1947 *Present:* **Wijeyewardene and Jayetileke JJ.**

WHITELAW, Appellant, *and* CONCANNON, Respondent.

139—D. C. Kalutara, 24,269.

Defamation—Qualified privilege—Scope of—Meaning of malice—Defamatory statement—Meaning given to it by the person to whom it is published—Material factor.

The plaintiff was the superintendent of a rubber estate which belonged to a company which had its head office in London. One of the duties of the defendant, as visiting agent of the estate, was to report to the local agents of the company if the supervision of the estate was below standard.

In an action for defamation brought by the plaintiff in respect of certain statements contained in a report which was sent by the defendant to the local agents—

Held, that a communication made by a person in the discharge of a duty or in furtherance of an interest possesses a qualified privilege provided the person to whom it is made has a duty or interest to receive it.

In order to destroy the effect of a plea of qualified privilege the plaintiff must prove affirmatively that the statement complained of was made by the defendant maliciously.

By the term "malice" in the case of defamation is meant not necessarily any actual ill-will borne by the defendant to the plaintiff but merely the doing of a wrongful act without just cause or excuse.

In an action for defamation, the meaning which the writer intends to convey is immaterial. The question always is: How were the words understood by the person to whom they were originally published?

APPEAL from a judgment of the District Judge of Kalutara. The facts appear from the judgment.

F. A. Hayley, K.C. (with him *N. K. Choksy*), for the defendant, appellant.—The District Judge gave judgment for the plaintiff in a sum of Rs.. 5,000 in respect of statements (*a*) and (*c*). All the other statements (*b*), (*d*), (*e*) and (*f*) he held to be covered by privilege and substantially true to fact. With regard to statement (*a*) which referred to new clearings, the judge held that the statement referred to clearings both in Eaglesland and in Clontarf divisions and held further that in so far as that statement referred to new clearings in Eaglesland it was true to fact and protected by privilege but in so far as it referred to Clontarf it was not true to fact and was not protected by privilege. With regard to statement (*c*) the judge has held that it was outside privilege and as the defendant has not proved the statement to be true malice must be presumed.

The statements (*a*), (*b*) and (*c*) are contained in one document, P 1, which is the report of the defendant to the local agents in respect of a visit made by the defendant in September, 1942. The judge held that such an occasion was one of partial or qualified privilege and further held that if the plaintiff can prove malice extraneously the plaintiff need not prove that the statements were false. The defendant's plea is privilege mainly and truth only incidentally. Truth does not begin till privilege ends. Privilege can only be destroyed by express malice or malice in fact and not by implied malice which is there in all libellous statements.

As regards statement (*a*) the finding of the judge that it refers to Clontarf as well is not correct. The report P 1 itself taken as a whole shows that only the new clearings in Eaglesland are referred to. Further, what the defendant intended or said he intended is immaterial in the case of a libel. The libel must be judged from the effect it produced on the people who are to read the statements. Moreover the meaning of the statement must be gathered from the document as a whole. See Odgers on Libel and Slander, 5th Edition, Chapter 5. See also *Haire v. Wilson*[1]; *Jones v. E. Hulton & Co.*[2]. From this aspect it is quite clear that no one who read the libel would have understood that the statement referred to Clontarf. It is quite clear that neither the local agents nor the Company in London understood that the statement (*a*) referred to Clontarf.

As regards statement (c) the statement is clearly privileged. Whether the statement is an interpolation or not does not matter in the least. The defendant might have made statement (c) in a separate letter and even that letter would be privileged as it was the clear duty of the defendant to make communications as to the competency, efficiency or otherwise of the superintendents of the estates which he visits and, further, the trial judge has made a mistake in the construction of the statement and has given a meaning to the words in statement (c) which is entirely wrong.

On the meaning and scope of privilege see *Gulick v. Green*[3]; *Fernando v. Peries*[4]; *Livera v. Pugh*[5]; *Adam v. Ward*[6]; *Shipley v. Todhunter*[7].

The second cause of action is not maintainable; see *White v. Stove Lighting Co.*[8].

C. Thiagalingam (with him *S. Canagarayer*), for the plaintiff, respondent.—The finding of the judge that statement (*a*) referred to new clearings in Clontarf as well is clearly right. The defendant himself said so and in fact no other view is possible on a correct appreciation of the evidence in the case, particularly the document P 1. The learned judge is also correct as regards the construction he placed on the meaning of the last part of that statement (c). He has very carefully considered the various aspects of the case and come to certain conclusions on the facts and unless these conclusions are plainly proved to be wrong the Appellate Court will not interfere. See *Tharmalingam Chetty v. Ponnambalam*[9].

As regards statement (c) the evidence in the case as well as the conduct of the defendant before and during the trial of the case show that the statement (c) was false and that the defendant knew that such statement was false. Apart from the findings of the judge the statement (c) is clearly outside privilege in that though the occasion was privileged it was not at all necessary to make that statement at that time. In fact the statement was an afterthought and quite foreign to the subject matter of the report P 1. See Spenser Bower on Actionable Defamation, 1st Edition, p. 326, and *Chelliah v. Fernando*[10].

[1] *(1829) 9 B. and C. 643.*
[2] *(1909) L. R. 2 K. B. 444.*
[3] *(1918) 20 N. L. R. 176 at 180.*
[4] *(1919) 21 N. L. R. 7.*
[5] *(1920) 22 N. L. R. 69.*
[6] *L. R. (1917) A. C. 309.*
[7] *(1836) 7 C & P. 680.*
[8] *(1939) 108 L. J. K. B. 868.*
[9] *(1942) 23 C. L. W. 57.*
[10] *(1937) 39 N. L. R. 130 at 134.*

In the case of qualified privilege every communication is not protected. If the defendant knew the statement to be false malice necessarily follows, and privileges does not protect such a communication. Further, recklessness in not caring whether the statement is true or false proves malice. Even a *bona fide* belief in the truth of the statement by itself is not protected by privilege. See *Molepo v. Achterberg* [1], *Clark v. Molyneux* [2], *Royal Aquarium and Summer and Winter Garden Society, Ltd. v. Parkinson* [3], *Adam v. Ward (supra)*, *Watt v. Langden* [4], *Winstanley v. Bampton* [5].

On the cross-appeal, see *Place v. Searle* [6], *De Stempel v. Dunkels* [7].

F. A. Hayley, K.C., in reply.—If the occasion is privileged it is for the plaintiff to prove affirmatively facts which destroy the privilege. See McKerron on Delicts, pp. 188-189, section 70, 2nd Edition; *Vaitilingam v. Volkart Bros.* [8].

Cur. adv. vult.

June 26, 1947. JAYETILEKE J.—

This is an appeal by the defendant against the judgment of the District Judge of Kalutara awarding to the plaintiff a sum of Rs. 5,000 as damages for defamation. The plaintiff was the Superintendent of Glanrhos Estate, Matugama. This estate had three divisions—Glanrhos, Clontarf and Eaglesland containing in extent 286, 244, and 182 acres, respectively. All the divisions were planted in rubber. Between 1937 and 1938 Clontarf was replanted with budded rubber; in 1942 forty acres of Eaglesland were replanted with clonal seeds and another forty acres were cleared and prepared to be replanted with budded rubber. The Estate belonged to the General Ceylon Rubber and Tea Estates, Ltd. (hereinafter referred to as the Company) which had its head office at London. The Galaha Ceylon Tea Estates and Agency Co., Ltd: (hereinafter referred to as the local agents) were the local agents of the Company. The defendant was the visiting agent of the estate since 1935. He is a well-known visiting agent in the District. He visited 45 rubber estates in extent approximately 31,000 acres. He has been a member of the Board of Control of the Rubber Research Scheme for over 12 years and of the Rubber Commissioner's Increased Rubber Production and Advising Committee since 1942. The defendant visited the estate on September 4, 1942, and sent the report P 1 to the local agents which contained the following statements:—

(*a*) I am forced to the conclusion that Mr. Concannon's management of new clearings falls far short of what I see on other estates.

(*b*) Such large areas are involved that unless matters are put right at once I can have no alternative but to ask the Directors to place in charge of this work a superintendent who, I know, will get the best value for the money spent.

[1] *(1943) S. A. L. R. App. Div. 85 at 97.*
[2] *L. R. (1877) 3. Q. B. D. 237 at 247.*
L. R. (1892) 1 Q. B. D. 431 at 444.
[3] *(1929) 98 L. J. 711 at 721.*
[4] *(1943) 1 A. E. R. 661 at 664.*
[5] *L. R. (1932) 2 K. B. D. 497 at 520 and 521.*
[6-7] *(1938) 1 A. E. R. 239.*
[8] *(1939) 40 N. L. R. 515 at 517.*

(c) I was surprised to find that in spite of five years' experience of budded rubber Mr. Concanon was quite unable to identify most of the common clones and as this is one of the first essentials in budding work I recommend a close study of the question.

He next visited the estate on January 17, 1943, and sent the report P2 which contained the following statements :—

(*d*) It is very disheartening for me to find that some very bad and serious damage by wounding was done in the second half of 1942 on the Glanrhos Division. Some of the work is the worst I have ever seen in Company owned rubber.

(*e*) The tapping has been very poor in some places.

(*f*) In my last report I stated that many vacancies might result. Due to the heavy grass cover (snails, rats, &c.,) it is reported that 800 imported Prang Besar Seedlings were killed off.

The plaintiff alleged that these statements were made by the defendant falsely and maliciously and that they injured his reputation as a planter and caused him pain of mind. He claimed Rs. 25,000 as damages. He also alleged that the statements were made by the defendant with the intention of causing the Company to dismiss him and that, as a result of the said statements, he was dismissed. He claimed under this head Rs. 25,000 as damages.

The defendant admitted that he made the statements but he denied that he made them falsely and maliciously. He said that the statements were true and were made on privileged occasions.

After a very lengthy trial the District Judge reserved judgment. Three months later he delivered his judgment in which he held as follows :—

(1) That (*a*) was made with reference to Eaglesland as well as to Clontarf ; that as regards Eaglesland it was protected by privilege and was true in substance and in fact ; and that as regards Clontarf it was not protected by privilege and was made by the defendant maliciously.

(2) That (*b*), (*d*), (*e*) and (*f*) were protected by privilege and were true in substance and in fact.

(3) That (c) was not protected by privilege and was made maliciously.

(4) That the plaintiff was dismissed not because the defendant induced the Company to dismiss him but because the plaintiff failed to follow the defendant's directions.

The defendant filed this appeal against the first and third findings. The plaintiff filed a cross-appeal against the fourth finding.

Mr. Hayley in a very careful argument in the course of which he analysed the evidence both oral and documentary with great ability contended (1) that the statement (*a*) was made by the defendant with reference to Eaglesland only and (2) that the statement (c) was made on a privilege occasion and that it was true in substance and in fact. He further contended that the plaintiff failed to prove express malice on the part of the defendant in making the said statements.

Privilege is the name given to the protection which the law affords to a person who makes a defamatory communication in the exercise of a right or the discharge of a duty. (See *McKerron—The Law of Delict*[1]). Privilege is of two kinds—(*a*) absolute, (*b*) qualified. The difference between the two is thus stated by Odgers on the Law of Libel and Slander at page 187 :—

"In the first class of cases, it is so much to the public interest that the defendant should speak out his mind fully and fearlessly that all actions in respect of words spoken thereon are absolutely forbidden, even though it be alleged that the words were spoken falsely, knowingly and with express malice. This is confind to cases where the public service or the due administration of justice requires complete immunity, *e.g.*, words spoken in Parliament ; everything said by a Judge on the Bench, or a witness in the box ; reports of military officers on military matters to their superiors. In all such cases the privilege afforded by the occasion is an absolute bar to any action. In less important matters, however, the interests of the public do not demand that the speaker should be freed from all responsibility, but merely require that he should be protected so far as he is speaking honestly for the common good ; in these cases the privilege is not absolute, but qulified only. In such cases the plintiff will recover damges in spite of the privilege, if he can prove that the defendant in using the defamatory words was not acting in good faith, but was actuated by some improper motive. Such improper motive is called "malice".

In the present case the plea is one of qualified privilege. The law on the subject is thus stated by Lord Campbell L. C. in *Harrison v. Bush*[2]—

"A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without this privilege, would be slanderous and actionable".

and by Lord Atkinson in *Adam v. Ward*[3]—

"It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential".

According to these judgments a communication made by a person in the discharge of a duty possesses a qualified privilege provided the person to whom it is made has a duty or interest to receive it. In *Clark v. Molyneux*[4] Brett L. J. said :—

"If the occasion is privileged it is so far some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive".

[1] *McKerron—The Law of Delict, page 182.*
[2] *1855) 5 E and B at p. 348.*
[3] *(1917) A. C. at p. 334.*
[4] *L. R. (1877) 3 Q. B. D. 246.*

In order to destroy the effect of a plea of qualified privilege the plaintiff must prove affirmatively that the statement complained of was made by the defendant maliciously. What is meant by the expression "malice" is thus stated by Maasdorp [1]—

> "By the term 'malice' in the case of defamation is meant not necessarily any actual ill-will borne by the defendant to the plaintiff but merely the doing of a wrongful act without just cause or excuse".

At the argument before us, Mr. Thiagalingam did not question the correctness of the finding of the District Judge that statements (*b*), (*d*), (*e*), (*f*) and (*a*) so far as it refers to Eaglesland were protected by privilege.

P 1 covers eleven pages of typed matter. It has a summary on page 1. The matters dealt with are given in the summary under various heads. Under the heads "replanting" and "new clearing" it reads :—

	Page
"*Replanting* (older clearings) growing well	5
New clearings very unsatisfactory	6"

On page 5 the defendant has dealt with Clontarf. He has given in six columns the extents replanted, the dates on which they were replanted, the clones used, the successful buddings done, the stand per acre of successes and the vacancies. At the foot of the page he has expressed his opinion about the plantation. It reads :—

> "I am well pleased with the growth and present condition of these areas and if Mr. Concannon can maintain them as they are at present, I shall offer no criticism".

He has mentioned in paragraph 16 certain matters which required immediate attention, *e.g.*, removal of iluk from a small block, supplying of a few vacancies, taking a count of the trees approaching tappable size and treating *fomes*. At the bottom of page 6 he has dealt with "This year's replanting programme". He has stated that he was disappointed with the plaintiff's work. He found 70 out of the 80 acres knee deep in grass and there was every possibility of rats and bandicoots breeding in the thick grass and destroying the valuable plants that were there. He also found that drains and holes had not been cut and foodstuffs had not been planted. The head "This year's replanting programme" clearly applies to Eaglesland and this was admitted on both sides. After dealing with various matters in paragraphs 17 to 24 the defendant made certain observations in paragraph 25 under the head "General" on page 11. It reads :—

> "I have no criticisms as regards the old rubber. I am forced to the conclusion, however, that Mr. Concannon's management of new clearings falls far short of what I see on other estates. Such large sums are involved that unless matters are put right at once I can have no alternative but to ask the Directors to place in charge of his work a Superintendent who I know will get the best value for the large sums of money spent".

[1] *Institutes of S. African Law Vol. 3 at page 133.*

It is agreed that the first sentence refers to the old rubber on Glanrhos and Eaglesland. Counsel for the plaintiff urged that the next two sentences refer to Eaglesland as well as to Clontarf and Counsel for the defendant urged that they refer to Eaglesland only. The District Judge has given two findings on this question which are diametrically opposed to each other, but in the later finding he has stated that the earlier finding is wrong. In paragraph 3 of his judgment he says :—

"As regards the young rubber on Clontarf the defendant has stated that he was well pleased with the growth and condition of the areas and that if the plaintiff could maintain these as they then were he would not offer any criticism. Then the defendant went on to discuss the 80 acres of Eaglesland that were being replanted at the time. At the date of P 1 40 acres of these had been planted with Prang Besar Clonal seeds imported from Malaya and they had just started to take root, and the other 40 acres had been holed to take in nursery buddings according to the programme arranged earlier. It is with regard to these 80 acres that the statements (*a*) and (*b*) had been made".

In paragraphs 76 and 77 of his judgment he says :—

"In giving evidence the defendant referred to the manner in which the weeding vote of Clontarf was spent in the first five months and said that when he wrote this statement he was thinking of that too. He did not refer to fomes. The defendant did not at that time call this manner of spending the vote bad management. Mr. Burt did a similar thing but the defendant did not say it was bad management. In Mr. Burt's case he said the estate was looking better than ever before. In the plaintiff's case he said the estate was looking better for the generous expenditure. The manner in which this money was spent cannot be called bad management. The plaintiff was allowed some more money but the December report P 30 and P 29 shows that all that was not spent and the earlier reports would show that weeds had beaten the defendant. The above-mentioned evidence of the defendant, page 580 of the evidence, shows that he intended to apply the statement (*a*) to Clontarf too. The expression used is "new clearings". There are two new clearings on this estate one older than the other—Clontarf and Eaglesland. There is evidence that the fact that the plaintiff was replanting Clontarf with budded rubber was well-known ; people came to see it. The statement (*a*) casts a serious reflection on the plaintiff. It is not true to fact. About the beginning of my judgment in setting out the various statements I said that the statements (*a*) and (*b*) applied to Eaglesland. This is a mistake. The statement (*a*) applies to Clontarf too. And as far as Clontarf is concerned this statement is not true to fact and the defendant who made the earlier reports on this direction must have known it".

The District Judge has given two reasons for holding that the statement (*a*) applies not only to Eaglesland but also to Clontarf—(1) that the expression used is "new clearings" and not "new clearing", (2) the defendant said in his evidence that when he wrote (*a*) he intended it to apply to the manner in which the weeding vote of Clontarf had

been spent by the plaintiff and also to the handing over form D 7 in which the plaintiff said that he was satisfied with the condition of the estate.

An examination of P 1 shows beyond doubt that the first reason given by the District Judge is erroneous. The summary on page 1 refers to Clontarf as the "replanting older clearings" and to Eaglesland as the "new clearings". In the report P 24 dated January 15, 1942, similar expressions are used in the paragraph headed "General". In the body of the report P 1 the defendant states that Clontarf is in good order and condition but Eaglesland is more or less in a deplorable condition. I cannot see how any one reading P 1 can possibly say that the statement (*a*) refers to Clontarf. P 1 was sent by the defendant to the local agents. On receipt of it they sent D 31 dated October 8 1942, to the plaintiff. It reads :—

> "In reference to our letter of the 25th September, covering Mr. Whitelaw's recent report we wish to point out that we can take no responsibility for reports such as this. Will you therefore kindly let us have an explanation by return on the 1942 replanting programme and food production referred to on page 11 of the report as the matter is urgent and we may have to cable the Directors".

This letter indubitably shows that the adverse remarks in P 1 were understood by the local agents to refer to Eaglesland. The plaintiff's reply P 32 dated October 10, 1942, shows that he himself understood it to refer to Eaglesland. The material portion of it reads :—

> "I thank you for your letter of 8th October, and, as requested, I state the following for your kind consideration :—
>
> *Eaglesland*—This is a very steep estate and has been divided into two 40 acre blocks . . . . . ".

There is no reference either in D 31 or in P 32 to Clontarf. The second reason given by the District Judge is erroneous according to law.

In an action for defamation, what meaning the writer intends to convey is immaterial—(See *Haire v. Wilson*)[1]. The question always is :— How were the words understood by those to whom they were originally published ? (Odgers 6th edition, page 93.) D 31 and P 32 indicate very clearly what meaning the statement (*a*) conveyed to the minds of the local agents and of the plaintiff. I do not think that any person of ordinary intelligence could have understood it in any other way. The finding of the District Judge on statement (*a*) indicates that if the statement applied only to Eaglesland it would be true in substance and in fact and therefore not actionable. The plaintiff's claim based on (*a*) also fails. It is therefore unnecessary to consider the defendant's statement made three years later in the course of the lengthy cross-examination to which he was subjected as to what he intended to convey to the local

[1] *(1829) 9 B and C 643.*

agents of the company by the statement (*a*). But as there was a great deal of argument on the point I shall deal with it briefly. The defendant's evidence reads :—

Question.—What did you have in your mind when you talked of his management of the new clearing ?

Answer.—I was referring to the 1942 incident of spending the whole year's vote in five months without informing anyone . . . . I was referring also to the fact that he took over the estate and wrote "satisfied" and then found it was not satisfactory.

For the year 1942 the estimate for weeding was Rs. 4,221. The defendant found on his visit in June, 1942, that during the first five months the plaintiff had spent Rs. 4,001 on weeding leaving a balance of Rs. 220 for the next seven months. In his report P 25 the defendant criticised the work of the plaintiff in these terms :—

"When Mr. Concannon returned from home last in April, 1941, he complained that so large a portion of the season's weeding allowance for this 244 acres had already been spent that he was quite unable to carry on with the balance in hand till the end of the year. This necessitated a special visit by me and full details were given in my special report of July 3, 1941. The nett result was that considerable extra funds had to be allowed, and by the end of the 1941 season weeding had cost the very large sum of Rs. 28 per acre or Rs. 32 if control of legumes is also included. The average for 28 different clearings I visited totalling 4,147 acres was Rs. 19.50 per acre. I now find that without informing the Agents or myself of the position Mr. Concannon has again this season spent the whole season's allowance in the first five months. Rs. 4,001 or about Rs. 18 per acre has been spent against Rs. 4,221 allowed, and the matter has simply been presented as an accomplished fact. In view of last year's trouble, surely Mr. Concannon must realize he had no right to do such a thing. Surely he must know that the Directors have every reason to reply that the estimates as sent home are not worth the paper they are written on. In five months the cost per acre (Rs. 18) is almost equivalent to a year's average cost on 28 estates in 1941 . . . . . Now I am left with the choice of—

(i) refusing to recommend any further expenditure till the end of the season in which case the position will get entirely out of hand and will cost large sums to rectify in 1943, or

(ii) recommending an extra sanction of Rs. 150 per acre per month for the last 7 months on 234 acres = say Rs. 2,451. This I do with great reluctance and I disclaim responsibility for it".

P 25 and the plaintiff's evidence on marginal pages 26 and 108 show that the above remarks were made in connexion with Clontarf. They were made under the head "Growth" which dealt with an extent of

244 acres which is the exact extent of Clontarf. The correctness of the above statements in P 25 was not disputed by plaintiff in his evidence. When the local agents called upon him for his explanation he wrote as follows in P 28 dated June 16, 1942 :—

> "*Cost of weeding*—I note what you write and Mr. Whitelaw's remarks, and in future you will be informed if any such expenditure is incurred. I will endeavour to carry on weeding with the balance available until the Directors' instructions are received".

The plaintiff exhausted practically the whole of the weeding vote for the year 1942 by the end of May without reference to the defendant or the local agents or the Directors of the Company and the defendant was compelled to recommend a further vote in order to keep the estate in good condition. I should think that the defendant would have been well within his rights in criticising the plaintiff's management of the estate in much stronger language than that used by him in P 25. In my view the plaintiff was guilty of gross mismanagement of the estate. In paragraph 63 of his judgment the District Judge says that the defendant's criticism of the plaintiff's work in P 25 cannot be called unfair or unjust. Yet he held that the statement (*a*) was false in fact and was made by the defendant maliciously. In April 1940 the plaintiff went on a year's leave. During his absence one Burt was placed in charge of the estate by the local agents. The plaintiff returned in April 1941 and took over the estate from Burt on April 24, 1941. According to the local agents' orders Burt and the plaintiff had to fill in and sign a form called the "handing over form". D 7 was the form that was signed on this occasion. In the remarks column the plaintiff has entered in his own handwriting—

> "Satisfied.
> The furnace of the new smoke house is still receiving attention".

The plaintiff says that before filling up D 7 he went round the estate with Burt in order to satisfy himself as to its condtiion and he found that Clontarf was in heavy weeds. At that time the defendant had gone to Nuwara Eliya on a holiday and he did not want to disturb him. He waited till the defendant returned in June and had a telephone conversation with him about it. He asked the defendant what he should do and the latter dictated a letter P 17 on June 5, 1942, to be sent to the local agents. It reads :—

> "I write to inform you that I find certain acreages costly to weed and I would like to have Mr. Whitelaw's advice on the position".

The local agents sent him a reply P 18 in which they stated that Burt had in previous correspondence reported increased weed growth on Clontarf and the defendant too had done so in his report of February 19. They requested him to make an appointment with the defendant to discuss the matter. The local agents wrote to the defendant another

letter requesting him to go into the matter with the plaintiff. The defendant says that he thought that a discussion would serve no useful purpose and he decided to inspect the estate. He visited the estate and sent the report P 22 to the local agents. In it he states :—

" (*a*) There has been an increased growth of weeds all over the clearing in recent months and Mr. Burt reported this to the agents in his December report. I must admit I have noticed several instances where weeds get out of hand about the third year.

(*b*) To deal with the increased growth Mr. Burt has spent Rs. 1,539 out of the year's full allowance in the first six weeks of the season and this leaves only Rs. 1,300 or Rs. 5.30 per acre for the rest of the season—a totally inadequate amount. Although I now agree that 1940 expenditure and 1941 estimate for weeding were too low, I think it would have been better if Mr. Burt had informed that he was going to spend this large proportion of the season's estimate. As matters stand an entire grant will have to be given.

(*c*) Mr. Concannon took over about the middle of April and his handing-over statement reported that the general state of affairs was " satisfactory ". It is a great pity that Mr. Concannon did not, at the time of taking over, state, instead of saying that he was satisfied, that weeding was in poor order and that he could not manage without somewhat large extra grants. By bringing the matter up two months later Mr. Concannon makes it very difficult to apportion responsibility ".

The plaintiff gave three reasons for writing " satisfied " in D 7.—

1. He thought that the defendant was partly responsible for the condition of the estate.
2. He did not wish to displease the defendant as there was unpleasantnesss between him and the defendant over certain remarks made by him in the first taking over form in the year 1935.
3. He did not wish to find fault with Burt's work because " Dog does not eat dog ".

I do not think that the first reason can be accepted because the defendant's report P 78 dated February 14, 1941, in which he said that he noticed an increased growth of weeds on his visit must have been in the plaintiff's hands at the time. Nor do I think that the second reason can be accepted because the defendant had severely criticised in his report P 4 the work done by Brown from whom the plaintiff took over. He said that the work for a good number of years in the past has been bad and that the estate was one of the worst inspected in Kalutara. It follows, therefore, that the reason why the plaintiff wrote " satisfied " when, in fact, he was not satisfied was because " Dog does not eat dog ". In finding that there was some substance in reasons 1 and 2 given by the plaintiff the District Judge has obviously lost sight of P 78 and P 4. After writing " satisfied " in D 7 the plaintiff did nothing till June 14, when, probably, the monsoon was at its height and he was unable to control the weeds. He then telephoned to the defendant and he says

he informed the defendant that Burt had "mucked up" the estate. If Burt had "mucked up" the estate up to April 24, 1941, there can be no question that the plaintiff had "mucked it up more" between April 24, 1941, and June 14, 1941, during which period he sat quiet doing nothing until he lost all control of the weeds. Having regard to these facts I am unable to resist the conclusion that the plaintiff has not only failed in his duty to the Company but he has also deliberately deceived the local agents to whom D 7 was sent by writing "satisfied" when in fact he was not satisfied. If he had informed the local agents promptly that the estate had to be weeded before the monsoon rains commenced, I feel sure that steps would have been taken to prevent the estate from deteriorating further. There is every indication of it in the letter P 18 written by the local agents to the plaintiff. Even if the defendant intended to refer to the plaintiff's conduct in statement (*a*) I am of opinion that he has used language which, to say the least, is very mild.

I shall now proceed to deal with the statement (c). The word "clone" is said to be a Malay word which has the same meaning as the word "jarth". Common clones are those very largely used in Ceylon, *e.g.*, Pilmoor B 84, TJ 1, TJ 16, BD 2, BD 26, PB 86, PB 186, AV 49, PSR 152, Millakanda, Hillcroft, Waga and Glenshiel. Budgrafting is specialized work which requires expert knowledge. It can be done either in the nursery or in the field. Plants are grown out of seeds and buds taken from high yielding trees are grafted on them. Budded stumps and budwood for grafting used to be imported largely from Java and Malaya. But they were also available on estates in Ceylon. The various clones had slight differences which could be identified when the shoots were eight to twelve months old. Clontarf was replanted with bought budwood and stumps of various clones. The names of the clones appear in the report P 1. It was important that the plaintiff should know to distinguish one clone from another because there was the possibility of the clones being mixed up by the sellers and wrong trees being found in a field and also because it had been decided to use budwood from Clontarf in the replanting of Eaglesland.

The defendant said that it was not possible for the plaintiff to bud correctly unless he was able to identify the clones. Counsel for the respondent agreed with this view in the course of his argument. It must be noted that at the time the statement (*a*) was made 40 acres of Eaglesland had been cleared for replanting with budded rubber in October/November. The defendant in his evidence gave the circumstances in which he made the statement. He said that when he was walking through Clontarf one morning he noticed two common clones BD 10 and BD 5 mixed up in a block. He asked the plaintiff to identify one or two of the trees and he found that the defendant was unable to do so. During the rest of the morning he questioned the plaintiff about other clones in the area and found that the plaintiff was unable to identify any one of them properly. When he wrote P 1 he thought it was his duty to inform the local agents about this and he wrote the statement (*c*). The plaintiff denied the whole of this incident and stated that he was well able to identify all the clones on Clontarf. After examining the

evidence on this point the District Judge came to the conclusion that the defendant's evidence was not false but that the defendant failed to prove that the plaintiff did not in fact know to identify clones. He said :—

(1) The defendant told us that the plaintiff has been showing resentment towards him. The defendant, perhaps, asked him about the two clones but the plaintiff was in no mood to reply to the defendant.

(2) I do not think that the defendant was entitled to infer from this that the plaintiff did not know most common clones.

He held that the statement was not privileged and, even if it was, that it was made maliciously. It is difficult to gather from the judgment the reasons for the finding that the statement is not privileged. Mr. Thiagalingam invited our attention to the following passages in the District Judge's judgment :—

(1) that the statement has been interpolated in the report.
(2) that at the time it was made all budding was finished and the budded stumps were waiting to be put in the field.
(3) through anger the defendant has been reckless as to the truth or otherwise of the statement he made with regard to the plaintiff's knowledge of clones.

These statements, I need hardly say, are not relevant to the question whether the occasion was privileged. On the documents I think it would have been possible for the District Judge to hold that the plaintiff did not answer the questions put to him by the defendant because he did not know to distinguish between clones. The evidence shows that copies of the defendant's reports were sent to the plaintiff and that the plaintiff did not protest against any of the statements made by the defendant in P 1. His comments on the report are in P 32. He has dealt with various matters in it but he has said not a word about the defendant's allegation that he did not know to distinguish between common clones. According to the findings of the District Judge I am of opinion that the defendant had every right to infer that the plaintiff did not answer the questions put to him because he was unable to identify the clones. How could the defendant have known that the plaintiff did not answer the questions because he was not in a mood to do so? If the defendant was aware of it, it is improbable that he would have questioned the plaintiff further the whole morning.

On these facts the question that arises is whether the defendant in making the statement (c) had an interest or duty, legal, social or moral, to make it to the local agents, and whether the local agents had a corresponding interest or duty to receive it. One of the duties of the defendant as visiting agent of the estate was to report to the local agents if the supervision of the estate was below standard. The defendant's evidence shows that he was of opinion that the plaintiff's supervision of the estate was below standard because he did not know to distinguish between common clones ; so the defendant had a duty to make the communication to the local agents and the local agents had an interest in receiving the communication. In these circumstances, I do not think that it can be

contended that the statement was not made on a privileged occasion. In order to succeed the plaintiff has to prove that the defendant made the statement maliciously.

The wrongful act complained of by the plaintiff is that the defendant made a false statement in (c). This the plaintiff has wholly failed to prove. On the contrary, the finding of the District Judge implies that the defendant had grounds for believing that the statement was true. Thus the plaintiff's claim on (c) also fails. It is, therefore, unnecessary to go into the question whether the defendant made the statement (c) merely for the gratification of anger. But, in fairness to the defendant, I think I shall say a few words on the point. The plaintiff says that between 1931 and 1942 there were various incidents over which he believed the defendant bore ill-will towards him. In 1931 he learnt that the defendant was instrumental in getting an allowance that was made to a friend of his by the Comrades Association of Kalutara stopped. He took up the matter and got the allowance restored. It will be noted that at that time he had not met the defendant. Again between 1936 and 1939 he had discussions with the defendant about the diagnosis and treatment of fomes, and about a prescription given to him by the defendant to prevent corrosion of galvanized sheets. He next referred to the dismissal of a conductor called Kodituakku by him in the year 1941. Kodituakku wrote to the defendant that he had been wrongfully dismissed and the defendant forwarded the letter to the local agents. The local agents called for a report from him. He sent P 52 giving his reasons for the dismissal. In the concluding paragraph he stated :—

> " I would have appreciated Mr. Kodituwakku's letter to Mr. Whitelaw forwarded to me for my comments before sending same to you ".

He says that this remark annoyed the defendant considerably. When his report was forwarded to the defendant for his observation the defendant in his reply P 87 said :—

> " It is apparent from the last paragraph of Mr. Concannon's letter, which I consider on the verge of insolence, that he resents my having brought the matter of the dismissal of these men to your notice ".

Finally he referred to an incident in 1941 about the Usk Valley labourers. He said that certain labourers employed on Usk Valley estate were discharged for rioting. They found their way to Glanrhos estate and were employed by him. The defendant was displeased with him for employing the labourers, and, on his visit to the estate in September, 1942, he became like " an angry bull " when he found that the labourers were still on the estate.

The defendant denied that he was annoyed with the plaintiff over the 1931 incident or the discussions referred to by the plaintiff. He admitted that he was annoyed with the plaintiff over the remark made by him in P 52 but he denied that the remark left a scar on his relations with the plaintiff. His evidence on this point is supported by P 52. He had before him two conflicting versions as to what led to the dismissal and he preferred to accept the version given by the plaintiff. It is also

supported by his report P 24 dated January 15, 1942, in which he recommended an increase of plaintiff's salary. P 52 and P 24 show that he had a judicial mind.

With regard to the employment of the Usk Valley labourers the defendant denied that he took an interest in it beyond giving a little advice to the plaintiff when he casually dropped in at the office of the local agents when they were having an interview with the plaintiff about it. P 26A shows that the matter was taken up with the local agents by the Kalutara Planters' Association. The Chairman of the Association complained in P 26A that the plaintiff was continuing to employ the labourers who had been discharged from Usk Valley estate for rioting notwithstanding a promise given by him to send them away. On receipt of P 26A the local agents requested the plaintiff to call over at their office for an interview. When the interview was taking place the defendant happened to drop in at the office. The defendant was sent for and asked for his advice. He suggested that the plaintiff should send a list of the names to the Chairman of the Association with a request that he should mark a star against the names of those who, he thought, should not be employed in the District so that they may be discharged. The plaintiff and the local agents thought that the defendant's suggestion was a good one and they agreed to act on it. The defendant's evidence that he did not take any further interest in this matter is supported by his report P 25 which was written about three months after the interview. In it he makes no reference to the Usk Valley labourers. The evidence shows that the plaintiff wrote P 27 to the Chairman enclosing a list of the names and that the Chairman sent the list back to the plaintiff with stars against the names of ten labourers. Thereafter no steps seem to have been taken by the plaintiff to send away any of the labourers and no question seems to have been raised by the Chairman of the Association or the local agents.

On the question of ill-will there are a large number of findings of the District Judge all of which are in defendant's favour. Referring to the report P 24 dated January 15, 1942, the District Judge says :—

> "A careful perusal of this report and all the earlier reports will show that no blame has been attributed to the plaintiff. This report does not show any ill-will towards the plaintiff. The defendant has recommended an increase of salary from the beginning of the year".

Referring to the next report P 25 dated June 8, 1942, he says :—

> "The incidents from which I am asked to draw an inference of ill-will have had no effect on the defendant's mind so far as this report goes".

With these findings I find myself in entire agreement. The District Judge has, however, held that on his visit in September, 1942, the defendant lost his temper when he found Eaglesland overgrown with weeds and that the defendant wrote P 1 in a state of anger. The passage in the judgment reads :—

> "He must have remembered the recent disregard of his advice on the Usk Valley labourers. I do not, however, think he went to the estate as an angry boar or bull as the plaintiff called it. The

anger must have come on when he saw Eaglesland. The grass on it must have been the red rag. This must have caused him great anger and the report was written in that angry mood. Another point to show that the feelings were not good on that visit is that the defendant did not stay to lunch which he usually did. He did not stay for lunch the second day on which he visited Eaglesland".

An examination of the evidence shows that there is no justification for the finding that the defendant flew into a temper when he saw Eaglesland in weeds or that he left the estate in a temper. The District Judge has clearly erred when he said that the defendant did not stay for lunch on that day. The plaintiff's evidence on page 198 shows that it was on the subsequent visit in January, 1943, that the defendant went away without staying for lunch.

I would accordingly hold that the defendant was not actuated by malice when he wrote P 1 and P 2. The reports show that the defendant is a fair-minded person and that he has not allowed any annoyance caused to him by anything that the plaintiff said or did to affect his judgment on the plaintiff's work on any occasion. He has complimented the plaintiff on his work on many occasions and at the same time he has not failed to criticise his work when it was necessary.

The only other question is whether the plaintiff's claim on the second cause of action can be maintained. The plaintiff alleges that he was dismissed because the defendant made the statements (*a*), (*b*) (c), (*d*), (*e*), and (*f*) in P 1 and P 2 which were false. He has failed to substantiate this allegation and his claim must necessarily fail. The District Judge says in his judgment that the plaintiff was dismissed by the Company because he failed to follow the directions given to him by the defendant and not because the defendant induced the Company to dismiss him. This finding is supported by D 31 dated October 8, 1942, and D 34 dated October 26, 1942, and P 35 dated November 4, 1942. I do not think it is necessary to go into the question whether the plaintiff is legally entitled to claim damages under two heads in respect of the statements complained of by him. For the reasons given by me, I would allow the appeal and dismiss the plaintiff's action with costs here and in the Court below.

WIJEYEWARDENE J.—I agree.

Appeal allowed.