[IN THE PRIVY COUNCIL.]

1937 *Present :* **Lord Thankerton, Lord Alness, and Sir Lancelot Sanderson**

SABAPATHI *v.* HUNTLEY.

Defamation—Charge of negligence and incompetence against Medical Officer—Letter to Director of Medical and Sanitary Services—Communication to Chairman of Planters' Association—Publication of proceedings of Association in the Press—Defence of privilege—Plea of justification as defence—Public benefit—Roman-Dutch law.

The plaintiff, a Government Medical Officer, sued the defendant to recover damages for alleged defamatory statements made by the defendant in a letter written by him to the Director of Medical and Sanitary Services complaining of the negligence and incompetence of the plaintiff in the medical treatment received by him and his wife. The statements were repeated at an interview with the Director on a subsequent date.

A copy of the letter was also sent by the defendant to the Chairman of the Planters' Association and was read at a meeting of the Association, at which several members expressed themselves in strong terms on plaintiff's conduct and a resolution was passed endorsing the terms of the letter.

A report of the proceedings and the terms of the letter were published in the public newspapers.

Held, that the statements made at the interview with the Director of Medical and Sanitary Services were made on a privileged occasion but that they were made maliciously.

Held, further, that the statements made in the letter to the Chairman of the Planters' Association were not privileged.

APPEAL from a judgment of the Supreme Court[1].

December 21, 1937. Delivered by LORD ALNESS.—

This is an appeal from a judgment and decree of the Supreme Court of the Island of Ceylon, dated March 9, 1936, which set aside a judgment and decree of the District Court of Avissawella, dated September 1, 1934. These judgments and decrees were pronounced in an action for defamation, in which the appellant was plaintiff, and the respondent was defendant. The District Court awarded the plaintiff a sum of Rs. 10,000 as damages while the Supreme Court dismissed the plaintiff's action.

The circumstances under which the present suit was brought, excluding controversial matter, are as follows :—

The plaintiff is a Bachelor of Medicine and Master of Surgery of the University of Madras, a Licentiate of the Royal College of Physicians, London, and a Member of the Royal College of Surgeons, England. He was, at all times material to this action, employed as the Government District Medical Officer in charge of the Government Hospital at Karawanella, and had been in the service of the Government of Ceylon for a period of twenty-two years or thereby. The defendant was, at all material times, a member of the Kelani Valley Planters' Association, and the superintendent of the Vincit estate, which is situated at Ruanwella in the Kelani Valley District.

On January 26, 1933, the defendant and his wife paid a visit to one Mr. D. S. Urquhart, the acting superintendent of the Panawatte estate,

[1] *37 N.L.R. 171.*

which is some 16 miles from the Vincit estate, and stopped the night with him. On the afternoon of January 27, 1933, the defendant and his wife were being driven home, in their car,. by a chauffeur, when they were involved in a serious accident. The car left the road, fell down a deep slope, and overturned. The defendant and his wife were pinned underneath the car. A message was thereupon sent to Mr. Urquhart, who arrived in a short time at the scene of the accident in his car. The defendant and his wife were assisted into the car, and were conveyed to the Karawanella Hospital. On their way there, the car stopped at the plaintiff's bungalow, which is close to the hospital. The plaintiff was in his bungalow, and, being informed of the circumstances of the accident, he directed the party in the car to proceed to the hospital. He stated that he would follow them. Beds were prepared with all speed in the hospital for the reception of the defendant and his wife. They were assisted into the building, were undressed, and were put to bed. The acting matron of the hospital—Sister Cooper—was in charge of the ward to which the defendant and his wife were admitted. After certain treatment by the plaintiff, who followed them to the ward, he left the defendant and his wife in charge of Sister Cooper, and returned to his bungalow. The defendant and his wife decided not to go home, but to remain for the night in the hospital.

Next morning—January 28—the plaintiff visited the defendant and his wife in the hospital. At that time the acting matron, and a friend of the defendant, named Mr. Nicoll who had come to visit them, were in the room. The plaintiff visited the defendant and his wife again in the course of the afternoon of January 28. In so doing he was complying with a rule which required him to visit each patient in a paying ward twice a day.

On the morning of January 29, the defendant and his wife left hospital and were driven in Mr. Nicoll's car to their home. On February 1, 1933, the defendant wrote and dispatched to the plaintiff a letter in the following terms :—

Vincit,
1st February, 1933.

The District Medical Officer,
Karawanella Hospital,

Dear Dr. Sabapathi,

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

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

Yours sincerely,
(Sgd.) G. Huntley.

On February 7, 1933, the defendant had occasion to pay a business visit to Colombo, and he was accompanied by his wife. By prior arrangement with Dr. de Silva, a leading specialist in the city, he examined the defendant's wife, and subsequently the defendant. It is not unimportant to observe that, in the course of his examination, Dr. de Silva, even at this date, did not diagnose fractures either in the case of the defendant or his wife. On Dr. de Silva's advice, however, both of them were X-rayed by Dr. Gunawardene. His examination revealed that both the

defendant and his wife had sustained fractures by reason of the accident. On the advice of Dr. de Silva, the defendant and his wife repaired to the Fraser Nursing Home, where they remained for 45 days, and were treated by him.

On February 13, 1933, while still in the Nursing Home, the defendant wrote and dispatched to Dr.. Briercliffe, the Director of Medical and Sanitary Services, Colombo, a letter in the following terms :—

13th February, 1933.

The Director of Medical and Sanitary Services,
Colombo.

Dear Sir,

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

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

We arrived at the hospital at 8 P.M. and the District Medical Officer after a very perfunctory examination pronounced definitely that no bones were broken and without any suggestion whatever of an X-ray examination in Colombo put us in charge of the acting matron in the Paying Ward and actually intimated that we might leave on the following morning.

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

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

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

Mr. Urquhart of Panawatte estate can also corroborate my statement *re* District Medical Officer's treatment at Karawanella Hospital.

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

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

Yours faithfully,
(Sgd.) G. Huntley.

A copy of this letter was also sent by the defendant to Mr. Selwyn, Chairman of the Planters' Association. This the defendant did without giving the plaintiff any opportunity of explaining or justifying his conduct.

The letter referred to is the foundation of the plaintiff's claim for damages in the present suit, in so far as it is based on libel. On February 21, Dr. Briercliffe referred that letter to Dr. de Silva for report. On February 23, 1933, at the annual general meeting of the Kelani Valley Planters' Association at Colombo, the Secretary, under direction of the Chairman, Mr. Selwyn, read the defendant's said letter to the meeting. Several members of the association expressed themselves in strong terms regarding the plaintiff's conduct, and the association passed a resolution endorsing the terms of the defendant's letter. All this was done without

giving the plaintiff any opportunity of being heard in his defence. The defendant's letter, as well as a report of the discussion which ensued, and also the terms of the resolution passed, were published in several newspapers in Ceylon. On February 25, Dr. de Silva replied to Dr. Briercliffe's letter of February 21. On February 27 the Planters' Association conveyed to Dr. Briercliffe the terms of the resolution passed by them at their meeting. On March 1, the plaintiff wrote to Dr. Briercliffe, expressing his surprise at the published report of the proceedings of the association, and detailing the circumstances relating to his treatment of the defendant and his wife. On March 10, the plaintiff wrote a further letter to the Provincial Surgeon, at Sabaragamuwa, who was his immediate superior, and the official channel of communication with Dr. Briercliffe.

On March 16, the defendant, not having had a reply to his letter from the Director of Medical and Sanitary Services, sent him a reminder, and on March 20 Dr. Briercliffe wrote to the Secretary of the Kelani Valley Planters' Association a letter in these terms :—

No. T. A. 1/398.

Office of the Director of Medical and Sanitary Services,
(P. O. Box 500),
Colombo, 20th March, 1933.

Complaint against Dr. Sabapathi, District Medical Officer, Karawanella.

Sir,

With reference to your letter dated 27th February, 1933, and my letter No. T. A. 1/398 of 7th March, 1933, I have the honour to inform you that I have had the complaints made by Mr. Huntley carefully investigated. When he left the Karawanella Hospital on the 29th January, Mr. Huntley appears to have been satisfied with the manner in which he and his wife were cared for by Dr. Sabapathi since on 1st February he wrote the following letter :—

Dear Dr. Sabapathi,

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

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

Yours sincerely,
(Sgd.) G. Huntley.

2. On 7th February, Mr. and Mrs. Huntley consulted a Surgeon of high professional standing in Colombo. who after a clinical examination advised that an X-ray examination should be made. I have communicated with this Surgeon, and he informs me that definite diagnosis of the underlying injuries in either patient was not possible without the aid of the X-ray examination.

3. Dr. Sabapathi is of opinion that Mr. Huntley's letter of the 13th February is libellous, and he desires to take proceedings. I consider it is regrettable that the letter was publicly discussed at a meeting of your association on the 23rd February and published in the *Ceylon Daily News* on the 24th February, before the allegations had been investigated. It appears to me that Mr. Huntley's allegations of gross neglect and carelessness against Dr. Sabapathi cannot be substantiated, but if a suitable apology were made to Dr. Sabapathi I should advise Government not to allow Dr. Sabapathi to resort to legal action.

4. In the second paragraph of your letter referred to above you state "that this would not appear to be an isolated case as during the discussion several other cases were mentioned which would rather point to the complete lack of interest of this officer in his duties, and my association felt that they must ask you to make a full inquiry into the whole matter and take the necessary action". I shall be obliged if you will bring these or similar cases to the notice of the Provincial Surgeon, Sabaragamuwa.

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

The Hony Secretary,
Kelani Valley Planters' Association,
Dabar estate, Deraniyagala.

On April 7, 1933, the defendant, at an interview which he had with Dr. Briercliffe, made the following statements to him:—(1) that the plaintiff on January 27 had examined the defendant and his wife while they were still in the car, and (2) that the examination in each case lasted only half a minute or so. These statements form the basis of the plaintiff's claim for damages, in so far as slander is concerned. On April 8, 1933, the Director of Medical and Sanitary Services wrote a letter to the Povincial Surgeon, Sabaragamuwa, in these terms:—

No. T. A. 1/398.
Office of the Director of Medical and Sanitary Services,
(P. O. Box No. 500),
Colombo, 8th April, 1933.

Complaint against Dr. Sabapathi, District Medical Officer, Karawanella.

Sir,

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

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

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

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

The Provincial Surgeon,
Sabaragamuwa Province,
Ratnapura.

The plaintiff on April 15 wrote the following letter to the Provincial Surgeon :—

The District Hospital,
Karawanella, 15th April, 1933.

The Provincial Surgeon, Sabaragamuwa,
Ratnapura.

Sir,

Referring to your T 1585 of 10th April, 1933, and of D. M. & S. S.'s T.A. 1/398 of 8th April, 1933, I have the honour to submit the following :—

1. The statement in para. 3 of my letter of 1st March, 1933, is a correct account of what transpired on the evening of the 27th January last.

2. There was no examination of Mr. or Mrs. Huntley by me when they were in the car. The statement that I examined them in the car is not true.

3. There was a careful and complete examination of Mr. and Mrs. Huntley after they were put in beds in the ward. That the examination and treatment given to them left nothing to be desired is shown by the letter written to me by Mr. Huntley himself on 1st February, 1933, when the facts were fresh in Mr. Huntley's mind and when there was no reason for him to state anything but the truth.

4. After examining the patients with due diligence, I immediately recorded in the bed head tickets of both the patients, the injuries and other particulars which I observed and put in writing my opinion in both the bed head tickets as follows :—

"No evidence of fracture".

5. I expressed the same opinion orally to the patients.

6. I annex herewith copies of three statements for your information as to what transpired that evening.

I am, Sir,
Your obedient Servant,
(Sgd.) C. Sabapathi,
District Medical Officer, Karawanella.

Appended to the plaintiff's letter were three sworn statements by the acting matron of the hospital, and two other witnesses, named De La Harpe and Hassim.

On December 21, 1933, the plaintiff, having obtained the necessary permission, field the present suit against the defendant, the defendant filed an answer, and certain issues were adjusted for the trial. The case was heard by Mr. Vythialingam, the District Judge of Avissawella, without a jury, and he, on September 1, 1934, issued judgment in favour of the plaintiff. He accepted his evidence and that of his witnesses as true. He disbelieved the defendant and several witnesses whom he had adduced. He held that the defendant's plea of justification was not made out. The learned Judge further held that the defendant's communication to the Planter's Association was not made upon a privileged occasion, but he also held that if, contrary to his opinion, it was a privileged occasion, the defendant was actuated by malice in making the communication. The defendant appealed to the Supreme Court of Ceylon, and they, on November 28, 1934, sustained the appeal and dismissed the plaintiff's suit. The Supreme Court held that the defendant's plea of justification had been established. They further held, agreeing with the trial Judge, that the communication of the plaintiff's letter to the Planter's Association was not in the circumstances made on a privileged occasion, but, differing from the trial Judge, that the communication was not maliciously made. From that judgment this appeal has been taken by the plaintiff to His Majesty in Council.

There is no dispute between the parties that the written and verbal statements attributed by the plaintiff to the defendant were made by him, nor is there any dispute that those statements were in the one instance libellous and in the other instance slanderous and actionable, unless they were proved to be true or were written and spoken on privileged occasions without malice. The first question which arises accordingly is—has the defendant's plea of justification been made out? The trial Judge in reply to that question said—No. The Supreme Court said—Yes.

It appears to their Lordships that the defendant, in seeking to establish his plea of justification, is confronted by certain initial difficulties, which are certainly grave, and which may prove to be insurmountable.

(1) The establishment of the defendant's plea involves the reversal of the judgment of the trial Judge, who saw and heard the witnesses, and who was thus in a superior position to that of the Appeal Court, in judging of their demeanour and credibility on a pure question of fact. This is at all times a difficult enterprise for a litigant to undertake. (*Cf. Powell v. Streatham Manor Nursing Home*[1].) Moreover the Judge of first instance in this case, despite some slips which he made in disposing of the case—and these, in the circumstances, are not surprising—and which were quite properly emphasized by the defendant's counsel, has written a careful and painstaking judgment, which is deserving of full consideration and respect.

(2) The statements made by the defendant in his letter to the Planters' Association and at his interview with Dr. Briercliffe, regarding the plaintiff's incompetence and negligence are antecedently improbable. It must be remembered that their Lordships are concerned with a responsible public official, who had been for 22 years in Government service, and against whom in the past no suggestion of inattention, far less of incompetence and negligence, had been made. Moreover the plaintiff, on the occasion in question, was dealing with a European planter as a patient, who, to the knowledge of both parties, had sustained a serious accident; and it is in evidence that members of the Planters' Association are not slow to make complaints of medical inattention on the smallest provocation. Finally, under this head, there is a complete absence of motive or explanation suggested by the defendant to account for the lapse from care and skill on the part of the plaintiff which is attributed to him.

(3) Again, the sweeping character of the allegations made by the defendant in his letter to Dr. Briercliffe, and at his subsequent interview with him, *prima facie* render them difficult to justify. Incompetence, negligence, lack of interest—all these are attributed by the defendant to the plaintiff. Whether these allegations be general in their character, or are limited to the occasion in question—and their Lordships are disposed to take the latter view—it is manifest that the charges are hurtful and grave. The most significant commentary upon them is made by the defendant himself, at the close of his letter, when he expresses the hope that the Director will take "strong action" in the matter, and when, in evidence, he said that he hoped that an incompetent man like the plaintiff should be removed (record p. 39).

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

(4) Lastly, it is difficult to escape from the conclusion that the affirmation of the defendant's plea of justification postulates, upon the plaintiff's part, not only perjury, but conspiracy as well. For, if the defendant is right, not only the plaintiff, but Nurse Cooper—to whose demeanour and credibility as a witness the trial Judge awards a high certificate—De La Harpe and Hassim—whose evidence the trial Judge accepted as true—must be regarded as parties to a plot to bolster up the plaintiff's claim, to deceive the Court, and to frustrate the ends of justice. On the other hand, the main witness on the other side is the defendant himself, and it is not only charitable but indeed probable to suppose that the serious accident which he sustained, with its consequent shock, may have tended to impair his recollection of some at least of the events which ensued. He states in evidence that "on some points I am quite clear, and on other points I am not" (p. 35).

Coming to closer quarters with the case, and surveying the evidence adduced—and their Lordships may say that, in the circumstances, they consider themselves absolved from a meticulous examination of it—there are certain incidents which seem to afford a touchstone *hinc inde* of the truthfulness of the witnesses concerned. Their Lordships propose to refer to two of these.

The case for the defendant now is that the plaintiff, on February 28, examined him and his wife in the car before they were admitted to the hospital, and that thereafter there was no examination of them by the plaintiff in the hospital. The Supreme Court, in their judgment, it may be noted refer to the fact that the defendant "for some inexplicable reason seems to have persisted in saying that there was no examination in the ward at all" (p. 180). The only witnesses who depose to the examination in the car are the defendant and his friend Mr. Nicoll. On that evidence two preliminary observations may be made. The first is that it seems *prima facie* improbable that the plaintiff should in the car conduct an examination of his patients, in an imperfect light, and in difficult circumstances, seeing that they were about to be admitted to the hospital ward, where a full and satisfactory examination would be possible. The second observation is this—that the defendant did not suggest, in is letter of February 13, that an examination by the plaintiff in the car had taken place, and indeed did not suggest it till the interview which he had with the Director of Medical and Sanitary Services on April 7, 1933. It would appear to be an afterthought. However that may be, their Lordships have no hesitation in preferring, in this regard—as the learned trial Judge did—the evidence of the plaintiff, Hassim and De La Harpe to the evidence of the defendant, whom on this point, the trial Judge did not believe, and the evidence of Mr. Nicoll. It may be noted that Hassim and De La Harpe, in examination-in-chief, affirmed in terms that there was no examination of the defendant and his wife by the plaintiff in the car, and that they were not cross-examined on that evidence. If the alleged examination of the defendant and his wife in the car be, not only an afterthought, but an untruth, then that conclusion cuts, in their Lordships' opinion, very deep into the defendant's case.

But there is another and even more significant consideration, and that is the evidence afforded by the bed head tickets. These are

contemporaneous records of the treatment received by the defendant and his wife as inmates of the hospital ward at the hands of the plaintiff. The bed tickets were filled in by the secretary of the hospital, the acting matron, and the plaintiff. There is no suggestion made that these tickets are not *bona fide*, or that they were subsequently tampered with, and they may and indeed must be accepted at their face value. What do they disclose? They disclose, contrary to the defendant's allegation, a course of normal, competent, and careful treatment of the defendant and his wife. They disclose—again contrary to the defendant's allegation—that the plaintiff's diagnosis was—not "no fractures"— but "no signs of fracture"—a very different thing. They disclose—contrary to the defendant's allegation—that the plaintiff visited the defendant and his wife on the morning of January 29 before they left the hospital. In short, it is not too much to say, that, in their Lordship's opinion, the bed head tickets are largely destructive of the defendant's case.

Their Lordships now pass to consider briefly what may be termed the medical aspect of the case. The pivotal charge which the defendant, in the end of the day, made against the plaintiff is that he failed at the time to recommend the defendant and his wife to undergo an X-ray examination. Now their Lordships think it clear that, until an X-ray examination of the defendant and his wife was made in Colombo on February 7—an examination which disclosed fractures in both cases—it had not occurred to the defendant to make any charge against the plaintiff. Indeed his letter to the plaintiff, dated February 1, 1933, which has been already quoted, records marked improvement in the condition of the defendant and his wife, and expresses appreciation of and gratitude for their treatment by the plaintiff and his staff while in hospital. And in evidence the defendant states: "Till the fractures were discovered, I thought that Dr. Sabapathi's examination was an ample one" (p. 42).

In any case, the charge which the Supreme Court has affirmed against the plaintiff, and upon the affirmation of which they regard his negligence and incompetence to be established, was his failure to advise an X-ray examination of the defendant at the time (p. 186, line 36). The proposition affirmed by the Supreme Court would seem to run thus—After a motor car accident, the attending physician must advise resort to a radiologist, and, if he omits to do so, he displays both incompetence and negligence. The proposition is simple in statement, but is not so simple in solution. Their Lordships think that, as stated by the Supreme Court, the proposition is far too wide. An X-ray examination, their Lordships apprehend, must always be a question of circumstances—depending, for example, on the condition of the patient, the character of the injuries, and the accessibility of the apparatus. In this case, the defendant's leading and indeed only medical witness, Dr. de Silva, in his report, dated February 25, 1933, said:—

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

The plaintiff's position in the matter seems to their Lordships to have been clear and consistent throughout. He found, on examination of

his patients, no evidence of fracture. He allowed them to go home, instructing them to let him know how they progressed. Had their pain and other symptoms continued unabated for a week, he would no doubt have advised an X-ray examination. When, however, the plaintiff received a letter from the defendant stating that he and his wife were "much better," it is not surprising that he concluded that the worst was past, or that assuming, as he did, that they were carrying out their avowed intention of going to Europe, he thought no more of the matter. It is not unimportant to observe that no witness adduced for the defendant affirmed in terms that delay for a week, to await developments, before advising an X-ray examination, rather than advising such an examination at once, *per se* constitutes negligence or incompetence on the part of a physician. And yet such is the basis of the judgment of the Supreme Court against the plaintiff.

Their Lordships are in these circumstances clearly of opinion that the defendant's plea of justification fails. That being so, their Lordships are absolved from considering the apparently difficult question of whether according to Roman-Dutch law, which obtains in Ceylon, the defendant's statements were not only true, but were made "for the public benefit". On that question the existing law would appear, from the argument which their Lordships heard, to be far from clear, and on it their Lordships offer no opinion.

It only remains to consider—

(1) whether the occasion on which the defendant penned his letter to the Chairman of the Planters' Association was privileged,

(2) If it was, whether the defendant acted maliciously in the matter,

(3) whether the statements made by the defendant to Dr. Briercliffe, at the interview of April 7, 1933, were made on a privileged occasion, and, if the occasion was privileged, whether the statements were made maliciously.

(1) Agreeing with both Courts below, their Lordships are of opinion that, in the circumstances disclosed in evidence, the occasion was not a privileged one.

(2) Their Lordships are further of opinion—agreeing with the trial Judge—that the defendant was actuated by malice when he wrote the letter in question. He must have known that its terms were false. The finding of the learned Judge of first instance on the question of malice is a finding in fact. The state of a man's mind, as has been said, is as much a fact as the state of his digestion. Their Lordships see no reason for disturbing the finding of the trial Judge on this question of fact.

(3) Their Lordships are of opinion, agreeing with the Supreme Court, that the statements made to Dr. Briercliffe by the defendant, at the interview of April 7, were made on a privileged occasion, but, as already indicated, they are of opinion that they were maliciously made, and are therefore unprotected.

It was admitted by the defendant's Counsel that, in the event of the success of the plaintiff's appeal, he did not desire to dispute the *quantum* of the damages awarded by the trial Judge.

Their Lordships will humbly advise His Majesty that the plaintiff's appeal should be allowed, the judgment and decree of the Supreme Court set aside, and that the judgment of the trial Judge should be restored, with costs here and in the Courts below.

Appeal allowed.