Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 45/80

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN	JOHN SAMUEL GAFAR	PLAINTIFF/APPELLANT
AND	ALFRED ALEXANDER FRANCIS	DEFENDANT/RESPONDENT

Mr. Berthan Macaulay, Q.C., Mrs. Margarette Macaulay & Mr. Rudolph Francis for appellant

Mr. R.N.A. Henriques, Q.C. Mr. Allan Wood & Mrs. Paulette Francis-Smellie for respondent

December 9, 10, 11, 16, 17, 18; 1985
April 21, 22, 23, 24, 25, &
July 24, 1986

CAMPBELL J.A.

On July 24, 1980 Carey J. as he then was, handed down a written judgment in which he found as a matter of law as well as on the facts, that paragraph I of a "Statement from the Department of Economics on John Gafar" hereafter called "the Statement" co-signed and published by the respondent, was defamatory of the appellant as the words in the aforesaid paragraph imputed to the appellant that he was a plagiarist in that he had put forward as his work what was no more than the purloined ideas in the National Planning Agency paper authored by one Professor Hines.

Paragraph I of the Statement which was thus found to be libellous is as follows:

> "It is our opinion that Section III of 'Mark-ups in the Distribution Sector and the Inflationary Process in an Open Economy: The Jamaican Experience' by John Gafar presents as the work of the author what is essentially the work of the National Planning Agency contained in an Appendix A entitled 'The Distribution Chain in Jamaica.' "

The learned judge nonetheless found that the respondent succeeded in his main defences to the libellous publication which defences covered justification, qualified privilege and fair comment.

Against this judgment the appellant appeals on seven grounds of appeal. Grounds 1A, 2 and 3 have been grouped together by Mr. Macaulay for purposes of his submission and are substantially capsuled in 1A with the two other grounds being treated as illustrative of the complaint in ground 1A.

Ground 1A reads thus:

> "The judgment was not only against the weight of the evidence but, with respect to the learned trial judge, wrong in that it involved not only a rejection of the plaintiff's evidence, but also a rejection of:
>
> (a) The statement in the pleadings of the defendant.
>
> (b) The defendant's own evidence in cross-examination, and
>
> (c) The evidence of the defendant's own witnesses in cross-examination.

The gravamen of Mr. Macaulay's submission in relation to Grounds 1A, 2 and 3 is that the learned judge while taking into account every admission made by the appellant in his evaluation of the oral and documentary evidence, ignored and or explained away every admission favourable to the appellant made by the respondent and his witnesses in such evaluation. In this regard Mr. Macaulay submitted some 16 pages of foolscap comprising over 200 tabulated excerpts from the evidence on record mainly of the respondent, and his witnesses Mr. G. Brown,

presumably, 'to speak to' his paper. The meeting was, however, less than cordial: it was not the calm and dispassionate academic discussion which the plaintiff asserted was its tone, and indeed came to a premature close. In my view, the plaintiff was less than candid with the court in this regard. The evidence of the Governor of the Bank of Jamaica and the Director of Social and Sectoral Planning in the National Planning Agency, which I preferred, did not accord with that description of the meeting. The plaintiff was, in fine, accused of plagiarism.

Subsequent to this aborted meeting, rumours became rife on the University Campus, at Mona, that the plaintiff's 'magnum opus', far from being the original piece of work which its author claimed for it, was little more than a rehash of an unpublished paper, entitled "The Distribution Chain in Jamaica" and prepared by Professor Hines for the National Planning Agency, a Department in the Prime Minister's Office.

The plaintiff was, understandably, perturbed at this unhappy turn of events. The defendant raised the matter with him on the morning of 28th November, 1975. On that very date, the plaintiff wrote signifying his intention to resign, effective September, 1976. Subsequently, however, on December 5, he requested the Registrar to "place his resignation in abeyance." The defendant, as head of the Department of Economics, summoned a meeting of members of the Department for December 1, 1975. The plaintiff attended. This meeting was adjourned for the next day, as it was plain that all had not read both papers. Although encouraged to attend by the defendant, the plaintiff excused himself from that adjourned meeting on the ground that he did not wish his presence to inhibit a full and frank discussion among his colleagues. All effective members of the Department, but one, who was on leave, entered an appearance. They arrived at a unanimous verdict that the plaintiff was guilty of plagiarism. Their condemnation was recorded in a statement to

(5) There were substantial materials in Section III of Document I which do not appear anywhere in Document 2. This again differentiated Section III from Document 2.

Mr. Macaulay submitted that the failure of the learned judge to consider and evaluate these pieces of evidence and their effect as summarised above, rendered the judgment bad in that the said judgment, particularly in relation to the finding that justification and fair comment had been established could not be said to have been based on the totality of the evidence, and a judgment not so grounded cannot and ought not to stand.

The starting point in considering whether Mr. Macaulay's submission is valid is undoubtedly the evidence of the appellant in order to isolate firstly, his admission as to similarities between Section III of Document I and Document 2, and the use made by him of Document 2; secondly, his disclaimer that certain differences between Section III of Document I and Document 2 are bases on which he claims that Section III is an original piece of work; thirdly, the bases on which he relies as establishing that his work is original; and fourthly, his claim that he had acknowledged Document 2.

In summarising the evidence, "Section I" "Section II" and 'Section III" refer to sections of the appellant's paper which is itself referred to as Document I. Document 2 refers to the National Planning Agency paper which in point of time had earlier been prepared by Professor Hines. The "Yellow Sheets" refer to Documents 4-7 which comprised raw data compiled in tabular form by the National Planning Agency (NPA) as a result of a survey conducted by it. From these raw data, Professor Hines compiled Tables which he used as statistical tools in Document 2 to demonstrate the ideas which he expressed in the aforesaid Document.

The Claim of the appellant is that the Tables which he used in Section III were in the main compiled by him directly and independently from Documents 4-7 except for the few which he admittedly reproduced directly from Document 2, and which he acknowledged.

To the contrary, the assertions of the respondent and his witnesses are that the Tables in Section III are basically reproductions of, or otherwise derived from, the Tables already compiled by Professor Hines and incorporated by him in Document 2.

The main points of the appellant's evidence in relation to Section III may be summarised thus:

1. Section III sets out as an original contribution that margins are excessive in the distributive sector and this represents a major contributing source of inflation.

2. Section III is an original work which sets out to show by analysis that the theoretical underpinings of certain works of Professor Hines (not Document 2) were wrong.

3. Section III is an empirical analysis of a hypothesis which is not to be found in Document 2. This hypothesis is that the level of mark-ups is not only due to external factors but to internal factors as for example transport costs, labour costs and profits. Document 2 merely describes the distribution chain and its various stages. He, however, here concedes that his empirical analysis is not based on any input by him of transportation costs, labour costs and the like , or on any additional data than that used in Document 2.

4. The originality of Section III is not based on:

   (i) It being a critique of Document 2;

   (ii) the introduction in Section III of additional Tables compiled by him from Documents 4 - 7;

(iii) the identification by him in one or two of his Tables of a large range of specific commodities;

(iv) his having in some of his Tables reversed the order of items or the classification of items from the order in which they appear in Document 2;

(v) his having used larger or smaller sample sizes in some of his computations;

(vi) his having at page 46 a section headed 'conclusion' which does not appear in Document 2.

5. Section III admittedly showed marked similarities with Document 2 as regards methodology, analysis and approach. This was due to the rigid structure of the data presentation in Documents 4-7.

6. It is possible that there are many instances where the same words and phrases appear in Section III and Document 2 because he used the latter paper. He took a deliberate decision to use the same methodology and analysis of Document 2 in preparing Section III.

7. Notwithstanding the admitted similarities Section III showed by empirical analysis a different conclusion from Document 2.

Further Section III differed from Document 2 in the following respect namely:

(i) Section III was different in approach;

(ii) Section III concentrates on monetary margins as well as on percentage margins whereas Document 2 concentrated only on percentage margins;

(iii) Section III showed by a theoretical model that monetary margin is preferable to a percentage margin;

(iv) Section III did not concentrate only on controlled and uncontrolled goods as Document 2 did but in addition looked at 'broad economic aggregates.'

(v) Section III in dealing with locally manufactured goods, unlike Document 2, attributed excessive margins to the import substitution policies pursued by Government.

(vi) Section III unlike Document 2, identified that excessive margins in the distributive sector was due to power relationship which distributors as a whole exert on political power.

(vii) Section III identified that price controls did not change margins significantly over time and that this movement must be interpreted as illustrative of the limitations of Government trying to manage a capitalist economy.

In relation to four of the above criteria differentiating Section III from Document 2 namely 7 (III), (v) (vi) and (vii), the appellant conceded that they were bare assertions, not based on any empirical analysis of available data much less were they based on any independent survey and analysis.

As regards 7 (iv) above, the appellant explains that in saying that he used "broad economic aggregates" he meant that he re-classified certain items contained in Documents 4 - 7. He conceded that these same items were used in the analysis in Document 2 to arrive at the conclusion that margins were in fact excessive, and that his re-classification was used for a similar purpose and arrived at a similar conclusion.

At the close of the evidence given by the appellant the aforesaid evidence revealed that four of the criteria differentiating Section III from Document 2 on which he relied for the originality of Section III were clearly and manifestly unsubstantiated because they were bare assertions not tested by empirical analysis, and consequently do not contribute to the existing fund of knowledge. The inclusion of these assertions in Section III would not therefore prevent the latter being essentially Document 2.

Again no significance attaches to the use by the appellant in Section III of additional Tables computed by him and the inclusion in these tables of more materials than are in Document 2. They have been disclaimed by the appellant as indicia differentiating Section III from Document 2. Thus the submission by Mr. Macaulay on the failure of the learned judge to consider evidence given by the respondent and his witnesses in relation to these matters is misconceived and is inconsistent with the posture of the appellant in the court below. The learned judge could not properly make use of such evidence even if such differences between the two documents had been admitted by the respondent and his witnesses because the appellant himself does not rely on the aforesaid differences. There remained the issue whether as claimed by the appellant his work was original and differed from Document 2, due to (a) difference in approach, (b) concentration by him on monetary margins as well as percentage margins (c) concentration by him not only on controlled and uncontrolled goods but in addition on "broad economic aggregates."

The evidence given by the respondent and his witnesses on the observed similarities between Section III and Document 2 and on the above outstanding issue touching on the bases for the claimed originality of the appellant's work are to the following effect:

1. The respondent said that Section III was not original. It contributed nothing in that what is said therein was already said in Document 2. The main thrust of Section III was that margins are excessive and to exemplify this it sets out to examine the distribution chain for different categories of commodities. This examination is contained in Document 2. Section III would have been original if it had taken Document 2 as a basis for a critique on the formula, the methodology and or the conclusion reached instead of using

> the same methodology, same analysis, same formula and coming to the same conclusion as Document 2. The respondent gave detailed evidence comparing Tables 5 to 17 in Section III with Tables in Document 2 to demonstrate that all of these Tables including those which the appellant claimed that he computed independently from Documents 4-7 were all traceable to comparable tables in Document 2. Even though some Tables in Section III were not identical in all respects as regards data with the comparable Tables in Document 2, the differences in the Tables in Section III were largely due to rearrangement of columns, application of a common adjusting factor developed in Document 2 to different figures contained in a Table in Document 2, simple manipulations of data in Tables in Document 2 not involving any great algebraic feat; but in all cases the Tables in Section III were used to convey the same basic idea as were the Tables used in Document 2 and the Tables in Section III were used in the identical places as the same were used in Document 2.

On the question whether the appellant adopted a different approach to that in Document 2, and that he used monetary and percentage margins, whereas Document 2 used only percentage margins, the respondent's answers to questions put are as hereunder at page 228:

> "Q. It is claimed that difference is that one deals with monetary and percentage and the other only with percentage margins, is this a fair distinction in your view?
>
> A. It would not be fair. Both papers in their primary concern was percentage margins - no doubt in my mind about that. The approach to the prime concern is the same, same formula, same approach, same categories of commodities."

2. Mr. G. Arthur Brown in his evidence in relation to Section III said that it was designed to demonstrate the central thesis that mark-ups was the factor that contributed to the level of prices. He said that from a comparison of Section III and Document 2 he found that 'there was a great similarity on much of the data in both papers, that in some cases there was no acknowledgment in later paper of material which was virtually reproduced from the first paper.' He demonstrated by comparison of the text of Section III and Document 2, the areas of similarities and virtual reproductions. His evidence at first as regards the Tables was that Tables 8,9,10,11 and 14 in Section III were not in Document 2; however, later in his evidence he demonstrated that the said Tables were either comparable to Tables in Document 2 or conveyed the same ideas as were expressed in the latter document. Dealing with the differences between these Tables he said at page 291:

> "As between these Tables referred to and correspondence to Tables in NPA, difference is in Gafar's paper, there are either individual or groups of items leading to total while in 'Hines' total only are shown. In some cases total basket - the numbers in the basket may differ. For example in Table 5 - 38 items, while in Hines he uses 40."

Mr. G.A. Brown concluded his evidence in chief by stating that in relation to Section III, he found very little originality. He said that as regards the data used it was essentially the same as in Document 2. As far as analysis including the definition of margins it is essentially the same as Docuement 2.

On the question of Section III concentrating on monetary and percentage margins, Mr. Brown said it was incorrect that Section III concentrated on monetary and percentage margins whereas Docuement 2 concentrated on percentage margin. Both did the same thing.

On the question of Section III concentrating not only on controlled and uncontrolled goods but in addition on "broad economic aggregates," Mr. Brown's evidence was to the effect that the appellant did introduce some broad economic aggregates such as distribution of G.N.P. and Tables on employment in Section 11 of his paper but these he said contributed nothing by way of learning since they were all unstructured and were presented as pieces of information without any relationship to the central thesis in Section III.

Finally, Mr. Brown opined that if the appellant had even included in his analysis in Section III at the minimum, the consumer price index figures for June 1975 which were readily available, his paper written in October 1975 would have differed from and have added to Document 2 which was prepared in or about August, 1974.

3. Dr. Norman Girvan in his evidence summarised the observed similarities between Section III and Document 2 as hereunder:

A. The base of both papers appeared to be identical;

B. The categories for analysis of mark-ups are substantially the same. Thus each used the years 1972/71 for comparison of margins for agricultural products and 1973/72 for imported and locally manufactured goods; each analysed margins in relation to super-markets, higglers, storage margins, distributors margin, wholesale margins, retail margins, and total margins; each used sample size of 45-50 individual commodities; each analysed commodities under the heading of locally produced argicultural commodities, selected imported consumer goods and locally manufactured commodities; each analysed margins in relation to controlled and non-controlled items; each analysed margins in relation to goods entering consumer price index and those which do not, and each described the way in which the distribution chain operates in similar manner.

C. The analytical conclusions based on the analysis of the data presented are substantially the same. The main empirical findings of Section III are to be found in Document 2 namely that:

(i) mark-ups are excessive;

(ii) mark-ups have increased over the years 1972/71 and 1973/72 for the relevant analysed items;

(iii) mark-ups were greater for non-controlled items than for controlled items among the items featuring in the C.P.I;

(iv) mark-ups were wider for super-markets than for higglers, and

(v) mark-ups are on a percentage rather than on a monetary basis.

D. The policy implications flowing from these analytical conclusions are substantially the same. Though the appellant made certain assertions in Section III which are not in Document 2 there was no empirical evidence providing the basis for these assertions e.g. that differences in mark-ups are related to the degree of monopoly power in the distribution sector. Both papers discussed the effect of abolishing distributor's margin.

E. The same gaps in data are mentioned in Section III and Document 2 without the appellant in his later paper making any effort to fill such gaps which could have been done.

Dr. Girvan demonstrated the validity of his above findings by making copious and detailed comparisons between the pages of and Tables in Section III and the comparable pages and Tables of Document 2. The findings are amply confirmed by such comparisons.

On the issue that the appellant concentrated additionally on "broad economic aggregates," Dr. Girvan's evidence is to the effect that the use by the appellant of that expression as meaning reclassification of items in Document 4-7 is misconceived and completely out of context

having regard on the one hand to the accepted meaning of the expression namely that it relates to concepts like GNP and exports and on the other hand to the analysis which was being undertaken.

On the issue that the appellant concentrated on monetary and percentage margins in Section III, Dr. Girvan pointed out that all the Tables in Section III save two were computed on percentage basis without any reference to prices, and the excepted two which mentioned prices did not adopt monetary margins. He concluded that since the analysis in Section III is based on Tables derived from Document 2 it necessarily had to be on a percentage basis and the analysis in fact proceeded on this basis.

4. Dr. Donald Harris under cross-examination did say that one or two of the Tables in Section III may well have been based on Tables in Documents 4-7. However the highlight of the evidence elicited from him was that the Tables in Section III to which he was referred namely Tables 8, 9 and 14 were merely dis-aggregated forms of Tables A4, A5 & L1 in Document 2.

5. Dr. Headley Brown under cross-examination was asked whether Tables 11 and 12 in Document 2, and Tables 10, 11 and 13 in Section III each had the same heading as Document 4. He answered in the affirmative. He was further asked whether Tables L1 and L4 in Document 2, and Tables 14, 15, 16 and 17 in Section III each had columns and headings as in Document 5. Again he answered in the affirmative save for a column headed "Total margins" which he said did not appear in Document 5. He was asked if he would agree that Document 2 used data in Documents 4-7. The obvious answer was yes. The inference sought to be drawn from the evidence of similarities in the columns and headings of the Tables in Section III, Document 2 and Documents 4 and 5 is that the relevant Tables in Section III could well

have been independently computed by the appellant from Documents 4 - 7. However, this inference did not avail the appellant because the Tables could equally have been reproduced from Tables in Document 2 and this was affirmatively stated in evidence to be so by the respondent and his other witnesses. The evidence of Dr. Headley Brown cannot possibly assist the appellant since it was merely a conjecture. The totality of the evidence of the respondent and his witnesses was thus distinctly unfavourable to the appellant on every material outstanding issue including his having computed the Tables in Section III independently from Documents 4 - 7.

Having reviewed the evidence of the respondent and his witnesses relative to the observed similarities between Section III and Document 2 and on the issue of the originality of Section III I find myself in complete agreement with the submission of Mr. Henriques that the respondent and/or his witnesses did not, either in examination in chief or under cross-examination give any evidence supporting the appellant that Section III was original or that there were significant dissimilarities between it and Document 2. Dealing specifically with the claimed effect of those pieces of evidence as summarised by Mr. Macaulay, I find that nowhere in their evidence did these witnesses attribute the similarities between Section III and Document 2 to the fact that a common source namely Document 4 - 7 was used. To the contrary, the burden of the evidence of these witnesses was that the similarities existed because Section III was essentially a reproduction of Document 2. Itused in many places the same words and phrases. It adopted the same narrative with inconsequential changes in language. It used the same analysis and methodology. It used the same Tables in the identical places and for the identical purposes as such Tables are used in Document 2. It expressed the / same ideas with the same

emphasis and arrived at the same conclusions as in Document 2. The bases for the similarities have been succintly expressed by Dr. Norman Girvan in his evidence. The respondent and his witnesses equally did not give any evidence favourable to the appellant to the effect that there were a number of Tables in Section III which were computed by the appellant which were not in Document 2 and that there were also substantial materials in Section III which were not in Document 2. Again the burden of the evidence of the respondent and of Mr. G.A. Brown and Dr. Girvan was directed to showing that all the Tables in Section III including even those which the appellant stated that he had computed, were either reproductions of, or derived from Tables in Document 2 with the data and other information disaggregated. The evidence elicited from Dr. Headley Brown as I have earlier said, was not sufficient to raise a reasonable inference that the appellant did compute his Tables independently from Documents 4-7.

On the submission of Mr. Macaulay that these witnesses all agreed that the appellant had introduced in Section III substantial materials which were not in Document 2, the evidence does not disclose that such additional materials, as were included, were substantial in the sense that they made Section III essentially different from Document 2 and the appellant himself disclaimed that there were differentiating factors.

Mr. G.A. Brown giving evidence with reference to Tables 8, 9, 10, 11, 14 & 15 in Section III did say at page 291:

> "As between these Tables referred to, and correspondence to Tables in NPA, difference is in Gafar's paper, there are either individual or group of items leading to total while in Hines' total only are shown. In some cases total basket - the numbers in the basket - may differ. For example in Table 5 - 38 items, while in Hines' he uses 40."

But he hastened to say that they conveyed the same ideas as are conveyed in the comparable Tables in Document 2.

Dr. Girvan in relation to Table 8 in Section III said at p. 297:

> "In Gafar specific items are identified. There may be some significance of mark-ups being higher as between items but the significance of identifying specific items is not brought out. Until author in the narrative indicates reason for difference in margins as between different items, cannot be said generated different conclusions to NPA paper."

Again in relation to Table 5 in Section III he said at p. 299:

> "I compared this to NPA, as regards Table 5 the data on which it is based appears to be the same as data referred to at bottom of p. 3 NPA paper. The difference is that specific commodities are identified in Gafar. I was unable to find what significance is attached to the specific items selected. For example at Table 5, margin for plantain is 21.7% and condiments is 214.5%. There is no reference to this to discuss possible reasons for such a wide variation. From one year to the next there are different margins e.g. potatoes 71.7% in 1971 to 91.7% in 1972. What significance is attached by the author is not brought out. One is unable to say in what respect the author is coming to a different conclusion to NPA."

On the submission by Mr. Macaulay that these witnesses were all agreed that if the same data source was used with no additional input one would expect common conclusions, common methodology and common errors and omissions, the evidence clearly did not go that far, but merely that it was possible to reach the same conclusion but that the exercise would be sterile.

The respondent in relation to the use of same data said at page 268:

> "Two people using same data may arrive at same or different conclusions."

And in answer to the question whether "an analysis in certain circumstances by two persons of the same data could be an original contribution" he said at p. 283:

> "they could come to same conclusion working independently."

Dr. Girvan in his evidence in answer to the question "would you agree if 2 persons working on same data may arrive at similar conclusion?" said at page 315:

> "They may. If one person uses a given set of data and arrives at certain conclusion and another person takes same data and arrives at same conclusion, this would be rare because 2nd person would not take trouble to analyse same data to arrive at same conclusion. If one is checking, that is O.K. what would happen is to critically analyse the first to see if you find defects. If 2 economists analyse same data one after the other .....the first having published conclusion, it is not common for 2nd to publish."

Mr. G.A. Brown had earlier given evidence as follows at page 287:

> "Q. Would it be proper to use data by another?
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> A. I would not consider it improper to use raw data if I acknowledge it. I take raw data and analyse it and find I come to same conclusion. I would not have contributed to knowledge. It is possible to use data and arrive at different conclusion."

Nowhere does the evidence establish that the use of the same data source would lead to common methodology, common errors and omissions. Such common errors clearly may arise not in the raw data but in the analysis of the same.

This leaves for consideration the submission of Mr. Macaulay that the respondent and his witnesses were all

agreed in their evidence that the appellant, in so far as he made use of Document 2, did acknowledge the same at page 27 footnote 15 of Section III which reads:

> "(15) The report entitled 'The Distribution Chain in Jamaica' deals primarily with the margins for aggregate CPI and aggregate NON CPI items, and concentrates on the margins for controlled and non-controlled items. No mention is made of margins for individual items. Neither does the report mention the margin for specific brands. This is unsatisfactory if government is to use the information to make national policies. Our analysis differs from that of the report in that it deals with broad economic aggregates and specific commodities."

On this issue it is also appropriate to begin with the evidence of the appellant. He said at page 158:

> "National Planning Agency analysis was used by me in Section III of my paper. Close study of two papers reveal this. I agree that nowhere in Section III do I advert to fact that National Planning Agency data was prepared for a study done by National Planning Agency. Nowhere in my paper do I allude explicitly to fact that National Planning Agency analysis has come to conclusion that there are excessive mark-ups in the Distribution chain ..... I am aware that where raw data exists and there has been an analysis prior to second, it is usual and well established practice to advert to previous study."

At pages 159 - 160 he said:

> "Only time I referred to National Planning Agency study is at p. 27 footnote, where I indicate my analysis is different from National Planning Agency analysis. The impression being formed is that my treatment of data is highly original."

At page 165 he said:

> "Footnote at page 57 is a bold statement of fact. I would say that apart from Note 15, there is no explicit reference that analysis is taken from National Planning Agency Paper. At. p. 27, I was dealing with agricultural commodities. I do agree my sentence 'In an unpublished (Footnote 15)' ..... does not indicate that I am adopting the empirical analysis of National Planning Agency as regards those products. I do agree that effect of Note 15 is to suggest explicitly that my analysis is different from analysis National Planning Agency adopted."

The appellant thus clearly and unequivocally admitted that the footnote was not designed, nor intended to highlight his indebtedness to Document 2 for its empirical analysis and methodology which he was in fact using, but rather it was designed to highlight that his analysis and approach were different.

Dr. Norman Girvan in relation to the acknowledgment in the footnote at page 27 of document 1 said at page 300:

> "At bottom of page 27 appears a footnote which refers to NPA paper. Overall impact of footnote is to establish difference between Gafar's Section III and the NPA paper."

Mr. G.A. Brown in his evidence at page 203 said:

> "I found that there was a great similarity on much of the data in both papers; that in some cases there was no acknowledgment in later paper of material which was virtually reproduced from the first paper ..... In my experience it would have been normal for acknowledgment of data to be done - both as to statistical data and information of the source. The same would hold true where one was adopting the analysis of earlier work."

Dr. Compton Bourne in his evidence said at p. 342:

> "I noticed inadequate acknowledgment of NPA paper in Section III of Document I. I would not regard it as unscholarly to use methodology of another scholar as long as one acknowledges one is doing that. I would not regard it as unscholarly

"to use analysis of another provided one acknowledges it fully."

In re-examination, his answer to a question relating to acknowledgment is stated thus:

"Q. Would you agree that if a particular author were using a particular source material and had at one stage made reference to that source, would later use of that source require repeated acknowledgment?

A. Yes. The repeat is essential, it advises reader of independence of work. The absence of such a repeat would have effect of causing reader to believe work is that of author."

Even in relation to the acknowledgment of the data source at page 22 in Section III which reads "The data used in this study is taken from an unpublished survey conducted by the National Planning Agency" the respondent and his witnesses did not consider that the acknowledgment was sufficiently explicit.

The respondent at page 209 said:

"It is misleading because the data in Gafar Section III corresponds in some places identically as in NPA paper and this acknowledgment gives impression that it came from unpublished survey."

Dr. Headley Brown at p. 332 said:

"I do not altogether agree with the words underlined at p. 22. I think Section should go on to make reference to Document 2."

Dr. Compton Bourne

"I did consider it a sufficient acknowledgment of an unpublished survey - emphasis on survey. To acknowledge methodology should say 'this is bound in methodology of so and so."

The above excerpts of evidence given by the respondent and his witnesses do not therefore support the submission of Mr. Macaulay that they established in favour of the appellant that he did acknowledge Document 2 as distinct from acknowledging specific Tables therein. The effect of their evidence was that the purported acknowledgment amounted to no acknowledgment at all.

Having thus carefully considered the evidence to which we have been directed, I conclude that there was no such evidence favourable to the appellant elicited from the respondent and his witnesses which the learned judge had ignored and or explained away in coming to the conclusion to which he came. The truth of the matter is that there was at the close of the case for the appellant no credible evidence which could be confirmed by the respondent and his witnesses, because the appellant kept on retreating from position to position until he was forced to say that Section III differed from Document 2 only in form.

In relation to these same grounds of appeal Mr. Macaulay further submitted that the judgment of the learned judge was in any event wrong for these additional reason namely that:

(a) He applied the wrong test, namely, the originality of Section III to the determination of the issue whether justification and fair comment as defences had been established; and

(b) He applied the wrong standard of proof, namely, proof on a preponderance of probability instead of proof beyond a reasonable doubt in determining that the respondent had discharged the burden of proof which rested on him in his defence of justification.

On the question that the learned judge applied the wrong standard of proof Mr. Macaulay submitted that since the respondent had in effect accused the appellant of literary theft,

of purloining the ideas in Document 2, the burden on him was to prove the truth of the charge beyond a reasonable doubt. The learned judge he said had found that the words "did impute to the plaintiff that he had put forward as his work what was no more than the purloined ideas of the NPA paper." Thus the standard of proof which was appropriate, was proof beyond a reasonable doubt. Mr. Macaulay cited a number of cases in support of his submission on the requisite standard of proof. I do not consider it relevant to refer to these cases because the decision of our own Court of Appeal in Paramount Betting Limited v. Bertram Brown (1971) 16 W.I.R. p. 523 is controlling and proves Mr. Macaulay to be clearly wrong. Luckhoo J.A. at page 527 said:

> "All of these matters taken together in my view raised a strong probability of a fraudulent conspiracy on the part of the plaintiff and indeed of others ..... while the accusation of fraudulent conspiracy is a grave one in a civil case, the standard of proof necessary to sustain such an accusation is the civil standard of a preponderance of probability, the degree of probability required being commensurate with the occasion."

Fox J.A. at page 531 said:

> "For the purpose of testing the sufficiency of the magistrate's considerations and the validity of his conclusions, it is important to bear in mind the nature of the burden of proof which was upon the defence to establish the allegation of fraudulent conspiracy. This was a civil action, and although the commission of a crime was being alleged, this was sufficiently established on a preponderance of probability."

The learned judge having adverted to the defence of justification as pleaded said at page 63:

> "The defendant had cast upon him the burden of demonstrating that the 'Gafar paper' was not the original work of its author, but substantially the work of the NPA."

There is nothing wrong in so stating the burden of proof. On the question of the learned judge having used the wrong test of originality, the learned judge having adverted to the word "essentially" in the paragraph of the "statement" which constituted the libel said at pages 67 and 68:

> "As I understood the sense in which that word was used, it conveyed to my mind the suggestion of 'substantially' or 'to all intent and purposes,' 'for all practical purposes.' If this be right then clearly some difference there must be, but these would be so relatively insignificant as not to alter or transform in any meaningful way the purport of the earlier work. Put another way the enquiry was not so much, what effort the plaintiff had put in his work but how much of the National Planning Agency ideas was to be found echoed in his work without acknowledgment and put forward as his own. It was in this way that I apprehend the defendant must meet the sting of the libel."

This approach is undoubtedly correct. It revealed that the learned judge had clearly and indelibly imprinted in his mind the nature and scope of the burden which was on the respondent to establish justification. This was to establish by evidence on a preponderance of probability firstly, that the ideas contained in Section III were essentially those contained in Document 2, secondly, that there was no acknowledgment in Section III of the ideas so taken from Document 2, and thirdly, that the appellant intended to pass off the ideas in Section III as his own original ideas. The fact that the evidence led by the respondent and his witnesses in proof of the defence of justification was partly directed to showing that Section III was not original was primarily due to the manner in which the appellant's

case was presented. Counsel on his behalf in opening his case had said at page 118:

> "Case does not rest on differences. Plaintiff says that assuming used all Tables and arrived at same results, does not deprive it of being original work." (emphasis mine)

It was the appellant who asserted in evidence that notwithstanding his deliberate decision to use the approach, methodology and analysis of Document 2, his paper in Section III was an original piece of work. It was he who in evidence asserted the bases on which he claimed that his work was original. It was counsel on his behalf who in his closing address said at page 369:

> "Matter to be proved:
>
> Prove work (i) not original (ii) not acknowledged."

Thus no valid complaint can be made if the learned judge evaluated the evidence given from the standpoint as to whether the appellant had made out a case that his work was original, or conversely, whether the respondent had demonstrably destroyed the appellant's claim that his work was original. In any case this submission of Mr. Macaulay is querulous because if on the evidence the respondent had failed to disprove that Section III was original as asserted by the appellant, the respondent would necessarily have failed to sustain his defence of justification which is predicated on proof that Section III was essentially Document 2, because a person who has produced something which is original cannot at the same time have produced what is essentially the work of someone else. The sting of the libel would not have been met.

Thus in my view, a legitimate way of proving that a literary work has been plagiarised is by proving that it is not original as claimed by the plagiarist, in addition to proving its essential similarity with some preceding work. The proof that it is not original must inevitably involve a comparision of the plagiarised work with the work of the plagiarist to establish that

the latter conveys essentially the same idea as the former but is presented by the plagiarist as his own original work. The learned judge understood the issue in that way as is clear from what he said at page 67 namely:

> "What the defendant was required to prove was not as would be the case in a copyright action, that there were substantial passages either actually copied or copied, with mere colourable alterations, but rather that the ideas in the Gafar Paper were substantially the same as those in the 'NPA paper.' In other words that the independent work, that is the thoughts and the ideas of Gafar were relatively insignificant."

Mr. Henriques in his submission on the correctness of the finding of the learned judge that justification was established, relied on the evidence on record which was that all the persons who compared Section III and Document 2 concluded that there were marked similarities in their contents. These persons included Professor Stone, Dr. Trevor Munroe, members of the Economics Department who co-signed the statement in addition to the respondent and the witnesses who gave evidence on his behalf. The appellant himself admitted that he made use of Document 2. The evidence of the respondent and his witnesses demonstrated that there were no significant dissimilarities between Section III and Document 2 and that the former contained essentially the same ideas and conclusions as were in the latter. Section III used the same approach, methodology and analysis as Document 2. There was in evidence a detailed tabulated comparison, for ease of reference, of the main similarities between Section III and Document 2. The learned judge made his own comparisons, no doubt assisted by the tabulated comparison (Document 3) which was in evidence and which he was entitled to use if he so desired as a reference.

There was evidence that there was really no acknowledgment in Section III of Document 2. The learned judge concluded his judgment thus at page 92:

> "The comparison which I have endeavoured to make, demonstrated beyond a peradventure in any view that the plaintiff who had in his keep the 'yellow sheets' and also a copy of the 'NPA paper' used the ideas expressed in the latter, and except where indicated above, failed to acknowledge his debt to its author. The footnote at page 27 created the impression that the 'Gafar paper' was altogether different in its approach to that of the 'NPA paper' and was an original piece of work. The above comparison, in my view, demonstrated that the reverse was true.
> Where the writer of a work uses, whether by choice or otherwise, the same data, analysis, approach and methodology of another work, incorporates the same ideas into his work, and comes to the same conclusion as an earlier work and fails to acknowledge his source, the writer is, in my judgment guilty of plagiarism; especially if any explanatory reference to the earlier work conveyed the impression that the writer's approach would be altogether different from the earlier work."
>
> "The defence of justification, in my judgment, succeeded."

In my view there was abundant evidence as summarised herein on which the learned judge, having adopted the correct approach as he did, and impliedly applying the correct standard of proof, could have found as a fact, as he did, that the defence of justification had been established by the respondent. There is no basis on which his conclusion on this issue can be faulted.

Grounds 1A 2 and 3 are for the reasons stated herein not well founded and are accordingly dismissed.

Ground 4 of the appeal relates to qualified privilege while grounds 5 and 6 relate to malice so far as it affects the defences of qualified privilege and fair comment. These grounds are stated as hereunder:

"4A. The learned trial judge erred in law in impliedly holding that the defence of qualified privilege applied to each and everyone of the several and distinct libels alleged that is to each and everyone of the several and distinct publications of the impugned document (Document 12 in Exhibit C) to members of the University of the West Indies generally and outside the Department of Economics, to students of the University of the West Indies and to members of staff of the University of Guyana. The learned trial judge failed to appreciate the fact that the failure of the Defendant to establish qualified privilege in respect of any one libel was sufficient to entitle the plaintiff to judgment in his favour.

4B. The learned trial judge erred in law in holding that the defence of qualified privilege applied to the publication of the libel to Mr. B. St. J. Hamilton of the Daily Gleaner newspaper, when in fact, the facts necessary to show that the publication was privileged was not pleaded by the Defendant nor was there any application to amend the Defence Pleadings to create the basis of privilege and when in fact the publication of the libel to Mr. Hamilton was after the issue of the Writ of Summons.

5. By his conclusion, the learned trial judge impliedly erred that malice in libel action meant ill-will or spite.

6. Assuming that the defence of qualified privilege and fair comment were open to the Defendant the learned judge failed to assess the thirty-five points in evidence which were handed to him in a note by the plaintiff's counsel at his (judge) request during the said counsel's address (these thirty-five points relating to the evidence were made in relation to the issue of malice)"

The submission of Mr. Macaulay is that the defence of qualified privilege would strictly cover only the publication of the "Statement" to members of the professional committee of the University as this committee had powers of discipline. The publication of the statement to all the others even though within the University community, and a fortiori, to persons outside that community was not covered by qualified privilege.

In particular publications to Mr. B. St. J. Hamilton of the Daily Gleaner Newspaper, Dr. Jainarine, Head, Department of Economics, University of Guyana, and to the University of Guyana were not covered by the defence of qualified privilege. In relation to all these others, there was neither an interest or a duty on the part of the respondent to publish, nor was there a corresponding interest or duty in them to receive the aforesaid publication.

Mr. Henriques premised his submission on the learned judge's statement of the law governing qualified privilege enunciated in Adam v. Ward (1916-17) (Rep) All E.R. 175 namely that:

> "A privileged occasion for the purpose of the defence of qualified privilege to an action for libel occurs where the words complained of as defamatory were published in pursuance of an interest or of a duty, legal, social or moral, to publish them to the person to whom they were published and the person to whom they were published had a corresponding interest or duty to receive them. The reciprocity is essential."

and on the learned judge's adoption of the view expressed by Geoffery Lane L.J., (as he then was) in Beach v. Freeson (1972) 1 Q.B. 14 at page 25 namely that:

> "There are no rigid or closed categories of interests."

and to the learned judge's own added view that:

> "there are no rigid or closed categories of duty."

On this foundation Mr. Henriques submitted that the limitation placed by Mr. Macaulay on the persons to whom publication would be protected by qualified privilege was too narrow. He relied substantially on the reasoning of the learned judge, namely, that all persons in an academic fraternity, or connected thereto, are properly within the ambit of qualified privilege as having reciprocity of interest or duty in relation

to the publication by or to them of academic matters by members of the academic staff or students.

Mr. Henriques further submitted that where the publication in the circumstances in which it is made, shows that it is intended for public and not merely for sectional consumption, then it becomes a matter of public interest and concern especially if it contains matters affecting the public. In the present case he submitted the appellant intended his publication of Section III of Document 1 to be for public consumption. The public would undoubtedly have an interest in knowing that, inter alia, government advisers were not giving the government proper or correct advice. This was the purpose of sending a copy of Document 1 to the then Honourable Prime Minister, Mr. Michael Manley. This objective is admitted by the appellant in evidence at page 147 of the record. Section III of Document 1 was openly discussed at a meeting at Government House as a result of it having been sent to the Prime Minister. It was compared with Document 2. The public had an interest in knowing whether the appellant had vindicated the contents of Section III. In these circumstances, Mr. Henriques submitted, the publication of the impugned document to Mr. Hamilton on behalf of the Daily Gleaner newspaper was protected by qualified privilege as the public, in order to determine whether the appellant had vindicated the contents of Section III, would have an interest in knowing the views thereon of others in the appellants' discipline.

The learned judge having considered the historical sequence of events leading up to the publication of the statement and the persons involved in these events concluded his judgment in these words at p. 102:

> "I was clearly of the view that on the basis of a reciprocal interest in the maintenance of academic excellence in the University 'the statement was entitled to privilege.' It was, in my view, unnecessary to consider whether the guidelines for Heads of Departments (Document 94) created any duty. It was sufficient to say that the Head of Department was required to promote the academic standards of the students in his department and he could hardly achieve this objective with a member of staff whose academic integrity had been so gravely impugned."

The learned judge thereafter elaborated on the circumstances which established a reciprocity of interest between the respondent and other persons in the University of the West Indies, the respondent and members of the University of Guyana, and the respondent and Mr. B. St. J. Hamilton of the Daily Gleaner to whom publications were respectively proved to have been made. In relation to Mr. B. St. J. Hamilton as representing the media the learned judge said at p. 105:

> "I approached publication to the Gleaner in this way. I asked the question, was the public at large entitled to be told or interested in, or had a duty to hear the criminatory matter? In my view, the public had a duty to hear that standards at the University were falling. The public as Tax-payer of a participating country were as concerned about academic standards as persons within the University itself. It is a public institution maintained at public expense for the benefit of their children or indeed themselves. I have therefore come to the conclusion that the defendant was entitled to claim privilege."

The above reasoning of the learned judge in applying the defence of qualified privilege to the three categories of persons involved in the publication is in my opinion sound. Coupled with the fact that, as submitted by Mr. Henriques, it was the appellant who carried Section III from the University

domain to the public, thereby making it a matter of public interest (a fact which Mr. Macaulay, in the course of the submission by Mr. Henriques, conceded). The publications to all these persons including the press were certainly protected by qualified privilege unless this defence was defeated by proof of express malice.

On the issue of Fair Comment it was conceded by Mr. Macaulay that evidence which established justification would satisfy the requirement of a factual base on which the comment was made. The learned judge having correctly found that Section III was not original but was substantially Document 2 necessarily found that there was a factual base for the comment.

As regards the other constituents of the defence of fair comment, Mr. Macaulay conceded that in the instant case the comment was on a matter of public interest. He further conceded that Mr. Henriques' formulation on the question of fairness of the comment, namely, "would a fair-minded person make that comment on the proved facts," was legally correct. However, says Mr. Macaulay, the respondent, having in the course of commenting on the literary work of the appellant in paragraph I of the statement, attacked his personal character and integrity in paragraph 2 thereof, the defence of fair comment is thereby destroyed. Mr. Macaulay cited in support of his submission Mark v. "Sunday Times" Newspaper Company (1915) State Reports (NSW) Vol. XV p. 490. This case, has

[illegible]hing whatsoever to do with Mr. Macaulay's submission.

[illegible] it supports the contention that a criticism suggesting

[illegible]arism is justified as fair comment if it is founded on facts which would support justification as a defence. The headnote of the case reads thus:

> "The plaintiff wrote a series of articles in the "Sun" newspaper upon the subject of 'Napoleon and the present war,' they were afterwards published in book form and a copy was sent to the defendants for review. In the review the defendants wrote: 'as newspaper articles the series of papers now collected served to pass an idle few minutes. In their present shape they stand revealed for what they are, the hastily strung together extracts from a copious but not very intelligently constructed collection of stories concerning the 'Man of Destiny.' In an action for libel the defendant in a motion for a non-suit contended that the review was not capable of a defamatory meaning being no more than justifiable literary criticism. The motion was refused and it was left to the jury to say 'whether the article was the honest expression of opinion of a fair minded man, and whether it contained an imputation on the plaintiff personally and went beyond the limits of fair comment. The jury found a verdict for the plaintiff. On appeal by the defendants against the refusal of their motion for a non-suit Shand K.C. for the plaintiff/respondent submitted that the article was in the first place capable of being defamatory and with regard to the defence of fair comment the article contained an absolute mis-statement of facts and as the alleged criticism is founded upon a misdescription or false statement of fact the whole defence of fair comment falls to the ground."

Prang J., with whose judgment on these issues the other two judges concurred, said thus between pages 494-496:

> "It has been contended on behalf of the defendants that the judge at the trial should have non-suited the plaintiff. Two grounds were taken in support of this contention, the first is that the article is not reasonably capable of any defamatory meaning. The plaintiff contends that it contains a personal attack upon himself charging him with plagiarism and with incompetence and want of intelligence as an author ..... The passage says that the articles 'stand revealed for what they are hastily strung together extracts.' That seems to indicate that what was in the writer's mind was that the plaintiff had collected a number of extracts from other authors, had put them together in the form of a book, and had endeavoured to hide the fact that they were extracts from other

> "authors ..... If that be so, it clearly would be a matter which would be calculated to bring the plaintiff as an author into public ridicule. I think, therefore, that the first ground which was argued in support of the non-suit is untenable. Then it was said that the judge ought to have held that the review did not go beyond what is known as fair comment. Now the question of fair comment is one which is eminently for the jury. If they thought that the writer of the review in the course of reviewing the book was making a personal attack upon the plaintiff they were, I think fully justified in saying that it went beyond the limits of fair comment; but the more substantial ground and the one upon which I should prefer to base my judgment is that which was alluded to by Mr. Shand ... that before the defence of fair comment can be set up a foundation of fact must be established. Now in this review it is alleged that these articles are extracts. I have looked through the book and certainly on the face of it, the great bulk appears to be original composition. No doubt there are some extracts but they are properly acknowledged. The plaintiff himself says that the work was not a collection of extracts. It was of course open to the defendants, if they had so chosen to have called evidence to show that the book itself was nothing more than extracts from other writers, but they did not do so. Therefore, so far as the jury were concerned it must be taken that the allegation that the book consisted of extracts was untrue. If that were so, the foundation for the comment at once falls and the defence of fair comment fails." (emphasis mine)

The learned judge was in no doubt that paragraph 2 of the statement did not take the matter any further since it did not contain any personal attack. The personal attack was contained in paragraph 1 being inherent in the accusation of plagiarism. The learned judge relied on the statement of principle in Joynt v. Cycle Trade Publishing Company (1904) 2 K.B. 292. This principle was stated thus by Vaughn-Williams L.J. at 297:

> "If an author had published a novel, and the critic suggested that the novel was not original, that, although published under the author's name, it was really a piece of plagiarism, a reproduction of a book previously written by someone else, although not well-known a criticism which contained such a suggestion could not be justified under the plea of fair comment, unless facts were proved which made it reasonable to make such a suggestion."

The learned judge thereafter reasoned thus:

> "It would seem that to impute plagiarism, is to suggest a base and sordid motive, in which event, the proper defence would be justification. But fair comment would remain valid if facts were proven which fairly warranted the suggestion. It was contended by Mr. Macaulay that the defendant had not got his facts right. Further it was slanted and unbalanced. It was he said, not until January 9, 1976 that the defendant prepared the comparison table (Document 3). It was the fact that similarities in text, tables, approach, methodology, weaknesses, conclusions existed. These were plain on any reading of the two texts, a comparison table was not required for that purpose. Indeed, as I understood the evidence, it was prepared to document the case of the Department of Economics before the Board of Studies. The onus was on the defendant to show facts which warranted the criticism. That onus he has, in my judgment, discharged."

The learned judge was clearly right in his approach, reasoning and conclusion. The defences of qualified privilege and fair comment are therefore fully established unless on the evidence they were defeated by proof of express malice.

On the issue of malice Mr. Henriques submitted that the appellant had pleaded express malice and that the locus classicus on express malice is Horrocks v. Lowe (1975) A.C. 135, which establishes that for express malice to be substantiated the evidence must disclose that the dominant motive in making the publication was ill-will and spite. He submitted that on the facts pleaded, none antedated the publication and accordingly cannot be evidence of ill-will and spite. The appellant he

submitted made no allegation of spite or ill-will by the respondent towards him prior to the publication. To the contrary the appellant's evidence is to the effect that the relationship between him and the respondent was good, cordial and very close. Even after the publication he had written to the respondent expressing his appreciation for the manner in which the respondent had dealt with the matter. On the issue of malice being inferred from the refusal of the respondent to file a complaint of misconduct against the appellant with the professional committee, Mr. Henriques submitted that under Clause 33 when read with clause 48 (b) (iii) & (iv) of the University Ordinance, the appellant if he was so minded, could himself have filed a complaint against the respondent for misconduct in falsely publishing the "statement." Thus, the refusal of the respondent to lodge a complaint with the professional committee cannot be evidence of express malice, in the sense that it was designed to prevent the appellant from getting a fair and impartial hearing to vindicate himself. Rather, it was the appellant, who on the evidence, opted to claim damage for libel in court proceedings which foreclosed the issue being adjudicated by the professional committee.

Mr. Macaulay before us relied substantially on his submission before the learned judge including certain highlighted points in the evidence which he had made available to the learned judge at the latter's request.

The learned judge found as a fact that the appellant was not precluded from taking the matter to the professional committee. He did not choose to invoke its procedures. He chose this forum. The failure of the respondent in such circumstances, and for his expressed reasons, to follow the procedures prescribed in the relevant regulations was not evidence of actual malice. In my view the learned judge is correct in his conclusion on the evidence which was before him.

The impugned statement was published on December 2, 1975. On that very day the appellant in tendering his resignation to the Registrar wrote inter alia as follows:

> "I could have taken the stand that I would not resign, subject to having the matter cleared through all the stages within the University. However this is a futile exercise since events during the course of this week, both in and outside the Department of Economics do not appropriately allow for this or indeed any course of action, except, only perhaps going to the courts."

It is conceded that on December 5, 1975 the appellant wrote to the Registrar requesting that his resignation be placed in abeyance and further expressed himself thus with reference to rumours affecting his professional integrity:

> "The Department of Economics has met and discussed the matter. I think that in view of the atmosphere which prevails in the Department and in the Faculty at Mona, I cannot get an objective hearing of my case. Accordingly, I would prefer to have the appropriate Professional Committee to look into the matter."

The reply of the Registrar to this letter was, so far as relevant, as follows:

> "As far as having the matter placed before the Professional Committee is concerned, I have to advise that I can only bring a matter to the Professional Committee when I have a signed statement of a report of misconduct or complaint against a member of staff vide section 33 of Ordinance 8. ....."

The appellant subsequently on the 7th & 8th of December 1975 was in communication with the Registrar, formally withdrawing his letter of resignation dated December 2, 1975 but on neither of these occasions did he act on the advice of the Registrar with regard to having the matter touching on his professional integrity placed before the Professional Committee even though it was an easy matter to sign a complaint referring to the statement which was in his possession and which impugned his professional integrity and character.

Instead he acted as he was really minded to do, namely taking the matter to court by consulting his Attorney-at-law who from as early as December 16, 1975, wrote the respondent indicating the pendency of court proceedings.

The respondent's evidence was that the consensus of the Department of Economics was that the matter should not be taken to the Professional Committee as the Department had no confidence in the competence of that Committee as structured and in the way it functioned to deal with the issue. This view was also confirmed by the Board of Studies at a meeting on 22nd January, 1976. Thus the conduct of the respondent in not taking the matter to the Professional Committee was merely the implementation of the decision of the Department of Economics and it is difficult to see how in such circumstances the predominant motive in such conduct could be actual malice towards the appellant.

The learned judge next considered the other major particulars of malice averred, namely, the respondent's withdrawal as supervisor of studies of the appellant in his quest for his doctorate, his withdrawing his recommendation for indefinite tenure for the appellant, his moving a resolution for the removal of the appellant as moderator, and a faculty member on the Executive Committee. The learned judge concluded that in acting as he did, the respondent was acting honourably and with courage. I agree with the learned judge, I would merely add that the respondent was being consistent since he could hardly be expected to continue, for example, as supervisor of studies of a person whom, though to be regretted, he had found to be a plagiarist.

Finally the learned judge considered the remaining particulars of malice and concluded that they were totally incapable of amounting to express malice "in the sense that it demonstrated any indirect motive on the part of the defendant."

With this view I am wholly in agreement.

For the reasons herein expressed I am of the opinion that the appeal ought to be dismissed. I would accordingly dismiss the same.

KERR J.A.

I have read the draft judgment of Campbell, J.A. and I am in agreement with his reasoning and his conclusion. Accordingly I concur in the dismissal of the appeal with costs to the respondent to be taxed if not agreed.

WHITE J.A.

I have had the opportunity of reading the draft judgment of Campbell J.A. I agree with the reasoning and the conclusions of his judgment. I concur that the appeal should be dismissed.