JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 8 OF 1980

BEFORE: THE HONOURABLE MR. JUSTICE CAREY, J.A.
THE HONOURABLE MR. JUSTICE WHITE, J.A.
THE HONOURABLE MR. JUSTICE WRIGHT, J.A. (AG.)

BETWEEN	HOPETON CAVEN	APPELLANT
AND	THE GLEANER COMPANY LIMITED	RESPONDENT

D. M. Muirhead, Q.C., for appellant.
R. H. Williams, Q.C., for respondent.

5th, 6th, 7th July, 1982; 23rd February, 1983

CAREY, J.A.:

On the 15th December, 1974, in an address to the public session of the University and Allied Workers' Union's second congress held at the Mona Campus of the University of the West Indies, Dr. Trevor Munroe, a Lecturer at the University and first Vice-President of that union used words plainly defamatory of the appellant who is himself a well-known trade unionist and General Secretary of a rival trade union - the Trade Union Congress of Jamaica. Liability was admitted at the hearing of the resultant action for slander and damages were assessed by Rowe, J. (as he then was) at $25,000.00. That defamatory speech was reported in the "Daily Gleaner" of the 16th December, 1974, and provoked a writ for libel against the proprietors of that newspaper.

It is convenient at this point to set out the impugned article which as appears in the statement of claim was in this wise:

> "3. On Page 2 of the issue of the said newspaper dated Monday, 16th December, 1974, under the heading 'MUNROE ASSIGNS BLAME' the Defendant falsely and maliciously printed and published or caused to be printed and published of the Plaintiff and of him in the way of his said offices and in relation to his conduct therein the following words:

> " 'Dr. Trevor Munroe in his address to the public session of the University and Allied Union's second congress at Mona, yesterday, said that the December 6 attack on him, was directed by Senator Hopeton Caven, General Secretary of the Trade Union Congress. Dr. Munroe, Vice-President of the Union, said that investigations carried out by his organization since the attack had proven beyond a doubt that Senator Caven had organized the attack, which left him with wounds to his head, back and arms and required 100 stitches. He said that the information which his organization had gathered, because of their non-belief in the sincerity of the Police Investigations, was that the gunmen on bikes were from the Concrete Jungle area in Trench Town and that the Crash Programme workers were picked up at the Ferry Marl Pit and taken to the scene of the U.A.W.U's meeting.
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> 'I have to tell the truth, cost it what it will,' the union's Vice-President and Lecturer in the Department of Government at the University of the West Indies Mona Campus, told some 500 cheering supporters who attended the union's annual congress. 'Whoever wants to bring libel action against me can go ahead. I am prepared to go into any Court to test the claim. It was directed by Senator Hopeton Caven.'
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> He said too that evidence had been found that people were paid and were still being paid.' "

The respondent relied on the statutory defence provided in sec. 9 of the Defamation Act. It pleaded as follows:

> "3. The Defendant says that the words are a fair and accurate report published in the said newspaper of the proceedings at a public meeting within the meaning of Section 9 of the Defamation Act and the Schedule thereto, which said meeting was held by the University and Allied Workers Union at the Dramatic Arts Theatre on the Campus of the University of the West Indies on the 15th day of December, 1974 to which the public was invited. The matter published was of the public concern, and the publication thereof was for the public benefit."

In a well reasoned judgment, Campbell, J., held that the respondent was entitled to the protection of the section and accordingly dismissed the appellant's claim. His judgment was attacked on a number of grounds before us and it is no disrespect to the lucid and persevering submissions of

Mr. Muirhead, Q.C., to observe that these amounted to one principal thrust, and some minor feints. As to the former, it may usefully be summed up in this question: is a court bound to hold that malice is proved where a publisher of defamatory material acknowledges that he had no belief in the truth of the allegations contained in the libellous matter? The minor feints related to the argument that there was some fundamental or, at all events, a substantial difference between common law qualified privilege and its statutory kin (sec. 9) which made it illegitimate to import the common law notion regarding the reciprocity of a moral or legal duty to publish statements and the interest of the public to hear those statements, into considerations of statutory privilege: common law qualified privilege it was pointed out had never been raised in the pleadings. Grounds 3, 6, 7 also fall into this categorization of feints. I set them out to dispose of them summarily hereafter:

> "(3) That the Learned Trial Judge was in error in relying on a case or cases referred to on page 25 of the judgment, namely 'libel actions against the New York Times and an Audubon Society Official' as
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> (a) the case was not cited by either Counsel in submission to the Court;
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> (b) the Learned Trial Judge did not refer Counsel to the cases during the course of the trial;
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> (c) the facts, circumstances and existence or otherwise of domestic laws are unknown to the Appellant/Plaintiff and may undoubtedly have influenced the tribunal in its decision;
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> (d) it was unsafe and unwise to rely on such a scanty reference as cited therein;
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> (e) by so doing the Learned Trial Judge became an advocate in the cause reserved for his adjudication.
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> (6) That the report was of a matter which was unrelated and/or irrelevant to the object of the meeting - Second Annual Congress of the University and Allied

" Workers Union - and accordingly the report under caption 'Munroe Assigns Blame' was not privileged.

(7) That the Learned Trial Judge was in error in holding that the publication was for the public benefit."

I begin, therefore, with the only real point of substance argued before us, which was based on an admission by Mr. Neita, the editor of the newspaper in the course of his testimony, that he did not believe that the appellant was responsible for the assault and battery committed upon Dr. Munroe. This, as the argument ran, was plainly evidence of malice so that the learned judge erred when he decided otherwise. The law is clear that in any action for publishing defamatory matter, it is presumed in the plaintiff's favour, not only that the allegations or imputations are false, but that they were uttered maliciously. In Adams v. Ward [1917] A.C. 309 at p. 318, Lord Finlay, L.C., expressed the view that "malice is a necessary element in an action for libel, but from the mere publication of defamatory matter, malice is implied unless the publication was on what is called a privileged occasion." Where matter is published on a privileged occasion, the presumption of malice is rebutted or displaced by the privilege and the plaintiff is obliged, if he is to succeed in his claim, to prove malice. It lies on the party who would deprive the other party of his privilege to show what the law calls "malice". And by that term, is meant not only spite, but "any indirect motive, other than a sense of duty which is what the law calls 'malice'." per Lord Campbell, C.J., in his charge to the jury in Dickson v. The Earl of Wilton 1 F & F 419 at p. 427. So that the motive of the publisher of defamatory matter is of crucial significance. The onus of proof shifts to the plaintiff and solid evidence must now replace the initial presumption. If the plaintiff can prove that the real motive of the defendant was to expose him to hatred, contempt, or ridicule, and the desire to inform the public of the proceedings, was only a secondary consideration, then malice is proved. Salomon v. Isaac (1869) 20 L.T. 885.

If the test is as I have ventured to suggest, then an enquiry into the relative importance of competing motives cannot, in my judgment, be avoided. The judge must perforce determine which of two or more motives is dominant. Was it from a sense of duty or to expose the plaintiff to public odium, that the publication was made?

It was contended by Mr. Muirhead that the question of competing motives could only arise where the defendant had a positive belief in the truth of the allegations. But with respect, I can see no judicial warrant for such a view. It is perfectly true that in Horrocks v. Lowe [1974] 1 All E.R. 662 in which the question of the motives for publication of defamatory matter was canvassed, there was a finding that the defendant had a positive belief in the truth of the allegations. The question which fell to be decided in their Lordships House, was whether a finding that a plaintiff was prejudiced against the defendant, and irrational in jumping to conclusions unfavourable to the plaintiff,must lead inexorably to the conclusion that malice was proved. It was held (and I extract this from the head-note) that:

> "Although gross and unreasoning prejudice could give rise to an inference of malice where it constituted evidence that the defendant had been indifferent to the truth or falsity of what he said, it could not do so in a case when it had induced him to believe in the truth of his allegations and there were no other circumstances from which malice could be inferred."

Lord Diplock at p. 669 said this:

> "So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved.
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> 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for

> "the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests."

These words, in my respectful view, plainly are of general application in circumstances where the court is called upon to consider malice. Nothing expressed in that citation limits the quest for a dominant motive solely to a case where the plaintiff believes in the truth of the allegations.

There are several methods of endeavouring to establish malice, but they fall into two main categories, extrinsic evidence and intrinsic evidence. The appellant in giving the particulars of malice pleaded by way of reply as follows:

> "4. Further or alternatively, in publishing the words set out in paragraph 3 of the Statement of Claim the Defendant was actuated by malice.
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> PARTICULARS OF MALICE
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> (i) At the date of publication of the said words the Defendant knew or ought to have known that the subject matter of the said words, to wit, an alleged attack by several persons on Dr. Trevor Munroe in the dock area of Newport West, Saint Andrew on or about 6th December, 1974, was the subject of intensive police investigations.
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> (ii) In publishing the said words the Defendant did so with the intention of influencing the said police investigations.
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> (iii) In publishing the said words the real motive of the Defendant was to expose the Plaintiff to hatred ridicule or contempt.
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> (iv) The Defendant published the said words recklessly not caring whether they were true or false and/or without any honest belief in their truth."

These particulars fall into the first category but learned counsel neither below nor in this court founded any argument on the existence of facts which verified them. He attacked the judgment squarely, as I have earlier remarked, upon the editor's belief in the falsity of the statements contained in the libel. It was Brett, L.J., in Clarke v. Molyneux (1877) 3 Q.B.D. 237 at p. 247 who said:

> "If a man is proved to have stated that which he knew to be false,no one need enquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive."

This dicta was the foundation of learned counsel's submissions, that knowledge of the falsity equals malice. But the learned Lord Justice did not assert that knowledge of the falsity of the allegations contained in the libel, meant that a finding of malice was automatic and inevitable. The use of the word "assumes", I suggest, makes that plain. But if there was any room for doubt, I am of opinion that the law is accurately stated in the judgment of Kelly, C.B., in Botherill v. Whytehead (1879) 41 L.T. 588 at p. 590 where he said this:

> "Now there is no subject in the law involving greater difficulties than this question of express malice. It was argued at the bar that, if a man be informed of something to the prejudice of another, and which is injurious to his character, if true, and if he bona fide believe in that information, that such his belief negatives express malice. I am clearly of opinion that if a man should receive information which is injurious, if true, to the character of another, he is not justified in publishing that information to the prejudice of him to whom it relates, merely because he believes it to be true. He may believe it to be true and will be guilty of malice if he publish it to the world; and he may believe it to be untrue and yet may be perfectly justified in publishing it to persons with whom he is in communication, and with whom it may be his duty to communicate freely on the subject of the information he has received." [Emphasis supplied]

It seems to me therefore, beyond dispute, that in point of law a belief in the falsity, or for that matter, the truth of the allegations contained in the defamatory matter, is not decisive of the question of malice vel non where the occasion is one of privilege. What is to be borne in mind is that the occasion of qualified privilege, is not to be used for a purpose other than that which is relevant to the occasion.

> "It is obviously right that a person should not be allowed to abuse the occasion by making it the opportunity of indulging in some private spite or for using the occasion for some indirect motive." per Bankes, L.J., in Gerhold v. Baker [1918] W.N. 368 at p. 369.

The occasions will be rare when an admission is made that defamatory matter is published although the publisher is aware of the falsity of the allegations and perhaps even more rare where evidence is produced to show the reason or motive which nevertheless prompted the publication thereof. Lord Diplock in Horrocks v. Lowe (supra) regarded this sort of case as "exceptional" (see p. 669 letters e - f). The search for the motive for publication is a question of fact and must be determined by a consideration of the particular facts and circumstances of the case. In the present case the learned judge found as follows: (at p. 88 of the Record)

> "In the present case we are dealing with an exceptional case where the defendant actuated by the paramount and predominant motive of giving information to the public in discharge of a duty at least moral, has passed on without endorsing a defamatory report made by Dr. Munroe."

This is a finding of fact, entitled to our respect, arrived at, on a proper consideration of the facts and circumstances of the case. In my judgment, it is not the law that an admission by a publisher of defamatory matter that he does not believe in the truth or knows of the falsity of allegations, necessarily is conclusive evidence of malice.

The point remaining for consideration in this connection focuses the alternative arguments deployed by Mr. Muirhead viz: that the facts of the case did not bring it within Lord Diplock's classification of "exceptional". By that is meant, those cases, where there is a duty to publish although a belief that the allegations are false, exists. There is, it may be noted, a marked dearth of learning on this aspect of the law. What are the occasions in which it is the duty of a defendant to publish irrespective of his personal belief in the truth or falsity of the allegations contained in the defamatory material? And, perhaps more importantly, do the facts of the instant case come within this classification? The sort of case which appear from the books to exemplify this classification, are cases where the character of an employee may be in question. See

Gatley on Libel & Slander (7th edition) para. 554 where the learned editor refers to the unreported case of Vanbergen v. Bosshard and suggests that one partner would have an interest in communicating to another a rumour about an employee, even if he knew it to be false. Stuart v. Bell (1891) 2 Q.B. 341 is also illustrative of this classification. The material facts of the care are succinctly set out in the headnote as follows:

> "In an action for slander it appeared that the plaintiff was a valet, and while he and his master were staying at Newcastle as the guests of the defendant, who was a magistrate and the mayor of the town, the chief constable of Newcastle shewed the defendant's letter which he had received from the Edinburgh police, stating that the plaintiff was suspected of having committed a theft at a hotel in Edinburgh which he had recently left and suggesting that a cautious inquiry should be made with the view of discovering whether the plaintiff was in possession of the property. The defendant did not make any inquiry, but just before the plaintiff and his master left Newcastle, he told the plaintiff's master privately that there had been a theft at the hotel and that suspicion had fallen on the plaintiff; and some days afterwards the plaintiff's master dismissed him from his employment upon the ground that he had been suspected of dishonesty:-
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> Held by Lindley and Kay, L.JJ. (Lopes, L.J. dissenting), that the occasion of the communication was privileged, and that, in the absence of evidence of malice, the defendant was not liable."

But I do not think that the duty to communicate arises only in these circumstances, although it would be true to say that the inference is more easily drawn then, that the publisher is acting in a disinterested manner rather than from any improper motive. Lord Diplock's view that such cases are exceptional, cannot, with respect, be faulted. The argument was advanced by Mr. Muirhead that such a duty could never rest on the editor of a newspaper because the "exceptional cases", could only exist where common law qualified privilege was the defence. The considerations in relation to qualified privilege he urged are altogether different from those as respects statutory privilege (sec. 9 Defamation Act).

A newspaper, it has been said, has no greater privilege than any natural person. So, it or its editor is

entitled to invoke any defence that is open to a natural person. As I observed in Gleaner Co. Ltd. v. Small [SCCA 65/79 - unreported - dated October 2, 1981]:

> "There must be a duty to publish and a corresponding interest so as to create an occasion of qualified privilege. The privilege depends not on any assumed duty or responsibility of the press to advise the public but on whether the subject matter is such that the public should be so informed."

So in this case, the question which arises is whether there was a duty to publish the defamatory matter, and whether the public at large were entitled to know of it. Was it in the general interest of society or for the common convenience and welfare of society? Both from the point of view of the subject-matter and the personalities involved, it was eminently right that the matter should be published. The subject-matter related to the alleged conduct of a high trade union leader and criticisms of that conduct by another equally highly placed union leader. The editor of the Gleaner made no comment on the report but published what was said in the address. It is worth pointing out that the advertisement of this public session appeared in the "Daily Gleaner" newspaper and in bold capitals trumpeted the theme of the conference - "The Working Class Must Rule" - "Down with Capitalism". The weal of the workers was the centripetal force of the conference. The spur to this influence for good, had been physically attacked and injured. The report of that attack was the subject not only of national condemnation, but was reported and discussed in the press and on radio. It was a matter in which the public was plainly interested. The perpetrator of that grievous crime ought to be unmasked, and his identity made known to the public. The victim of the offence, it is not unreasonable to believe, ought to be in a good position to testify to the identity of the wrongdoer. The editor of a newspaper which carried the report of the attack on Dr. Munroe, the comments and condemnations of the attack, the advertisement of the second congress, had a duty to publish

that Dr. Munroe had named his attacker. The learned judge thought that the editor had at least a moral duty to publish although from his personal relationship with the party accused, he did not believe the allegation to be true. When the matter is of such national importance, the duty to publish altogether outweighs the fact of one man's personal belief in its falsity.

The above is sufficient, as well, in my view, to dispose of grounds 6 and 7 which appear earlier in this judgment, viz., that the report was of a matter unrelated or irrelevant to the meeting and that the publication was not for the public benefit.

It is necessary to make it as clear as possible, that malice which will defeat qualified privilege undergoes no change when applied to statutory privilege. Sec. 9 (1) of the Defamation Act states (so far as is material) as follows:

> ".... subject to the provisions of this section the publication in a newspaper of any such report .... as is mentioned in the schedule shall be privileged, unless the publication is proved to be made with malice."

The act does not provide a definition of "malice". But I do not think it has ever been doubted that the reference to malice is to be understood as some improper motive. Malice has been the subject of much judicial gloss over the years and it is not to be supposed that the legislature was unaware of that meaning when it included that term in the Act. The same considerations and principles, in my judgment, are therefore applicable to malice irrespective of the specie of qualified privilege i.e. whether it be at common law or by statute which must be rebutted by that malice.

I had earlier in this judgment mentioned one of the submissions advanced by Mr. Muirhead, viz., that the learned judge was in error in finding that the respondent was under a duty "at least moral" in publishing the defamatory matter and accordingly was not guilty of malice because the question of duty legal, social or moral was not raised in the pleadings. The short riposte to this submission is that the privilege created by sec. 9 is an extension of qualified privilege at

common law to newspapers. Part III, paragraph 2 of the schedule provides as follows:

> "A fair and accurate report of the proceedings at any public meeting held in this island, that is to say a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern whether admission to the meeting is general or restricted."

Since in construing a statute it is not permissible to pray in aid marginal notes, the intention of the lawgiver, must be determined by looking at the words of the provision, viz. sec. 9 (1) which enacts as follows:-

> "Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the schedule shall be privileged, unless the publication is proved to be made with malice."

Since malice defeats the privilege, then, we are dealing with qualified privilege. In the law of defamation, the general principle which underlies privilege whether absolute or qualified, is the "common convenience and welfare of society." In order to obtain the protection of the section, the matter published must be of public concern and for the public benefit. See Sec. 9 (3) which states:

> "Nothing in this section shall be construed as protecting the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit."

So there is a real correlation between the duty to publish and the interest to be informed. The editor's duty is plainly not a legal duty, no statute obliges him to publish; it is a duty shared with any other person and is thus social or moral. It is expected that a right-thinking member of society would from a sense of moral or social duty inform other members of society on matters of importance which affect the welfare of society, and right-thinking members of society correspondingly would wish to be informed on such matters.

In my view, the defence of qualified privilege has by sec. 9 been statutorily extended to newspaper reports but removes from its purview reports of matters illegal or trivial

which rightly remain, unprotected. I would hold that a judge when considering qualified privilege whether at common law or by statute is concerned with the duty to publish and the reciprocal interest to receive that information and that duty may be legal, social, or moral. The contention of Mr. Muirhead as to any significant distinction is plainly ubreal and explains my reason for describing it as a minor feint.

I now pass to the ground critical of the learned judge's reference to Edward & Ors. v. National Audubon Society, Inc. & Ors. 556 F 2 d 113 (1977). The inclusion of this case in his judgment which I would have thought, a tribute to the learned judge's industry and research skills, cannot fairly be said to be a breach of natural justice, in that counsel was not heard on it. It is right to set out how the judge dealt with the case. He quoted the words of Chief Judge Kaufman at p. 120:

> "If we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith that his report accurately conveys the charges made."

I understood that to mean that a reporter acting without malice is entitled to publish an accurate account of what he hears. That approach Campbell, J., said is in keeping with the spirit of sec. 9 of the Defamation Act. He then points to that portion of Lord Diplock's speech in Horrocks v. Lowe where he discusses the motive with which defamatory matter is published (see p. 660 et seq.) and observes that the citation from the speech sounded "no discordant note." I think, myself, that the learned judge was perhaps guilty of an inversion of reasoning. But it is plain he was not relying on any dicta from the U.S. case to make the point that the dominant motive of the publisher was crucial. Unless an authority is being prayed in aid by a judge to support some view of the law not canvassed at the hearing, I can see no objection to its inclusion in his eventual judgment. In this case, it is as clear as can be, that

the learned judge founded the ratio of his judgment on Horrocks v. Lowe which was, of course, cited to him, for he said:

> "In the present case we are dealing with an exceptional case where the defendant actuated by the paramount and predominant motive of giving information to the public in discharge of a duty at least moral has passed on without endorsing a defamatory report made by Dr. Munroe. Its knowledge of the falsity of the report is not evidence of malice and as the plaintiff has failed totally to establish any improper or indirect motive for the publication, he has failed to establish malice in the defendant."

That feint is wholly unsuccessful.

Accordingly, I am of opinion that there is no merit in the appeal and it should be dismissed with costs both here and below, to the respondent.

WHITE, J.A.:

By their defence to this action for libel brought by Hopeton Caven, the appellant, the defendants pleaded the protection provided by section 9 of the Defamation Act and the Schedule thereto. Section 9 subsection (1) of the Defamation Act accords qualified privilege to the publication in a newspaper of any such report or other matter as is mentioned in the Schedule .... unless the publication is proved to be made without malice. That Schedule protects by qualified privilege "A fair and accurate report of the proceedings of any public meeting held in this island, that is to say, a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern whether the admission to the meeting is general or restricted."

This appeal brings into focus the terms of that Act in so far as the defendants were held to have been thereby protected, and so not liable to the appellant for libel, which was grounded on the publication in "The Daily Gleaner" of the 16th December, 1974, of certain remarks made by Dr. Trevor Munroe, on the 15th December, 1974, when he addressed the public session of the Second Congress of the University and Allied Workers Union. Those remarks were reported under the headline "MUNROE ASSIGNS BLAME." As recorded, Dr. Munroe's assignment of blame was not only general, but more relevantly, specific in that he made a direct accusation that a physical attack on him, which left him with serious wounds to his head, back and arms, was directed by the appellant. It is not necessary to repeat in toto the whole newspaper article; it is sufficient to quote the direct reference: "Whoever wants to bring libel action against me go ahead. I am prepared to go into any Court to test the claim. It was directed by Senator Hopeton Caven." For those defamatory words the appellant recovered damages against Dr. Munroe in a separate action.

By his statement of claim in the present action, the appellant averred that not only did the defendants publish

those words falsely and maliciously of him, but the defendants thereby meant to convey that he had committed a criminal offence. The words were also calculated to disparage the appellant who was, and is, an eminent public figure by virtue of his being the General Secretary of the Trade Union Congress of Jamaica, a registered Trade Union under the laws of Jamaica. As a trade unionist, he was, from time to time, an accredited trade union representative from Jamaica to the annual convention of the International Labour Organization held in Geneva, Switzerland. In addition, at the material time he was a Senator in the Senate of the Parliament of Jamaica.

On this appeal the plaintiff, through his counsel, sought vigorously and with pertinacity to pursuade this Court to set aside the judgment of Campbell, J., in favour of the defendants. The affirmative findings in favour of the respondents have been subjected to much criticism by Mr. Muirhead, who appeared for the appellant. He raised questions regarding the ambit of the judgment, which of necessity gave serious and detailed consideration to the complaints of the appellant, as well as to the pleaded defence. Not only did the respondents deny in paragraph 2 of the defence that they published the words falsely or maliciously of the plaintiff, but by paragraph 3 thereof it was pleaded:

> "The defendant says that the words are a fair and accurate report published in the said newspaper of the proceedings of a public meeting within the meaning of s. 9 of the Defamation Act and the Schedule thereto, which said meeting was held by the University and Allied Workers Union at the Dramatic Arts Theatre on the Campus of the University of the West Indies on the 15th day of December 1974 to which the public was invited. The matter published was of public concern and the publication thereof was for the public benefit."

The judge's finding that the meeting was a public meeting was not disputed at the hearing of the appeal. Despite this, it should be noted for background that the proceedings of the Second Congress had been advertised in "The Daily Gleaner" of December 14, 1974. It would be in two

parts - a private session, to which only members of the Union would be admitted; and the public session, to which "All Invited." The public session lasted for about four hours. There were present not only members of the public, but representatives of the press, as well as delegates from like organizations abroad. The published account of this meeting in "The Daily Gleaner" was derived from the notes of one of their reporters, Mr. Balfour Henry, who gave evidence at the trial.

Mr. Muirhead pressed his arguments questioning those parts of the judgment which found that the report was fair and accurate, was for the public interest, and of public concern, even without malice. Firstly, in impugning the judgment, Mr. Muirhead contended that the learned trial judge imported into his determination considerations which were not applicable where the defence relies solely on the statutory defence and where no common law defence is pleaded. He said that as there was no contest over the defamatory nature of the words used, the defendants must succeed or fail solely on the statutory defence as pleaded. I do not propose to follow the order in which the grounds of appeal are stated. Instead; I will deal with the questions which plainly arise on the grounds, in the following order: (a) whether the publication was a fair and accurate report? (b) whether the publication was for the public benefit? (c) whether the report was on a matter of public concern? (d) whether there was malice?

(a) <u>Whether the report as published was fair and accurate</u>?

This question was raised by ground 5 of the grounds of appeal. Here, the gravamen of the complaint is that the statute does not entitle the publication of matters irrelevant to the object of the meeting. And if any such irrelevant matters are published such publication would constitute malice on the part of the newspaper. In this regard, it is worthwhile to bear in mind apposite remarks by the Law Lords in the case

of Adam v. Ward [1917] A.C. 309, particularly those by Lord Loreburn at pages 320, 321:

> "But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected. To say that foreign matter will not be protected is another way of saying the same thing. The facts of different cases vary infinitely, and I do not think the principle can be put more definitely than by saying that the judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane, and reasonably appropriate to the occasion, or has given to it a publicity incommensurate to the occasion. For a man ought not to be protected if he publishes what is in fact untrue of some one else when there is no occasion for his doing so, or when there is no occasion for his publishing it to the persons to whom he does in fact publish it."

These remarks were made in a case where a letter was written under official aegis, and it was sought to show that irrelevant matter was introduced, and that this deprived the communication of any qualified privilege attending such a letter. Although this case was not cited in argument, it is only mentioned here to indicate by quotation a useful guide to the ascertainment of what is irrelevant matter.

Pursuing his argument about the publication of matters irrelevant to the purpose of the meeting, Mr. Muirhead submitted further that the only thing published about the meeting in this particular issue of "The Daily Gleaner" was the statement by Dr. Munroe of the attack on him, although the meeting dealt with wide ranging issues. The reference to the "Caven attack," he said, was irrelevant to the purpose for which the meeting was called, viz., to explain the policies and programmes of the Union. Indeed, on his argument, to gain the protection of the statute what is reported by the newspaper must relate to the object of the meeting, and must be much more than the opinion of someone and from his own knowledge, and not from what he was told.

At this stage I will rehearse the appellant's evidence regarding the activities of Dr. Munroe. He said that Dr. Munroe had become "well-known for trade union activities which he started in 1972, by organizing the hourly paid workers at U.W.I., the U.A.W.U. having been formed in 1972." He added, according to the judge's notes, "Prior to incident at the Port of Kingston "(where and when Dr. Munroe had been assaulted) I do not know if "Dr. Munroe's trade union activities were confined to U.W.I. "As far as I knew the incident at the Port was the first trade "union activity of Dr. Munroe outside U.W.I. I had heard that "Dr. Munroe was trying to recruit workers among the Port-workers. "I understand he was trying to organise the Port Workers during "strike, his activities in attempting to organise workers were "only widely publicised after attack on him on the 6th December, "as far as I know."

This understanding was in the context that at the time of the assault on Dr. Munroe, the portworkers were on strike in support of their demand for a refund of interest accrued on their superannuation scheme contributions. The estabished and accredited unions had advised the workers that their claim could not be maintained under the scheme. According to the appellant, when he attempted to address the workers at a joint union meeting of the entire body of workers, "I did not get a chance "as they said we were not telling them the truth, and that the "Doctor at the U.W.I. had told them that they were entitled to "receive interest. They identified the Doctor as Dr. Trevor "Munroe. The meeting was aborted." If this was the pervading atmosphere on the 6th December, 1974, it is inconceivable that in making his report on the work of the union, Dr. Munroe would have failed to deal with the incident. This would not be irrelevant to the purpose for which the meeting was called. Such a report would necessarily review the past year's activities and would, in my view, fall within the lawful purpose of such a meeting which was to explain the policies and programmes of the union. It goes without saying that part of

those policies and programmes would be the efforts at recruiting new members to the union, and certainly the results of those efforts would be conveyed to the meeting. There could therefore be here no irrelevancy to the object of the meeting.

Mr. Muirhead's arguments about this encompassed the failure of the respondents to publish other aspects of the meeting, at the same time as publication of the defamatory matter. He seemed to be arguing that this omission made the report misleading. But the associated surroundings and events had no greater importance than the offending passage which itself was more immediately newsworthy, according to Mr. Balfour Henry. He made notes of the speech in longhand, and when he gave his evidence he maintained that the article into which his report was fashioned was fair and accurate. What he wrote in the article was an excerpt from the speech. In my view, the fact that other things which Dr. Munroe had said were not reported does not vitiate the assertion of the report being fair and accurate.

It is to be observed that each of the types of publications referred to in Part II and Part III of the Schedule to the Defamation Act is introduced by the phrase "A fair and accurate report." In each case, it is conceived, that phrase must bear the same connotation. In my opinion, a useful pointer is how that phrase has been judicially developed in relation to reports of judicial proceedings and parliamentary proceedings. From as early as 1825 Littledale, J., opined that the plea that the supposed libel was in substance a true account and report of the trial was a proper plea. "I do not mean to say that it "is necessary that the supposed libel should contain every word "uttered at the trial or that unnecessary matter may not be "omitted." Flint v. Pike (1825) 4 B & C 473.

The tenor of the judgment in the case of Hoare v. Silverlocke (1850) 9 C.B. 20; 19 L.J. C.P. 215; 137 E.R., 798, was that it is a good defence to an action for a libel that it consists of a fair and impartial, though not verbatim report of a trial in a court of justice, and such defence is admissible

under not guilty which puts in issue as well, the lawfulness of the occasion of the publication as the tendency of the alleged libel. In the case of Weaver v. Smith (1851) 16 L.J.O.S. 512, the opinion of the court was that "A fair account of proceedings "in a court of law is not a libel even although it may reflect "upon the character of a person implicated in them. It is not "necessary for this purpose that the report should be a report of "all that took place, provided it be a fair and not garbled "account of the proceedings, and the onus of proof of this is on "the defendant. It is a question for the jury whether the "report was or was not, a fair one, and if satisfied that it was "a fair one defendant is entitled to a verdict." Andrews v. Chapman (1853) 3 Car & Kir 286; 21 L.J. O.S. 108, N.P. contains the expression of the same point of view stressing that it is not essential that every word of the evidence, of the speeches, and what was said by the judge should be inserted, if the report is substantially a fair and correct report of what took place in a court of justice. The case of Turner v. Sullivan (1862) 6 L.J. 130, recognised the right of a newspaper to publish either a verbatim or an abridged and condensed report of what passes in a court of justice, even reflections there made cast upon parties by counsel or otherwise. But it must be done fairly and honourably, so as to convey a just impression of what has passed there. Whether it is such a fair report is not a question of law for the judge, but a question of fact for the opinion of the jury.

In his judgment in MacDougall v. Knight (1890) 25 Q.B.D.1, Lord Esher, M.R., expressed himself in these words:

> "The rule of law is that the publication without malice of an accurate report of what has been said or done in a judicial proceeding in a court of justice, is a privileged publication, although what is said or done would, but for the privilege, be libellous against an individual, and actionable at his suit, and this is true although what is published purports to be and is a report, not of the whole judicial proceedings, but only of a separate part of it, if the report of that part is an accurate report thereof and published without malice."

Importantly, Lord Esher put the ground of the privilege thus:

> "That the publication of what took place is merely a means of putting those who were not present in court in the position of those who were."

Here Lord Esher, M.R., was in effect echoing the judgment of Cockburn, C.J., in Wason v. Walter (1868) L.R. 4 Q.B. 73 at pp. 87 - 88. The headnote reads:

> " A faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question. But the publication is privileged on the same principle as an accurate report of proceedings in a court of justice is privileged, viz., that the advantage of publicity to the community at large outweights any private injury resulting from the publication. "

In his judgment he said this:

> "It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.
>
> "The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual malice, is meant, while by legal malice, is meant as explained by Bayley, J., in Bromage v. Prosser; no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise, 'The rule,' says Lord Campbell, C.J., in the case of Taylor v. Hawkins, 'is that, if the occasion be such as repels the the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice.'
>
> "It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged.

> "The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is given by Lawrence, J. in Rex v. Wright, namely, that 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage of the country in having these proceedings made public, more than counterbalances the inconvenience to the private personswhose conduct may be the shbject of such proceedings.' In Davidson v. Duncan, Lord Campbell says, 'A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconveniences, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity.'
>
> And Wightman, J., says - 'The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great.' "

The foregoing discussions was intended to show that even before the Law of Libel Amendment Act, 1888, the courts had set the standard of "A fair and accurate report," for judging the publication by newspapers of defamatory words, albeit where those words were used in courts of justice and in Parliament. The Defamation Act contains similar provisions to those of the English Defamation Act 1952. This Act of 1952 by section 7, replaced section 4 of the Law of Libel Amendment Act. I quote from Halsburys Statutes of England Vol. 9, "In conjunction "with the Schedule, the section restates the rules as to the "special qualified privilege of newspaper reports, broadening 'the privilege in two ways, viz., by making it available to all 'periodicals, published at not more than intervals of thirty-six

"days i.e. to monthlies and fortnightlies, and by extending "considerably the classes of reports capable of attracting "privilege." All this in my view, shows that Mr. Muirhead's submission that a reliance on cases dealing with reports of judicial proceedings is not supportive of cases dealing with reports of public meetings, is misconceived. According to the submission, the law presupposes that what takes place in the courts of the land are matters which the public have to know, and are treated in the same way as matters which take place in parliament. Reports of both these proceedings are privileged he said.

It is my view that the distinction between the absolute privilege for defamatory words spoken in parliament or the courts and the qualified privilege for the newspaper reports thereof, must be kept in mind. This distinction was stressed by Lord Denning, M.R., in his judgment in Cook v. Alexander [1973] 3 All E.R. 1037. At p.1041 of the report he says:

> "Ever since Wason v. Walter it has been settled that, in a report of proceedings in Parliament, there is a privilege - a qualified privilege - in the reporter. If his report is fair and honest, then he is not liable to an action. It may be that a speaker in the debate got his facts entirely wrong or was actuated by the most express malice; nevertheless, the reporter is entitled to report what he said. Neither the reporter nor the newspaper is liable as long as the report was fair and the reporter himself was not actuated by malice."

The case of Cook v. Alexander is a mordern example of the compass of the descriptive phrase "a fair and accurate report." The Court of Appeal (Lord Denning, M.R., Buckley and Lawton, L.JJ.) was there dealing with complaints about a parliamentary sketch of a debate in the House of Lords. The sketch consisted of a selective report of part of the proceedings.

The learned Lords Justices were unanimous that the sketch was privileged if it was a fair and honest presentation of what took place. Each judge specifically upheld the right of the reporter to select any part of the proceedings which he considers is a matter of public interest. Thus in the words of Lord Denning, M.R., at p. 1042:

> "When making a sketch, a reporter does not summarize all the speeches. He selects a part of the debate which appears to him to be of special public interest and then describes it and the impact which it made on the House. I think a Parliamentary sketch is privileged if it is made fairly and honestly with the intention of giving an impression of the impact made on the hearers. In these days the debates in Parliament take so long that no newspaper could possibly report the debates in full, nor give the names of all the speakers, nor even summarize the main speeches. When a debate covers a particular subject-matter, there are often some aspects which are of greater public interest than others. If the reporter is to give the public any impression at all of the proceedings, he must be allowed to be selective and to cover those matters only which appear to be of particular public interest. Even then, he need not report it verbatim, word for word or letter by letter. It is sufficient if it is a fair presentation of what took place so as to convey to the readers the impression which the debate itself would have made on a hearer ..... Even if it is defamatory of some one, it is privileged, because the public interest in the debate counterbalances the private interest in the individual. ...."

> "Such a sketch, which gives the impression on the hearer, so long as it is fairly done, seems to me to be the subject of privilege - qualified - for which the reporter is protected unless he is actuated by malice."

In the view of Buckley, L.J., the Parliamentary sketch "being a selective report concentrating on one particular aspect of the debate to which it relates, is not so tendentious or otherwise so slanted as to make it a distorted report of the part of the proceedings to which it relates." In his judgment -

> "The reporter or editor of the newspaper in which the report appears, as the case may be, is entitled in my judgment to select some part or parts of the debate or proceedings which he considers to be of particular public importance or otherwise likely to be of particular interest to the public - not on scandalous grounds or other unworthy grounds that the subject-matter is of genuine public interest; and he is I think entitled to report on the proceedings or that part of it which he selects in a manner which fairly and faithfully gives an impression of the events reported and will convey to the reader what he himself would have appreciated had he been present during the proceedings."

Lawtom, L.J., envisioned a reporter who "must behave like a fair and reasonable man," who has to decide

for himself what is the memorable feature of the debate or proceedings. With this character in mind, he examined the basis for the qualified privilege which newspapers have in reporting Parliamentary debates; where such reports repeats defamatory statements which have been made in Parliament.

> "The law has decided that in the public interest the repeating of such defamatory statements may be allowed provided that the newspaper carrying the report has been neither unfair nor inaccurate. What then is meant by 'unfair'? That is the sole question in this case. No question has arisen about the accuracy of the defendant's report. 'Unfair' must mean unbalanced, as Mr. Cook said. It is important to remember, however, that the balance must be in relation to the plaintiff's reputation. The plaintiff is bringing the action. He is saying that the Parliamentary sketch was defamatory - and I use the usual words of the pleader - of and concerning him. The Parliamentary sketch may be unfair to the government: it may be unfair to the opposition: it may be unfair to the speaker. But that is irrelevant for the purpose of an action for defamation in which the sole question is, was it unfair to the plaintiff?"

It is fair to say that no complaint has been made about the accuracy in the reporting of the remarks of Dr. Munroe. The learned trial judge having considered the evidence before him came to the conclusion that "as a fact the publication under the "caption 'Munroe Assigns Blame' was a fair and accurate report of "the speech of Dr. Munroe which speech constituted an integral "part of the proceedings at the public meeting." I cannot dissent from this finding. I need not rehearse the evidence upon which the learned judge place reliance; suffice it to say that the remarks as reported were not given such disproportionate and predominant publicity, as to make it unfair to the appellant. The questions which implicitly arose were: Was the report impartial? Was it garbled by being condensed? As a matter of fact, the material accusatory remarks were put in quotes in the article and it was merely reported without any comment as a newsworthy item. it could not be said to have been so coloured as to misrepresent what Dr. Munroe had said. Mr. Balfour Henry described the offending newspaper report as "a fair report of what Dr. Munroe had said "about the matter contained in the report. It is an accurate "report of what Dr. Munroe had said." According to him he picked

out what he considered important "as being current, namely, the "question of who wounded him. .... I said the question of who "wounded him i.e. the attack, was the biggest news, it was very "important and was published by the media and the organizations "wrote about it." He was here alluding to the spate of sympathetic condemnation of the assault publicly express by various personages and organizations e.g. the Prime Minister, politicians of both parties, trade unions and their leaders, including the plaintiff's own union, journalists who wrote for the newspapers or broadcast over the electronic media. So that these several protestations had awakened in the mind of the public a heightened desire that the perpetrators be brought to justice.

This brings me to a consideration of (b) <u>whether the report was a matter of public concern</u> which is closely allied to (c) <u>whether the publication of the speech was for the public benefit.?</u> I can do no better than quote the opinion of Campbell, J., on this:

> "Discussions on impediments or obstacles in the way of Trade Union activities including attacks on its accredited leader in their campaign to enrol members are as much matters of public concern as the delivery of the keynote addresses and the enunciation of policies, programmes and strategies at meetings convened by Trade Unions. In the case here being considered the attack on Dr. Trevor Munroe was not in relation to some purely domestic matter; it was an attack on him in his capacity as Vice President of the U.A.W.U., lawfully engaged in a membership drive for his Union. The physical attack on him was a matter of public concern. Indeed the spontaneous, intense and widespread condemnation by the public of the attack is testimony enough that the matter was viewed by the public as of grave concern to them. A maximum police investigation had been mounted so that the person or persons responsible for the attack would be brought to justice. It would be taking a very narrow and oblique view of 'public concern' to say that while the public expressed concern about the attack on Dr. Munroe they would not be concerned to know who the attacker was so that he could be dealt with according to law.
>
> "Viewed in this manner the answer to the question whether the publication of the speech was a publication on a matter of public concern must be answered in the affirmative. It was a continuation so to speak of the debate and the commentary which had preoccupied

> "the public since December 1974, on which debates and commentaries the defendant had fully informed the public up to and including the publication which landed it in Court."

I endorse these remarks, despite the submissions of Mr. Muirhead that they are not valid. It is true that Gatley on Libel and Slander (7th edition) stated in paragraph 676 at p. 286:

> "It is not sufficient that the meeting should be for the public benefit, and the proceedings and speeches, on the whole, also for the public benefit. It must be proved that the publication of the actual words complained of was for the public benefit."

And the dictum of Manisty, J., in his judgment in Pankhurst v. Slower (1887) 3 T.L.R. 193 at p. 196 was projected by Mr. Muirhead as the standard:

> "The Statute only gives protection under certain conditions, one of which is that the publication of the matter complained of shall be for the public benefit. That is the most important condition. It was never intended that an editor might publish a report of anything said, however defamatory and however irrelevant to the subject of the meeting. Editors, no doubt, are under great difficulties, but they must take care not to publish foul accusations against individuals entirely irrelevant and introduced only for the purpose of libelling them ... it was never intended that such irrelevant attacks should be published, nor can the publication be for the public benefit."

Huddleston, B., in Kelly v. O'Malley (1889) 6 T.L.R. at p. 64 was as forthright in his opinion:

> "If a newspaper chooses to publish defamatory matter about anybody, though uttered at a public meeting, but which has nothing to do with the objects of the meeting, then it cannot shield itself behing ..... the Act."

These quotations must not be regarded as more than cautionary words regarding the necessity for editors to observe the duty of editing the whole paper. In fact, the above quotations have to be carefully applied in the light of the facts in the respective cases cited to us. In Ponsford v. Financial Times Ltd. & Hart (1900) 16 T.L.R. 248, the factual background was that a defamatory remark about a dismissed employee of a company was made at a shareholders' meeting. Matthews, J., pointed out that the chairman in his reference to the plaintiff was not discussing the matters in which the public were interested. "It seems to

"me that the report of any statement made at the meeting in "question which was strictly confined to the discussion of the "company's financial position would have been privileged, but it "does not follow that a report of all that was said in the course "of a speech on the affairs of a company would be appreciated. In Kelly v. O'Malley the newspaper reported in satirical vein the ipsissima verba of the interruptions of the speaker by persons who, by their heckling, suggested he had been fraudulent in the management of the affairs of a workman's society. The meeting had been called to discuss the abolition of sugar bounties. In his directions to the jury, Huddleston, B., used the words quoted above. Both these cases were concerned with the applicability of the Law of Libel Amendment Act 1888 to the facts of each case, for which purpose the jury were asked to give their verdict.

On the other hand, Sherman, J., sitting as a jury in Sharman v. Merritt & Hatcher Ltd. (1916) 32 T.L.R. 360, decided that the publication in that case was for the public benefit. What was there complained of was the newspaper's publication of a report of a committee of a local authority as it appeared on the agenda paper for a meeting of that local authority. The committee had expressed itself as not being satisfied with the way in which the plaintiff had carried out his duties and had recommendedtthat notice be given to him to terminate his services. The report alleged that he did not possess the proper qualifications for the performance of his duties. Although the report of this committee was not discussed at the meeting nor was it read in public, according to the usual custom,it was adopted. Sherman, J., held that the publication was for the public benefit. Not only was it a fair and accurate report of what took place at the meeting, but as it was matter relating to the manager of a public cemetery, it seemed to him that the Statute was intended to protect newspapers which honestly and without malice reported what happened at a public meeting. To hold otherwise, he said, would be placing an intolerable burden upon reporters at public meetings and would be laying pitfalls for them, and would help to fritter away the privilege which he was sure the Statute intended to give.

Accordingly, in the particular circumstances of this case, it is not possible to say that the appellant can turn to advantage the intendment of s. 9 (3) of the Defamation Act, which states:

> "Nothing in this section shall be construed as protecting the publication of any matter, the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit."

I have already drawn attention to the view of the courts that from a practical point of view it is the reporter, or the editor for that matter, who is entitled to highlight any feature of a public meeting which is newsworthy provided that report is not tendentious.

This appreciation falls squarely within the dictum of Carey, J.A., in The Gleaner Co. Ltd. v. Richard Small Supreme Court Civil Appeal No. 65/69, judgment delivered on October 2, 1981 when he said:

> "The authorities make it, I think, perfectly clear that news worthiness is not to be equated with qualified privilege, otherwise mere salacious gossip would be protected. There must be a duty to publish and a corresponding interest so as to create an occasion of qualified privilege. The privilege depends not on any assumed duty or responsibility of the press to advise the public, but on whether the subject matter is such that the public should know."

It must be for the public benefit and of public concern for a reporter to convey to the whole nation by means of the press the interrelationships of Trade Unions and their respective leaders, considering that the Trade Unions are an integral part of the fabric of our society, not only politically, but from an economic standpoint. Certainly, the public was put in a position to know about the conduct of the leaders in the administration of union activities. To Campbell, J.:

> "If a Trade Union leader publicly accuses another Trade Union leader of corrupt practices in competing for the votes of the workers in industry, or if a trade union leader publicly accuses another trade union leader of adopting strongarm tactics (whether amounting to a crime or not) in seeking to muscle out the former from spheres of influence in the labour field claimed by the latter, these are all matters the publication of which is for the public benefit. It must undoubtedly be to the benefit of

> " the public that they should know, having regard to the conduct and public utterances of trade union leaders in relation to and concerning such trade union leaders whether the latter should be trusted, or whether the former by their rash conduct and or rash public utterances have exhibited that sense of responsibility, that calmness, that penchant for truth, integrity and honesty to warrant their being entrusted with the attainment of the economic welfare of those who they seek to represent. The public undoubtedly derives a benefit from being supplied with all such information which enables them properly and wisely to exercise their rights of choice as between competing parties for their confidences and vote."

This is a perspicuous commentary on the evidence presented at the trial. Mr. Clifton Neita, the then legal officer and Assistant Editor of the Gleaner, was actuated to publish by among other things "the great public concern evoked over the previous eight or nine "days since the attack on Dr. Munroe," and "it was of the utmost "public importance that Dr. Munroe's accusation should be carried "as he made it."

As regards question (d) <u>whether there was malice</u>? Mr. Neita said that before publication he did satisfy himself that the report was of a public meeting held in Jamaica for a lawful purpose and was held for the discussion of matters of public concern. He did not know if the allegation was true or false, and he did not inquire, "as I did not think it was necessary for me to do so." He denied that the publication was designed to expose the plaintiff to public ridicule and hatred. He further said: "I do not know "what effect it had. I did not consider Caven as a thug. I am "friendly with him but I had a duty to perform. I did not think, believe the allegation of Mr. Munroe. I did not think it wise to contact Caven before publication. I thought I had a clear duty "to publish, my belief in the matter did not matter."

Upon this, in my view, the difficulties of this case arise. Mr. Muirhead boldly took his stand that the absence of belief in the truth of an allegation was clear evidence of malice. He conceded that if one has an honest belief in the truth of the words, and the dominant motive is not to injure, privilege attaches. Although Mr. Neita disclaimed any such dominant motive it was Mr. Muirhead's argument that malice had been established by the evidence of Mr. Neita, and this would destroy privilege.

The particular thrust of this submission was at the final paragraph of the judgment of Campbell, J. This reads:

> "In the present case we are dealing with an exceptional case where the defendant actuated by the paramount and predominant motive of giving information to the public in discharge of a duty at least moral, has passed on without endorsing a defamatory report made by Dr. Munroe. Its knowledge of the falsity of the report is not evidence of the malice and as the plaintiff has failed totally to establish any improper or indirect motive for the publication he has failed to establish malice in the defendant."

Mr. Muirhead took issue with the trial judge categorising this case by the words of Lord Diplock in Horrocks v. Lowe [1974] 1 All E.R. 662 at p. 669 e, when that learned law Lord spoke of "the exceptional case where a person may be under a duty to pass 'on, without endorsing, defamatory reports made by some other "person."

This, the argument runs, is not really applicable to the instant case considering that the respondent here really falls into the category of publishing defamatory matter which he knows to be false, or recklessly not caring whether it is true or false. This equation naturally developed from Mr. Neita's evidence that he did not believe the allegations by Dr. Munroe. And, the argument further runs, the substratum of the qualified privilege here under discussion is belief in the truth of an admittedly defamatory statement. Consequently, the respondent must be adjudged to have been reckless in the publication of the impugned defamatory statements. To this end, dependence was firmly placed on Lord Diplock's view that:

> "Apart from those exceptional cases what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally thought tautologously termed, 'honest belief.' If he publishes untrue defamatory matter recklessly without caring whether it be true or not he is, in this, as in other branches of the law, treated as if he knew it to be false." (p. 669 f)

It is important to note, however, the modification of these remarks in the immediately followjng sentence:

> "But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true." (p. 669 g)

To suggest, as Mr. Muirhead did, that the respondent in this case falls into the category of a person publishing defamatory matter which he knows to be false, or recklessly not caring whether it is true or false is to patently ignore the realities of the circumstances of this case. Nor can it be successfully argued that expressions regarding what constitutes malice at common law are inapplicable to issues which arise where the statutory defence is invoked by a newspaper. The remarks of Lord Diplock in Horrocks v. Lowe must be considered only in-so-far as the exempting criteria of the statutory defence are subject to the phrase "unless "the publication is proved to be made without malice." This is repeating the common law requirement that once qualified privilege is established both by the occasion and by the contents of the statement, the burden of proving that malice in actual fact existed, rests upon the plaintiff. What has to be ascertained is whether on the facts of the case the publication was made otherwise than "for the reason or motive which occasions the privilege" per Brett, L.J., in Clarke v. Molyneux (1878) 47 L.J. Q.B. 230 at p. 236 because as was said by Cotton, L.J., in the same case at p. 238 "when once it is laid down that the circumstances are such that a "communication must be privileged, the defendant can be deprived "of that only by the plaintiff showing that he acted from something "other than a sense of duty, which of course, is a question of the "man's mind."

Now, in Smith v. Thomas (1836) 5 L.J. Q.B. 52 at p. 56 Tindal, C.J., opined "If the plaintiff could show that the "defendant had uttered the words, and had not believed them to be "true at the time, he uttered them it would undoubtedly be "conclusive evidence of the defendant's malice." The occasion for this remark was a discussion of the plea by the defence which neither expressly denied malice nor stated the publication to have been made honestly or bona fide which might have amounted to an implied denial of malice. The plea only asserted that the defendant believed the words to be true. I should add that all this was based on a defamatory allegation in the course of a

confidential communication between one tradesman and another as to the solvency of a third party whom the enquirer was then about to trust in the course of business.

As against the above quotation from Smith v. Thomas, the words of Kelly, C.B., in Botterill v. Whitehead (1879) 4 L.T. at p. 590 deserve som econsideration. He is reported as follows:

> "A man may believe a statement to be untrue and yet may be perfectly justified in publishing it to persons with whom he is in communication and with whom it may be his duty to communicate freely on the subject of the information he has received: Bramwell, L.J., in Clarke v. Molyneux (1877) 3 Q.B. at p. 244 stated a similar view: 'A person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character that on that occasion it may be proper to communicate to a particular person who ought to be informed of it.' "

Giving deep consideration to this aspect of this case, I have come to the conclusion that it has not been shown that when the respondent published these defamatory allegations by Dr. Munroe, it acted from something other than a sense of duty to publish on a matter in which the public was vitally interested. Here the respondent is a disseminator of news to the public and its public duty to give a fair and accurate report of events to the public must not be limited by the same constraints as would normally apply between private citizens. The publication complained of has not been attacked on the ground that what was communicated to the public is an incorrect report of what was said. Compare Eyre v. New Zealand Press Association Ltd. [1968] N.Z.L.R. 736

A newspaper when it prints a defamatory statement made by another person is to be regarded as a publisher of defamation with all the legal consequences flowing therefrom, and cannot offset its liability by merely saying "I am reporting what was "said by someone else."

> " It should I think be brought home to court or other reporters that use of the word 'alleged' or similar words does not of itself offer any excuse or defence for the publication of defamatory matter. Responsibility for such publication will remain with the publisher even if he is in effect saying 'I do not say or know whether this is true or not .... it is what X said.' It is not an answer to publishing defamatory matter even if the informant is named, or even if it is true that a rumour to that effect was in circulation: see McPherson v. Daniels (1829)

> "L.R. 3 Q.B. 396. In such cases the person who publishes the defamatory matter must either prove it true or establish the defence of privilege if he can."

per Carberry, J.A. in The Gleaner Company Ltd. v. Richard Small, Supreme Court Civil Appeal No. 65/79, judgment delivered on October 2, 1981.

In the circumstances of the instant case, there exists the essential elements of privileged occasion as delineated by the Statute, and I have not been able, after much thought, to come to the conclusion that the appellant had proved at the trial that the respondent was actuated by malice or other improper motive to publish the remarks by Dr. Munroe.

I, therefore, agree with Carey, J.A., that the appeal should be dismissed.

WRIGHT, J.A. (AG.):

I have had the opportunity of reading the judgments, in draft, of Carey and White, JJA., and am in agreement with them that the appeal should be dismissed.