackburn in *Watkin v. Hall*.[4] On these authorities it appears to me that

[1] *(1884) 6 S. C. C. 89.*
[2] *(1832) 1 Cr. and M. 11.*
[3] *(1833) Cr. and M. 675.*
[4] *(1868) L. R. 3 Q. B. 396 at p. 401.*

even if the innuendoes assigned by the appellant are "bad" in the sense above explained, he is still entitled, under the law of this Colony, to rely on the contention that the statements complained of are defamatory on the face of them.

Before proceeding to deal with the facts of the case, it may be desirable to point out that, where a defendant in an action for libel pleads both justification and fair comment, those two issues must be kept distinct in the mind of the Judge, or of the Judge and jury, trying the case, and that the issue of fair comment only arises where the plea of justification has failed. In recent English cases (*see Dakhyl v. Labouchere*[1] and *Hunt v. Star Newspaper Co.*[2]) the verdicts of juries have been set aside because the Judge who directed the jury had not placed that distinction clearly before them. The development and present state of the law of England on the subject are explained by the Court of Appeal in *Walker & Sons v. Hodgson*,[3] where all the authorities, from *Campbell v. Spottiswoode*[4] down to *Hunt v. Star Newspaper Co.* (*ubi sup.*), are examined.

I come now to deal with the facts. The appellant, who is a proctor of the Supreme Court and the proprietor and editor-in-chief of the "Ceylon Independent," complains of the publication by the defendants, the proprietors and publishers of the "Times of Ceylon," in a morning edition, now no longer published, of their paper, of an article entitled "From the Courts Verandah." The article was signed "Outdoor Proctor." The learned District Judge says that, admittedly, neither of the respondents wrote it. I do not see any such admission on the record. But the point is immaterial. For the identity of the writer has not been disclosed, and the respondents have accepted, both by the terms of their answer and by their attitude throughout these proceedings, full responsibility for its publication. The appellant selects eight paragraphs, numbered from A to H in the article in question, and alleges that these contain seven distinct libels, to each of which he attaches an innuendo. Paragraph A comprises three headings: "The Rupee Testimonial Fund," "The Hat Trick," and "A Breakfast Table Problem." I do not propose to quote the actual language used. It has been found by the District Judge—and this observation applies to all the alleged libels—to refer to the appellant. The innuendo attached to it in the plaint is in substance that the appellant was a rogue and a designing wirepuller; that he had hypocritically organized public meetings posing as "the champion" of the people's liberties, but in reality seeking "pecuniary gain" for himself in order to enable him to prosecute his claim in the Dehigama case, to which reference will have to be made presently. The respondents in their answer met this part, and every other part, of the appellant's case by a defence, which seems to fall under five heads: (1) That

[1] (*1908*) *2 K. B. 325 n.*
[2] (*1908*) *2 K. B. 309.*
[3] (*1909*) *1 K. B. 239.*
[4] (*1863*) *3 B. and S. 769.*

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the innuendoes were bad; (2) that the publication of the matter complained of was not false and malicious; (3) that the appellant had suffered no damage; (4) that the meaning of the alleged libel "was plain and clear on the face thereof, and that the statements therein are true in substance and in fact, and that their publication was for the public good"; (5) that the circulation of the lists in connection with the Rupee Fund was a matter of public interest and that "the writer of the contribution aforesaid, having reason to believe that the circulation of the said subscription papers had the encouragement and secret support of those for whose benefit they were intended, made reference to and denounced such improper conduct on their part, and showed by allusion to facts, appearing in the passages cited by the appellant," that they were unworthy "of the aid for which the public was appealed to, by means of the said subscription papers." The plea concluded by setting up a defence of fair comment. I can only express my respectful amazement that the two last of these defences should have been allowed by the appellant to stand unchallenged on the record. It is the clear duty of a litigant, who alleges justification, to give particulars of the statements that he means to justify (*see Arnold and Butler v. Bottomley and others*[1]). This duty was specially important in a case like the present, where the innuendoes were denied. It is much to be regretted that the respondents were not at once compelled, either by an application for an amendment of their answer or by interrogatories, to discharge it. This observation applies with even greater force to the plea of fair comment. In effect that plea asserts that the writer of the alleged libel had "reason to believe" that there had been "improper conduct" on the part of "those for whose benefit" the subscription list were intended, and that he had shown "by allusion to facts appearing in the passages cited" by the appellant "that they were unworthy of the aid" for which they asked. Who were the parties referred to? What was the "improper conduct" imputed to them? What "reason" had the writer of the article to "believe" in its existence? Surely these were all matters that ought to have been settled *in limine*. But we must take the case now as we find it. It appears to me that the plea of fair comment in this case is one of fair comment in the proper sense of the term. That is to say, the respondents—in the event of the failure of their plea of justification—must be taken to have admitted that the allegations in the libel as to the Rupee Fund were defamatory of some persons unnamed, and to have pleaded that, by virtue of "facts" appearing in the article, they had not exceeded the bounds of *bona fide* and fair comment on a matter of public interest. It is almost needless to say that pleas of justification and fair comment must be made out by the litigant who relies on them, and that, in order to establish the former plea, in particular, the actual statement

[1] (*1908*) 2 *K. B. 151.*

made, and not some other statement, even if it is equally libellous, must in substance be justified. The case went to trial on six issues, as to the meaning of some of which there was not a little discussion at the argument of the appeal :—

(1) Did the various passages from the article cited in the plaint support the innuendoes alleged and refer to the appellant ?
(2) Did the statements themselves refer to the appellant, and were they defamatory of him ?
(3) Were these statements false and malicious ?
(4) Justification.
(5) Fair comment.
(6) Damages.

It was urged by Mr. Elliott, not as speaking from any recollection of his own as to what had transpired at the trial in the District Court, but as an inference from the language of the learned Judge himself, that the appellant had in the Court below accepted the position that the statements in the article here in question were not defamatory *per se*, and had elected to stand or fall by the innuendoes. No trace of any admission to this effect is to be found in the journal entries or in the Judge's notes of the evidence, but Mr. Elliot relied on two passages in the judgment in support of his contention : "Now it appears to me," says the learned Judge (p. 25/202), "that the plaintiff's (appellant's) case is that there are no words in the article complained of which are defamatory in their ordinary signification," and again (p. 31/348), "as I have already stated, there are no words in this publication which are libellous in themselves." Testing Mr. Elliott's argument on the matter solely by intrinsic criteria, I have great difficulty in accepting it. I can scarcely believe either that the appellant's legal advisers should have made such a damaging admission, or that, if made, the Judge should not have both expressly recorded it in his notes and dealt with it in terms in his judgment in language of a totally different character from that which he actually employed. The words "it appears," in the first of the two passages above cited, indicate, I think, that he was paraphrasing the appellant's case as he understood it from the pleadings, and not as it had been put before him by any formal admission at the trial. Moreover, if Mr. Elliott's contention were well-founded, there would have been no need for the learned Judge to discuss, as he does, the pleas of justification and fair comment. He holds in effect that the innuendoes are bad in law ; and as *ex hypothesi* the appellant's case had been staked on their sufficiency ; all that he had to do was to dismiss it. I may further point out that, in regard to one of the most serious of the alleged libels, the charge of "editorial tergiversation in the way of lawyers' fees," there is no innuendo, and yet both sides

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dealt with it at the trial, and it is also noticed in the judgment. Mr. Elliott invited us to consult the learned District Judge himself as to whether or not the admission in question was made. I do not think that it would be right to do so. The alleged admission is contested by the appellant's counsel. No direct evidence of any kind of its existence is to be found in the record. The balance of probabilities on the materials before us tells heavily against it. Under these circumstances I do not think that the appellant should be deprived of whatever legal right he possesses to rely on the ordinary meaning of the alleged defamatory statement, if the innuendoes fail. I have thought it best at the very outset of my observations on the facts to state once for all what I understand the line of defence and the real issues between the parties to be.

I will now deal with the alleged libels in turn as briefly as possible. In regard to the statements grouped under paragraph A, the learned District Judge has held (p. 26/241) as follows:—(1) "That the innuendoes as charged by the plaintiff cannot in law be attributed to the statements in question; (2) that the statements complained of were not published falsely and maliciously with intent to defame the plaintiff; (3) that they were fair and *bona fide* comments upon matters of public interest, and were printed and published without malice, and for the benefit of the public." There is here no express finding on the plea of justification, and no reference is made to the curious form in which the defence of fair comment was pleaded. But in view of the shape in which the appellant allowed the case to go to trial, I should not be prepared to interfere with the decision of the District Court in regard to this paragraph. Paragraph B—"to dispel doubts"—relates to the Dehigama claim. The learned District Judge holds in effect (pp. 27–30/242–312) (i.) that the statements contained in it are not libellous *per se*; (ii.) that, so far as the Dehigama case is concerned, the appellant's conduct, although very ambitious, was throughout honest and free from all suspicion; (iii.) that his appearance, however, in that case, as plaintiff against the Government, while holding the office of Crown Proctor, would certainly seem to the outside world a very anomalous one; (iv.) that the innuendo assigned in the plaint to that part of the paragraph which relates to the Dehigama claim, and which speaks of his having acquired that claim in "a doubtful way," is bad in law; (v.) that the words were written *bona fide* and as fair comment on matters of public interest; and (vi.) that the charge of "editorial tergiversation," with which paragraph B concludes, had been justified by the evidence elicited, or produced, at the trial with reference to the relations between the appellant on the one hand and Mr. Dornhorst and the late Mr. Charles Perera on the other.

I am unable to follow the learned District Judge in these findings, in so far as they are adverse to the appellant. I think that to say of a litigant, who is at once a proctor and a journalist, that he has

acquired a doubtful claim in " a doubtful way," and that he has been guilty of " editorial tergiversation " in order to enable him to prosecute that claim without having to pay " lawyers' fees," is defamatory on the face of it. The innuendo attached to the former of these allegations—for, as I have already pointed out, no innuendo is assigned to the latter—seems to me to be good in law, and I do not think that there is any evidence on the record—with which alone we are here concerned—that can justify a plea of fair comment. The article does not say that the appellant had acquired the Dehigama claim in a way that to the outside world might appear anomalous, or, for that matter, " doubtful." It asserts as a fact that the claim had been so acquired. There is nothing, so far as I can see, in the evidence that made that assertion a fair comment. Certainly the observation attributed to Sir Charles Layard C.J. on the appellant's application to be made substituted plaintiff in the Dehigama case (D 83, 107/428), in view of the attitude assumed by the Crown on that occasion, does not supply a basis for that plea. I hold that, in regard to this portion of paragraph B, the appellant ought to have had judgment entered in his favour. He was, I think, still more clearly entitled to succeed on the charge of " editorial tergiversation." Although this charge, as I have already said, was not made the subject of a special innuendo, its meaning was well understood by both sides at the trial. The suggestion was that, whereas the appellant had at one time, in his capacity of editor of the " Ceylon Independent," attacked Mr. Dornhorst as his bitterest enemy, he had abandoned this attitude in order to secure Mr. Dornhorst's services gratuitously as his advocate on the argument of the appeal in the Dehigama case here in the Supreme Court. The respondents endeavoured to justify the charge by showing that the appellant had in fact changed the policy of his paper towards both Mr. Dornhorst and Mr. Charles Perera as a consequence of a loan made to him by each of these gentlemen in 1903. The learned District Judge holds that the charge has been " reasonably made out." With the greatest respect, even if it had been established, the fact would not amount to a justification of the libel of which the appellant complains, viz., that he had been guilty of " editorial tergiversation " towards Mr. Dornhorst in order to secure his appearance without a fee in the Supreme Court in the Dehigama appeal. As the Chief Justice has shown, there has been no evidence in justification of that libel, and the appellant has a right to judgment in respect of it. But I agree also with the Chief Justice, and I cannot usefully add anything to the reasons that he has given for his conclusion, that, even as regards the loans to the appellant by Mr. Dornhorst and Mr. Charles Perera, the learned District Judge's finding is not warranted by the evidence.

As regards the words " much dishonesty " in paragraph C, I should not myself have understood them as involving only a charge

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of plagiarism. But I cannot say that there is no evidence justifying a finding to that effect. Paragraphs D to G, both inclusive, derive their importance from the manner in which they have been utilized by the respondents to support the allegation in paragraph H, that the appellant—for he is clearly referred to—is as "deficient in rectitude" as in rupees. The way was prepared for this argument by the special plea of fair comment, which I have already cited *in extenso*—a plea that ought to have been at once either struck out as embarrassing, or reduced to precision by amendment or discovery. The finding of the learned District Judge on paragraph H is as follows :—"Judged in the light in which the case has presented itself to me as a jury, and giving the word 'rectitude' its real meaning, which is correctness of principle or integrity, it seems to me that the defendants (respondents) have not exceeded the bounds as public journalists of *bona fide* comment upon the plaintiff's (appellant's) conduct as a public man in relation to matters of public interest, and that the whole of the article complained of was printed and published *bona fide*, and without malice, and for the benefit of the public, and not otherwise."

The learned Judge does not hold that the charge of "deficiency in rectitude" has been justified, and I am not satisfied that the legal relation of the plea of justification to that of fair comment could have been clearly before his mind when he recorded the findings above cited. He merely finds, if I understand him aright, that the facts of the case make an imputation of "deficiency in rectitude" fair comment. I cannot agree. I will not go through the various points in detail. I adopt in regard to each of them the reasoning and the conclusion of the Chief Justice, and I concur in the judgment that he has proposed.

Appeal allowed with costs; Rs. 1,000 awarded as damages.

August 4, 1909.—

A question having arisen as to the class in which costs were to be taxed, the Chief Justice (Wood Renton J. agreeing) ordered that costs be taxed in the class in which the action was brought.