IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1976/S083

BETWEEN	RAINFORD SMART	PLAINTIFF
A N D	THE GLEANER COMPANY LIMITED	FIRST DEFENDANT
A N D	ERIC SIBBLIES	SECOND DEFENDANT

FOR LIBEL

Libel and Slander, News Paper Report: Qualified Privilege.
Defamation Act: Request for Apology: Fair Comment.
Reply by Defendant to Attack: Joint Defendant.
Trial Without a Jury: Innuendo: Submission at Close of Plaintiff's case: Ruling at Close of Plaintiff's case.

Heard: July 17-20, '78; November 28-30, '78; December 1, 4-8, '78; February 19-21, '79

Dr. Lloyd Barnett and Mr. W. Walker, Attorneys-at-Law for plaintiff.

Mr. David Muirhead and Mr. David Murray, Attorneys-at-Law, instructed by Mr. Richard Ashenheim, Attorney-at-Law, for the first-named defendant, The Gleaner Company Limited.

Mr. W. K. Frankson and Mr. Codlin, Attorneys-at-Law for the second-named defendant, Eric Sibblies.

Delivered: April 5, 1979

CHAMBERS, J:

The facts of this case are fairly straight forward, when viewed from both the plaintiff's as well as from the defendant's case, but it involved many points of law on matters detailed above and which requires the determination of the court. Inspite of the facts and the points of law involved in this case, it is my opinion that the case need not have lasted as long as it did, some 15½ days, plus the time spent in delivering this judgment of some 127 pages of hand-writing, especially as the case was being heard by a judge without a jury.

First of all, what briefly are the facts sought to be proved, as gathered from the pleadings, and what is the evidence as presented on both sides, to the court.

Both the plaintiff, Inspector Rainford Smart, as he then was, and before his promotion to the rank of Assistant Superintendent of Police, and the second defendant, Superintendent Eric Sibblies, as he then was, before he [illegible]d from the police force, were at the relevant time, January 1976, [illegible]rs of the Jamaica Constabulary Force.

The first defendant is The Gleaner Company Limited, the publishers news paper known as 'The Daily Gleaner', and which has the

largest circulation in Jamaica and a wide publication outside of Jamaica of all the news paper published here, and which Company published in their Sunday Gleaner a letter addressed to the Editor by the second named defendant, Superintendent Sibblies, and which letter contained an alleged defamatory attack by Superintendent Sibbles on Inspector Smart, and is the subject of this action.

At the outset, it might be best to mention that the plaintiff, Inspector R. U. Smart, was at the time, Chairman of the Police Federation, having been elected to that position in three successive years; an organisation established by the Constabulary Force Act for the purpose of enabling sub-officers and constables of the said police force to consider and bring to the notice of the Commissioner of Police and the Minister with responsibility for the police, all matters affecting the general welfare and efficiency of the Jamaica Constabulary Force.

No Gazetted Officer, that is to say members of the police force above the rank of Inspector of Police could be a member of the Federation. The plaintiff, Inspector Samrt was then stationed at Mobile Reserve, Harmon Barracks, but was mostly at the offices of the Federation or travelling on Federation's business.

Superintendent Eric Sibblies was the Gazetted Officer in charge of certain police areas in Western Kingston noted for a high percentage or incidence of gun crimes and crimes of violence. As many English cases were cited to the Court in this case it may not be out of place to mention that our West-end of Kingston is equivalent to what is known in England as the East-end of London.

Before narrating from the pleadings, especially that of the second defendant's pleadings and from the evidence of the history of the circumstances which might have led up to the publication of the alleged libel in the issue of The Daily Gleaner of the 3rd of February, 1976, the first defendant's news paper, I shall state the portion of the lengthy publication (which incidentally was headed "Sibblies Reply", a heading formulated by the first named defendant's

Managing Editor, when editing the alleged libellous publication before his publishing it) and which was considered by the plaintiff to be the most offensive and defamatory portion. Of course, the entire article was tendered in Evidence as Exhibit I, and was, as is normal in such actions, pleaded by the plaintiff as being printed falsely and maliciously by the first-named defendant and which said article was alleged to be falsely and maliciously written by the second-named defendant for such publication in the press, and it was further alleged that both the printing and the writing of the article concerned the plaintiff in the way of his said offices and in relation to his conduct therein. The offending portion numbered in Court on Exhibit I as paragraph 9, reads as follows:

> "On Monday the 12th January, 1976, while men from Mobile Reserve were on duty at various places, an element in the Force well known to be organised to undermine discipline and divide the security forces, and who is an agent of certain political aspirants with the clandestine instructions of the said political aspirants, unauthorizedly took a radio car and with his bodyguard (a fringe benefit which he is the only member of the Force to enjoy) called off a number of men, all young men from duty, telling them to come to Mobile Reserve for a meeting."

The plaintiff, Inspector R. U. Smart, stated in his pleadings in paragraph 5 of his Statement of Claim that by the said words the defendants meant and were understood to mean that the plaintiff:

(a) had a reputation for organising indicipline and divisions within the security forces of the Island of Jamaica;

(b) is an agent of certain political aspirants who have been connected with political gun crimes;

(c) acting under the instructions of the said political aspirants, used a police radio car without authority;

(d) called off a number of members of the security forces from their duties and ordered them to report to a meeting at the Mobile Reserve Headquarters;

(e) committed an offence against the provisions of Section 69 of the Constabulary Force Act of the 1974 Revised Acts of Jamaica for which the plaintiff was liable to punishment by imprisonment and of forfeiture of all pension

rights and disqualification from being a member of the Police Force.

The plaintiff also pleaded in paragraph 6 of the Statement of Claim that he has in consequence been seriously injured in his character credit and reputation and in the way of his said offices and profession, and has been brought into public scandal, odium and contempt and lowered in the estimation of right thinking members of society generally.

The Defences of the first named defendant are set out in paragraphs 3 to 7 of his pleaded defence, and are as follows:

Paragraph 3: The first named defendant admits the publication of the article "Sibblies Reply" which included the words mentioned supra as paragraph 9 of Exhibit I but denies that it published the said words falsely or maliciously of the plaintiff.

Paragraph 4: first named defendant also denies that the words referred to or were understood to refer to or are capable of referring to the plaintiff.

Paragraph 5: Further and in the alternative, this defendant denies that the said words bore or were understood to bear or are capable of bearing the meanings referred to in paragraph 5 of the Statement of Claim or any meaning defamatory of the plaintiff.

Paragraph 6 of the Defence: Further, and in the alternative, this defendant says that the said words were a fair and accurate report published in the said newspaper of a matter issued for the information of the public by or on behalf of an officer of the Jamaica Constabulary Force and are therefore privileged under Section 9 of the Defamation Act and the Schedule thereto.

Paragraph 7: Further and in the alternative, this defendant says that the occasion of the publication was an occasion of qualified privilege.

The particulars of why the first named defendant, The Gleaner Company Limited, says that the publication was an occasion of qualified privilege are set out in the said paragraph 7 of the Defence and are numbered (1) to (4) as follows:-

(1) The second named defendant was at all material times a Superintendent of the Jamaica Constabulary Force.

(2) The said words were written and published as a result of calls made by certain members of the Jamaica Constabulary Force for the resignation, because of "playing politics" of the second named defendant at a demonstration on the 12th day of January, 1976.

(3) A report of the said demonstration was published by the first named defendant in The Daily Gleaner on the 13th day of January, 1976, and was also published by the other sections of the news media.

(4) That the conduct and administration of the police force is a matter in which the public as a whole has a ligitimate interest.

In the premises, the defendants and the public had a common and corresponding interest in the subject matter and publication of the said words.

Further, and in the alternative in the premises, the defendants were under a legal and/or social and/or moral duty and/or interest to receive them.

Further, and in the alternative in the premises, the defendants published the said words in the reasonable and/or necessary protection of their own interests and that of the employers of the second named defendant, the Jamaica Constabulary Force and the Government of Jamaica.

Further, and in the alternative in the premises, the said words written by the second named defendant were in reply to an attack made on his conduct by certain members of the police force, which reply, the first named defendant was entitled to publish.

By Paragraph 8 of the Defence of the first named defendant this defendant denies that in consequence of the publication Exhibit I, that the plaintiff has been seriously injured in his character credit and reputation and in the way of his said offices and profession or that he has been brought into public scandal, odium and contempt and lowered in the estimation of right thinking members of society generally.

Mr. Muirhead, Q.C., in opening his defence for the first named defendant laid heavy stress on Exhibit 8, which was a statement taken by the Managing Editor of The Gleaner Company Limited from Mr. Teno Geddes, one of the plaintiff's witnesses prior to the hearing of this suit, to show that Exhibit 8 related to and contained an accurate report of what took place at Mobile Reserve, Harmon Barracks on the 12th of January, 1976, and that the first named defendant made an accurate publication when he published Superintendent "Sibblies Reply" to attacks made on him Mr. Sibblies. As a result, apart from any other claim to privilege, Mr. Muirhead also claimed privilege as a result of Section 9 (1) of the Defamation Act 1961, and Section 14 of Part III of the Schedule to the Act, as he submits that The Gleaner Company only published a copy or fair and accurate report or summary of a notice or other matter issued for the information of the public by an officer of Government.

That as Section 9 (1) along with Section 14 of the Third Schedule to the Act protected them on the ground of privilege on their publishing a matter for the information of the public by a Superintendent of Police - an officer of Government, and that this ground of privilege can only be defeated if the plaintiff proves that he the plaintiff made a request of the first named defendant's news paper in the terms of the statute. Of course Section 9 (1) of the Defamation Act states, however, that such privilege can be defeated if the publication is proved to be made with malice.

Mr. Muirhead, for the first named defendant, also stated that he hoped to show that apart from the other defences, privilege also

arose, as the matter published was for the public benefit and was of concern to the public and was also published in defence of the second defendant who was attacked publicly both orally and in the press, including the press of the first named defendant.

The Defence of the second named defendant, Superintendent Eric Sibblies, was in many respects similar to the Defence of the first named defendant, The Gleaner Company Limited in respect of the denial that the accepted published words affected the plaintiff Smart, or that the words refer to or were capable of referring to the plaintiff, Smart, or were capable of the said alleged meaning or any other actionable or libellous meaning.

In any event the second named defendant like the first named defendant claimed qualified privilege for the publication. But, unlike the first named defendant, the newspaper company, who alone of the two defendants, was entitled also to attempt to rely on Section 9 of the Defamation Act Jamaica 1961 in regard to his claim for privilege, the second defendant's Counsel also pleaded fair and bona fide comment on a matter of public interest, that is, on the state and morale of the Jamaica Constabulary Force.

The pleading of the second named defendant set out particulars of what arose and which possibly gave rise to the plea of fair comment. Such particulars as pleaded by the second defendant are:-

(a) On Monday, 12th January, 1976, men from Mobile Reserve were on duty at various places including the Western Kingston Police Division.

(b) In Western Kingston, there was an escalation of political violence.

(c) Western Kingston is well known to be a strong-hold of the Jamaica Labour Party.

(d) These men on duty were called to Harmon Barracks, the Mobile Reserve Headquarters, for a meeting.

(e) The meeting was called under the guise of being a duly constituted meeting of the Police Federation.

(f) Police Radio-car was unauthorisedly used for the purpose of summoning men to the said meeting.

(g) The men called to the meeting were mostly junior members of the Police Force.

(h) The said calling off of the men seriously affected the preservation of law and order in the troubled area.

(i) Representatives of the news media were present at the said meeting.

(j) At the said meeting the plaintiff in a speech, called for the resignation of certain officers of the Police Force including the Commissioner of Police and this defendant, and went on to say that this defendant and Deputy Superintendent McKay, thought they ruled the West but they had to resign.

(k) This defendant was at all material times the officer in charge of the Western Division.

(l) Subsequent to this said meeting, there were several items by the news media concerning the calling for the resignation of those officers named by the plaintiff.

(m) In a radio broadcast by Senator Pearnel Charles, the Deputy Leader of the Jamaica Labour Party and caretaker of an area under the defendant's control, the said Pearnel Charles condemned the manner in which this defendant performed his duties.

(n) Subsequent to this said meeting this defendant has received several telephone calls daily, advising that when the present Government loses power this defendant will be shot in public.

(o) Early in the year 1975, guns were reported stolen from a ship off the coast of Jamaica. Acting on information this defendant led a party of men to Rema, a well known stronghold of the Jamaica Labour Party and recovered five (5) of the said guns.

(p) The plaintiff is a known sympathiser of the Jamaica Labour Party.

The Counsel for the second named defendant, Mr. Frankson, further pleaded in paragraph 6 of his defence thus:-

6. Further, and/or in the alternative the occasion of publication was an occasion of qualified privilege, the particulars of which are:-

(a) The defendant repeats the particulars to paragraph 5 above.

(b) The words complained of were written to enable the public to ascertain if the call for his resignation was reasonable and to attempt to restore the image of the police in Western Kingston.

(c) In the premises, this defendant, the first defendant and the public at large had a common and corresponding interest in the subject matter and the publication of the said words.

(d) Further, and/or alternatively this defendant wrote the said words to the first defendant in the reasonable and necessary protection of his own interest.

Paragraph 7 is a denial that the Plaintiff has suffered in any way, as stated in paragraph 6 of the plaintiff's pleading and as detailed early in this judgment, for the reason that since the publication of the words complained of, the plaintiff has been promoted in the Constabulary Force.

Now I, with the hope of shortening this judgment, especially in regard to the findings of fact, will set out the reply as pleaded by the Attorneys-at-Law, representing the plaintiff, Mr. Smart.

Reply as Pleaded:

Paragraph 2: The plaintiff in regard to paragraph 6 of the Defence of the first defendant will object that the facts and matters stated therein are not sufficient in law to render the occasion

of publication privileged under Section 9 of the Defamation Act and the schedule thereto or at all.

Paragraph 3: The plaintiff in regard to paragraph 7 of the Defence of the first defendant will object that the facts and matters stated therein, do not constitute an occasion of qualified privilege.

Paragraph 4: The plaintiff in regard to paragraph 5 of the Defence of the second defendant says the words complained of were not comments as alleged in the paragraph but were assertions of fact.

Paragraph 5: Further and in the alternative the plaintiff says that the words were not fair or bore no comment, nor did they relate to any matter of public interest.

Paragraph 6: The plaintiff in regard to paragraph 6 of the Defence of the second defendant will object that the facts and matters stated therein do not constitute an occasion of qualified privilege.

Paragraph 7: The plaintiff alternatively says in answer to Paragraphs 6 and 7 of the first defendant's Defence, that in publishing the words set out in paragraph 4 of the Statement of Claim the defendants were each actuated by express malice.

The particulars pleaded as to why the plaintiff says that each defendant was actuated by express malice are:-

(a) The plaintiff neither convened nor caused to be convened any meeting of the Police Federation or any other meeting at Harmon Barracks or at any other place on the 12th January, 1976, as alleged or at all.

(b) The plaintiff was at no time present at Harmon Barracks on the 12th January, 1976, and did not participate in any demonstration nor did he make any speech at the aforesaid place and on the aforesaid date.

(c) The facts stated in (a) and (b) above were capable of easy ascertainment from the plaintiff or from some other member of the executive of the Police Federation.

(d) The defendants therefore published the words complained of recklessly.

(e) The defendants had no honest belief in the truth of the said words.

(f) The defendants have neither withdrawn the words complained of nor have they or either of them given or offered any apology or correction for or of the words complained of.

Having dealt with the pleadings, I will now state in a summary way what are my findings of fact on the evidence presented to the Court, and thereafter, I shall deal in more detail with those facts, along with the law as it affects those facts, so that the decision will be understood and appreciated by all those immediately concerned as well as others who may wish to read this judgment either as lawyers or students.

I find as a fact from all the evidence made available to the Court that,

1. Both the plaintiff, Inspector R. U. Smart and the second defendant, Superintendent Eric Sibblies, were at the relevant time junior and senior police officers respectively in the Jamaica Constabulary Force, and then stationed in the respective police areas as mentioned earlier in the third paragraph supra of this judgment; and that the first named defendant, The Gleaner Company Limited is the publisher of a daily news paper and an overseas edition of that paper. They also publish an evening paper known as the Star. The daily paper is known as The Daily Gleaner and the Sunday edition is known as the Sunday Gleaner. The Daily and Sunday Gleaners respectively enjoy an exceedingly wide circulation in Jamaica

2. That there was a cessation of work by a large proportion if not nearly all of the junior ranks of the Mobile Reserve of the police force, who returned from their various postings to their headquarters at Harmon Barracks on the 12th of January, 1976.

3. There was evidence which I accepted, that a radio message was sent out by someone whose identity was stated to be unknown to

any of the witnesses called to give evidence in this case, even though a check was stated by one of these witness to have been made at the headquarters of the police, and an unsuccessful attempted check with Mobile Reserve. In fact there was no evidence of the source of the broadcast that called off the men of the Mobile Reserve from their duty to a meeting at Harmon Barracks.

The plaintiff, Inspector Rainford Smart, as well as the two witnesses Mr. Teno Geddes and Acting Corporal Bevon Earle who were called to support the plaintiff's claim, gave evidence to the effect that whatever happened at Harmon Barracks on the 12th of February, 1976, when the words complained of by the plaintiff were used, the plaintiff, Inspector Smart was not there. I will deal with and state what are my findings on this particular issue later on in this judgment when dealing with the law and with the question of innuendo.

4. I also find as a fact, that at the demonstration on the 12th January, 1976, at Mobile Reserve, Harmon Barracks, a demand was also made by the demonstrators for the removal of certain named police officers from certain areas. The officers named included the second named defendant, Superintendent Sibblies, for the reason as was stated there at the demonstration, that the three named persons including Superintendent Eric Sibblies, were leaking information to gun men.

I also find, as a fact, from the evidence, including certain Exhibits tendered in this case, that the history of certain events which occurred prior to the publication on the 3rd February, 1976, in The Daily Gleaner, by the first named defendant, of the letter supplied by the second named defendant, Sibblies, the letter to the Editor being Exhibit 10, and the edited publication of Exhibit 10 being numbered Exhibit I, were factually true as regards the writing and publication of these two Exhibits. Exhibit I being the subject of this suit.

The brief history prior to this action arising are:-

(a) On the 28th of May, 1975, Inspector Smart, as he then was, made a speech as Chairman of the Police Federation at their Annual General Meeting at which not only the Honourable Attorney General was present, but also representatives of the news media.

(b) In that speech, Mr. Smart accused the politicians of interfering with the police in the performance of their duties. That politicians were promoting gun crimes and interfering with the police in the performance of their duties. In cross-examination by Mr. Frankson for defendant Sibblies, Mr. Smart said that he knew which politicians were interfering with which police men, and that on request he supplied the names of thirteen to fourteen politicians who interferred in thirty-six instances, and in his speech of the 29th May, 1975, no names were called. No names were called at this meeting of the Federation and no innuendos could be drawn as to which politician or which police were involved.

(c) Mr. Smart admitted in cross-examination that as a result of his speech, which was published on the radio and in the press, the matter became of great public importance, resulting in several articles in the press and letters to the Editor on the subject and the matter became of great public interest and concern. That the speech, or portions thereof, was or were published in The Daily Gleaner on the 29th May, 1975. Publication tendered in evidence as Exhibit 6. That after the speech and publication, Exhibit 6, and broadcast of it on the radio, his, Inspector Smart's life, was threatened and as a consequence he was provided with two body guards. This fact of his being provided with body guards was also published in The Gleaner on the 1st June, 1975. Publication tendered in evidence as Exhibit 9.

I now quote from portions of Exhibit 9 of what the publication said that Inspector Smart spoke about:

> "..... Some politicians in the country are promoting gun crimes and had their own armed melitia to protect their interest. We are heading for chaos and frustration. The police are getting afraid. For God's sake will someone tell the politicians to get off the backs of the policemen? Will someone tell them to stop interfering with the policemen in the performance of their duties? Policemen are now afraid of which bird to touch and which not to touch".

The plaintiff, Inspector Smart, admitted in evidence that Exhibit 9 which was published on the 29th May, 1979, contained what he did say in his speech on 28th May, 1975. Exhibit 6 was a publication in the Sunday Gleaner of the 1st of June, 1975, by the first named defendant and was headed, "Police officer under guard. Threats against family." A sub-head of Exhibit 6 says, "Round the clock protection is being provided for Inspector Rainford Smart and his family as a result of threats he has been receiving".

Inspector Smart, again in this regard, says that after complaining to the Commissioner of Police about the threats he had been receiving, he was provided as from the 30th May, 1975, with two body guards, one relieving the other. Mr. Smart under cross-examination by Mr. Sibblies' Counsel, stated that he was the only member of the force to enjoy the fringe benefit of a body guard.

The next matter of importance historically in this case and accepted by the Court, is the fact that a demonstration took place at Harmon Barracks on the 7th January, 1976, when men of Mobile Reserve walked off their jobs or assignments after two of their colleagues from Mobile Reserve were shot dead while on static duties at the Sites and Services Project in Western Kingston.

The men of Mobile Reserve gathered in a noisy demonstration demanding the suspension of Static Duties. At this demonstration of the 7th January, 1976, there were Inspectors of Police down to Constables present.

Mr. Smart under cross-examination by Mr. Frankson for defendant, Sibblies said that he arrived at this meeting and saw the Prime Minister, the Commissioner of Police and the Minister of

National Security there, also other members of the executive of the Federation.

A meeting took place at 5:00 p.m. at Harmon Barracks and the result communicated to the men who then resumed duties.

This demonstration was again reported in The Daily Gleaner of the 8th January, 1976, Exhibit 7.

The next matter that occurred was the cessation of duties by the men from Mobile Reserve below the rank of Inspectors on the 12th of January, 1976, when the men were incensed that inspite of a promise made to them, static duty was restored, and the men were demanding the removal or transfer of certain police officers for playing politics and leaking information to gun men and that they were against the formation of a P.N.P. Defence Force (the P.N.P. being the People's National Party).

Witness Teno Geddes, a senior reporter or journalist from Radio Jamaica, and Constable Bevon Earle gave evidence of this incident of the 12th January, 1976, and said that what is stated in the preceding paragraph did take place and both these witnesses gave evidence that the plaintiff, Inspector R. U. Smart, was not present at the demonstration of the 12th of January, 1975. Indeed Inspector Smart denied being present at this demonstration or of his instigating or taking any part in it. He, however, stated that having later been informed of the men's grouse, including the allegation of officers playing politics, he made representations on their behalf at a meeting with the Commissioner of Police and the powers that be.

Again, the first named defendant's paper, the Daily Gleaner published on the 13th January, 1976, a news item about this demonstration of the 12th of January, 1976, and in this publication, the fact that the men of Mobile Reserve were demanding the removal or transfer of certain police officers including Superintendent Sibblies for "playing politics" was mentioned. The Gleaner publication of the 13th January, 1976, was tendered in evidence as Exhibit 5.

I, therefore, find from the above history that this matter concerning the security forces of Jamaica, in regard to alleged political interference and of certain police officers "playing politics" was an issue of great public interest and concern up to and including the fact of the police demonstration of the 12th January, 1976, when the men of Mobile Reserve openly demanded the transfer or resignation of Superintendent Sibblies for "playing politics" and also the subsequent publication in the press of this demonstration and alleged demands.

I, therefore, also finds that any letter written by Superintendent Sibblies to the said press in which these grave allegations against him were published, if such letter by him were written factually in and for his own defence, would be privileged and written on a privileged occasion and similarly such publication in the press would be a publication made on a privileged occasion. I hope to show by and in this judgment what are my findings as to the true position in law in regard to this allegation of libel of the plaintiff, Superintendent Rainford Smart when he was an Inspector of Police in the Jamaica Constabulary Force and prior to his being promoted to his present post.

If the article Exhibit I, especially paragraph 9 thereof, the subject of this action can be understood by reasonable persons, and reasonably so to refer to the plaintiff, Mr. Smart, then from the wording thereof, it would be defamatory of him in the manner detailed in paragraphs 5 and 6 of the plaintiff's pleadings, as is set out earlier in this judgment.

If the publication, Exhibit I, is defamatory of Mr. Smart, and if the allegations therein, especially paragraph 9 thereof are found to be true then Mr. Smart's action fails, but if such allegations about him are false concerning him, he may or may not succeed, even if the defendants establish a defence of qualified privilege. Such is the position in law which position I dare to say cannot be contradicted, as I shall hereafter show.

In doing this I shall endeavour to deal first, though not exclusively, with the publication in the Sunday Gleaner of the 3rd February, 1976, as it is a publication of the Gleaner Company Limited, the first named defendant in this action. In doing so, I shall deal with this publication as it is affected by privilege in at least two respects, namely, under the principle of public interest and the right to receive and publish, as well as the claim to protection by a news paper under the Defamation Act for publishing defamatory matter. Of course, as this is a joint trial of two defendants other aspects of the case will have to be referred to, especially in relation to cited cases.

Firstly, in regard to the Claim against the first named defendant, The Gleaner Company Limited, Mr. Clifton Neita, the Managing Editor of the first named defendant's news paper, The Daily Gleaner, said that he believed in the truth of what Mr. Eric Sibblies, the second named defendant wrote, and so he published the defamatory statement about a person to whom he did not know the article referred, and without checking as to the identity of that person or whether Inspector Smart was the person referred to in the innuendo.

However, Mr. Neita published a defamatory matter about someone whose name was not called in the publication and which fact should at least put a publisher on guard to see whether or not the innuendo referred to any particular person, whether that person was known to exist or not as in the case of Cassidy v Daily Mirror (1929) 2K.B. 331, which case I shall deal with later, even though he Mr. Neita, as both a Managing Editor and a trained lawyer believed he was protected under the Defamation Act, which Act I shall explain later in so far as it may or may not apply to this case.

Mr. David Muirhead, Q.C., the Counsel who appeared along with a junior, and instructed by Mr. Richard Ashenheim of the legal firm of Milholland, Ashenheim and Stone, referred the Court to the case of Horrocks v Lowe (1974) 1 All England Report 662, a case in which the defendant Lowe published a defamatory statement about someone

whose name was mentioned in the defamatory statement and whom the defendant knew he was speaking about, and which statement the defendant believed was true in toto concerning a named person. Here in the instant case of Smart v The Gleaner Company Limited et al, there was reckless publication at least as to the identity of the person defamed in the publication Exhibit I, while in the Horrocks' case there is no such similar recklessness.

In the Horrocks' case cited, the defendant, Lowe, unjustifiably defamed Horrocks who was both Chairman and majority shareholder in the vendor company, as well he Horrocks along with defendant Lowe were members of the Management and Finance Committee of the Bolton Borough Council, the purchasers of land from the vendor company, such land being subject to a restrictive covenant against building on it.

The vendor company which I shall refer to as the Horrocks company, disclosed the restrictive covenant to the Bolton Corporation. The Bolton Corporation, when leasing this purchased land to the Conservative Club, by oversight, omitted to inform the Conservative Club of the restriction against building on the land, resulting in the Corporation having to pay heavy compensation to the Conservative Club, which Club had to dismantle a building which they had put up on the land in ignorance of the restriction against building on the land.

Now, Mr. Horrocks, the plaintiff, was a member of the Conservative Party and which Party formed the Club, and the defendant, Mr. Lowe, was a member of the Labour Party.

The defendant, Lowe, on a privileged occasion, that is to say, at a meeting of the Management and Finance Committee of the Bolton Borough Council slandered Mr. Horrocks, accusing him of deception in the transaction.

Although the allegation concerning Mr. Horrocks was false, the defendant, Lowe believed the allegation against Mr. Horrocks to be true and justified, possibly because plaintiff, Horrocks, was both the Manager and majority shareholder in the original vendor Company,

and an ostensible party to the granting of an unrestrictive lease to the Conservative Club, of which he the plaintiff was a member, and the slander was spoken of, and about a transaction in which the plaintiff, Horrocks' Company was the vendor, and in which transaction the plaintiff had a financial interest, and his Company enjoyed the benefit of the restrictive covenants attached to the land.

In the cited case of Horrocks v Lowe, it was therefore held that the allegations of deceipt, though false, was honestly believed in the circumstances of that case, and that such belief protected the defendant Lowe, especially as his desire to protest the relevant interest of the Management and Financial Committee of the Bolton Borough Council was a relevant duty of all members of such a committee, of which defendant Lowe was one, and that defendant Lowe's desire to comply with such duty and to protect such interest played a significant part in his motives for publishing the slander. It was therefore held in this cited case that defendant Lowe was entitled to succeed on the ground that in those particular circumstances, his belief that everything he said was true made it impossible as a matter of law to find that he was actuated by malice on a privileged occasion. Lord Diplock stating at letter "h" on page 667 of the Horrocks Case that their attention was concentrated on the particular facts of that case.

In the instant case Mr. Sibblies, the second named defendant had a personal as well as a public interest to protect himself from defamatory statements which had been made against him by members of the Mobile Reserve, and published in the first named defendant's news paper, and even if the publication or portions of Mr. Sibblies' published reply to such allegations were false about the men of the Mobile Reserve only, or of some of the men who had taken part in the demonstration and verbal attack on Mr. Sibblies, if Mr. Sibblies the second defendant, and the first named defendant, The Gleaner Company Limited honestly believed in the truth of Mr. Sibblies' allegations in those circumstances and no innuendo could be referrable to Mr. Smart, they would, that is both defendants, in accordance with

the cited case of Horrocks v Lowe, be excused from any liability as the privileged occasion would be protected in the absence of malice, and which belief in the truth of what was said, would make it impossible, as a matter of law to find that they were actuated by malice, but the defendants could and should not be protected on this or any other ground of privilege if it is found that they unjustly defamed a person who was neither a party to or instigated the demonstration and/or the allegations made by the men about Superintendent Sibblies, as in the circumstances of the instant case and the available evidence therein, and if such be the case that Inspector R. U. Smart was absent from the demonstration and did not instigate it, it would be difficult to hold, that the two defendants herein, honestly believed in the truth of what was published about Mr. Smart the plaintiff in Exhibit I, in the circumstances of this case.

Further, in the cited case of Horrocks v Lowe per Diplock, L. J. as he then was, at page 670 letter "e", "f" and "g", it is stated that the only exception to the rule, that a plaintiff in order to succeed must show affirmatively, that the defendant did not believe the defamatory statement to be true, or was indifferent to its truth or falsity, is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty or the protection of the particular interest on which the privilege is founded.

So bringing Superintendent Rainford Smart, as Inspector Smart, defamatorily into the publication, if it be so found that he was not a party by his presence or otherwise to the demonstration of the 12th February, 1975, would seem not to be really necessary to the fulfilment of the particular duty or the protection of the particular interest on which the privilege is founded and which fact is easily contrasted with the position and circumstances in the Horrocks v Lowe's case, therefore in the instant case, the plaintiff, Smart would, if he was not present at that demonstration and he so proves by evidence, be relieved from the burden of proving affirmatively

that the defendants did not believe in the truth of the defamatory statements, and this would be especially so if the bringing of Inspector Smart into the publication was not really necessary for the fulfilment of the particular duty or the protection of the particular interest.

This judgment does not take into account the questions of absolute privilege as it does not apply to the facts of this case, such as defamatory remarks or allegations made in Court, or in Parliament and at certain International forums or Dominion forums and fair and accurate publications thereof as is mentioned in the Defamation Acts, both of Jamaica and the United Kingdom and in the respective schedules to those Acts, namely Part II of the Schedule to our Defamation Act, 1961, and Part I of the Defamation Act, 1952, of the United Kingdom.

Continuing on the facts and the law applicable to the instant case, it might be argued and has been suggested that the privilege has been lost and therefore there is no privilege if irrelevant matter appears in the publication, but I have held, and still hold, inspite of the arguments and submissions to the contrary by the plaintiff's Counsel, that the publication, the subject of this action, was done on a privileged occasion or in privileged circumstances, and so remains privileged until destroyed by evidence from the plaintiff as to malice, and I am so fortified by the statement of Diplock, L. J., as he then was, at letter "h" on page 670 of the cited case of Horrocks v Lowe, and quote:-

> "So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which on logical analysis could be shown to be irrelegant to the fulfilment of the duty or the protection of the right on which the privilege is founded."

Defendant, Lowe, who knew Mr. Horrocks personally gave evidence in the Horrocks' case, and stated that he believed, and still believes, that everything he said was true and justified - this was said in relation to the special circumstances of the case in which the plaintiff Horrocks' firm, of which Horrock himself was the principal shareholder, and therefore chief beneficiary was involved.

In the instant case, the second named defendant, Superintendent Sibblies, gave no evidence as to his beliefs, notwithstanding the evidence given by the plaintiff and his witnesses as to the non-involvement of the plaintiff in the subject matter of the defamation. However, the witness, Mr. Neita for The Gleaner Company Limited, the first named defendant, gave evidence as to his belief, and to quote from Mr. Neita's evidence, and quote:

> "I believe the truth of what Mr. Sibblies allege in his letter (Exhibit 10) I did not know to whom they referred and indeed didn't know Mr. Sibblies. I accepted that Mr. Sibblies was speaking the truth, and I accepted his bona fides because he was a Superintendent of Police. Because he was a Superintendent of Police I thought his allegations were true. I made no enquires at all."

Mr. Neita went on to say further under cross-examination by Dr. Barnett, and quote:

> "If the letter Exhibit 10 had named Mr. Smart I would have checked to see if he was one of the persons who had made the allegations against Mr. Sibblies. If he were not one of such persons I would have excised that protion. The excision of that portion might have completely ruined the letter."

This evidence by Mr. Neita seems logically reasonable enough, but Mr. Neita had earlier said under previous cross-examination, the following:

> "The person referred to in Exhibit 10 by Mr. Sibblies was not identified by me at the time I considered the letter for publication. I did not know then that it was possible to identify the person - I didn't try.

Looking on paragraph 9:

> "With his body guard which he was the only person in the force to enjoy. That person I suppose could be identified if I had written to the Commissioner of Police ..... I could have telephoned the Commissioner of Police ..... I could have asked Mr. Sibblies himself. I knew where to find him though I didn't know him."

Dr. Barnett in his closing address on the law, in regard to the point mentioned by Diplock, L. J. in Horrocks v Lowe's case, about a publication going beyond what was necessary for one's protection referred the court to the case of Koenig vs Ritchie (1862) 3 Foster and Finlason Reports p. 413 at page 420 which case emphasises but adds nothing to the principles in the Horrock's case and the analysis I am proceeding with on that and other cases.

When Exhibit 9 headed, "Police Officer Under Guard" and in which Mr. Neita admits that Inspector Smart, as he then was, was mentioned four times, the witness, Mr. Neita stated:

> "I didn't understand from Exhibit 9 that Mr. Smart was having a body guard. What Exhibit 9 conveyed to me was that protection was being provided Mr. Smart at his home for he and his family ..... I should imagine that the protection was being given to protect him from physical injury."

In other words Exhibit 9, inspite of its wording, did not convey to this witness, that Mr. Smart was being provided with a body guard.

Mr. Neita stated, that if Mr. Smart had been named in Exhibit 10, he would have checked to see if he was one of the persons who made the defamatory allegations, and if he was not, he would have excised the portion which attacked Mr. Smart or he would not have published Mr. Sibblies' letter, Exhibit 10, at all, yet a person whom the witness, Mr. Neita, states that he suppose could be identified if he had written to or telephoned the Commissioner of Police, or asked Mr. Sibblies himself about, was defamed in the publication.

How could this witness Mr. Neita, have, like Mr. Lowe in the cited case, say he believed the truth of what Mr. Sibblies said about an identifiable person whom he did not identify, and whom, if it turned out on his checking to be Mr. Smart, or if Mr. Smart was named, would have put him on guard to verify before making the publication.

In other words, if Mr. Smart had been named, Mr. Neita would have verified the truthfulness of Mr. Sibblies' allegations before publishing, yet he states he believed the allegations to be true although he did not know to whom it referred. Thus he published regardless of which officer had been attacked whether innocently or otherwise.

While on this point of the non-identification of the person named in the publication, Exhibit I, I propose at this stage to quote from the judgment of Scrutton, L.J. in the case of Cassidy v Daily Mirror News Paper Ltd. (1929) 2K.B. p.331, as I referred to earlier. Scrutton L.J. in this case, amongst other things, went on to express his full approval of the dictum of Farwell, L.J. in E. Hulton and Company v Jones (1910) A.C. when Farwell, L.J. said:

> "The rule is well settled that the true intention of any document, whether it be contract, will or libel, is that interpretation of the written words; and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who know the Plaintiff and the circumstances."

Scrutton, L. J., went on to say that the judgment in the case of E. Hulton and Company v Jones was approved by the House of Lords, by Lord Gorell and Lord Atkinson and supported by Lord Shaw at pages 25 and 26 of the judgment when Lord Shaw, agreeing and also quoting from the dictum of Abbott, C. J., in the case of Bourke v Warren (1826) 2 C. and P. pp 307, 309, when Abbott, C. J. said, and quote:

> "The question for your consideration is whether you think the libel designates the Plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel, it is sufficient if those who knew the Plaintiff can make out that he is the person meant.

Scrutton, L. J. went on to say, "I think it is out of the question to suggest that means, 'meant in the mind of the writer or of the publisher'; it must mean, 'meant by the words employed'."

Lastly, in regard to the cited case of Cassidy v Daily Mirror News Papers Limited, Scrutton, L. J. went on to say:

> "In my view, since E. Hulton and Company v Jones (1910) A.C. 20, it is impossible for a person publishing a statement which, to those who know certain facts, is capable of a defamatory meaning in regard to A to defend himself by saying: "I never heard of A and did not mean to injure him". If he publishes words reasonable capable of being read as relating directly or indirectly to A and, to those who knew the facts about A, capable of a defamatory meaning, he must take the consequences of the defamatory inferences reasonable drawn from his words."

In the instant case Superintendent Smart gave evidence, that when he read paragraph 9 of Exhibit I, he read it as relating directly to him, and he called three witnesses who said that they understood paragraph 9 of Exhibit I to relate to Mr. Smart.

Lord Loreburn, L. C., in the E. Hulton v Jones case at page 24 of the judgment said, "..... so he cannot show that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His intention in both respects equally is inferred from what he did. His remedy is to abstain from defamatory words."

I will deal more fully with the Cassidy v Daily Mirrow News Paper case later.

On a second limb of defence by the first defendant the Gleaner Company Limited, and which limb was relied on by Mr. David Muirhead, Q.C. who represented this defendant, the court was referred to the Defamation Act 1961, Section 9, subsections (1), (2) and (3) and Part III of the Schedule to the Act, paragraph 14.

Mr. Neita, who is also a trained lawyer, stated that he always kept these sections of the Act and its schedule in mind in relation to such publications.

Mr. Muirhead, Q.C., also in support of his defence, referred the court to the case of Boston v W. S. Bagshaw and Son and Another (1966) 1 W.L.R. 1126, 1127 and letters "D" and "E" pages 1134 and 1135, Harman, L. J., and Diplock, J's judgments.

(1) In the instant case, the first defendant, The Gleaner Company Limited, on a belief that qualified privilege existed under the Defamation Act 1961 in this case, published a defamatory statement about an identifiable person based partially on a mistaken interpretation of the meaning of the word "Officer of Government" as is mentioned in Section 14 of Part III of the schedule to the Defamation Act, 1961, which section gives qualified privilege to publications made persuant to Section 9 (1), of the Act, if such publication is done without malice.

Now, under this section of the Act namely Section 9 (1), together with Section 14 of Part III of the schedule to the Act, a claim to privilege by a news paper shall be a defence to the publication of a fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any government department, officer of the government or local authority. Part III of this Schedule also affords protection in other instances persuant to Section 9 of the Defamation Act and which I will mention hereafter.

"Officer of Government", would not, in this context, include a

Superintendent of Police, and in addition, I further hold, that no inference can be drawn from Mr. Sibblies' letter, Exhibit 10, which was written to the Editor of the first named defendant Company, whether before or after editing, as stated by Mr. Clifton Neita the Managing Editor and witness for the first defendant news paper company, that Mr. Sibblies was cleared or got permission from the Commissioner of Police, our Chief Officer of Police, for his writing the published or edited letter, that is the subject of this action.

The Equivalent Act of the United Kingdom is the Defamation Act 1952 and Section 12 of Part 2 of its Schedule is worded similarly to our 1961 Act - our Defamation Act, and Section 14 of Part III of its schedule, except that the United Kingdom Act instead of stating "Officer of Government" has "Officer of State" and in addition has "Chief Officer of Police" while our Defamation Act makes no mention of the police or any officer of the police whatsoever.

I shall set out more fully later, and deal more fully with both our Defamation Act 1961 and the 1952 Defamation Act of the United Kingdom, in the meantime, I shall concentrate on the Boston v Bagshaw and Son and another, case cited above.

(a) In the Boston Case cited supra, the publication was done by and at the instance of a Chief Officer of Police in the course of his duty to apprehend, and in the particular circumstances of that case, circumstances completely different from the circumstances in the instant case, and therefore the publication was held in the cited case to be privileged.

(2) In the instant case, the publication in the first named defendant's paper, of the letter or the edited version of the letter Exhibit 10, written by the second named defendant, Superintendent Eric Sibblies, and which letter was requested by him to be published by the first named defendant, was not for the purpose, as in the cited case of Boston, of assisting anyone to find or to apprehend a law-breaker who allegedly and by deceit gave the same name and occupation to the auctioneers as the plaintiff had in the cited case,

but was written by Superintendent Sibblies to the first named defendant press, for the purpose of protecting his, the second named defendant's self-interest from a defamatory attack made by some one or more persons on him, and in addition the publication by the irst named defendant of the letter Exhibit 10, edited as Exhibit I was news worthy. Could this letter, Exhibit 10, written by Superintendent Sibblies to the Editor of The Gleaner be regarded as a letter written as in the Boston case cited, be said to be written in the course of his duty? One has only got to ask the question to get the answer.

In proceeding in such circumstances as in the instant case, the person seeking to protect his interest and self-esteem and the person publishing such news-worthy items as a follow-up to previous published items about the police force and any of its members either by name or description should be careful who he or they deliberately defame in the process.

(b) In the Boston v W. S. Bagshaw et al case cited, Lord Denning, M. R. stated, that no reasonable person could think that the broadcast could refer to the plaintiff, while -

(3) In the instant case, I hold from the evidence, that a reasonable person could think that the publication in The Gleaner, Exhibit I referred to the plaintiff. The plaintiff, the former Inspector Rainford Smart said in evidence that he was the only person in the force with a body guard and three witnesses were called by the plaintiff to say, and who did say, that they believed that the article Exhibit I referred to the plaintiff. Of course one of the witnesses, a female witness, was not very reliable on this point as was shown up by cross-examination.

(c) Again in the cited case of Boston v W. S. Bagshaw et al, the defendant and the auctioneers had a common interest to protect, the former for the apprehension of a thief, and the latter, apart from the desire for the apprehension of the thief, that the thief should not be able to rob other auctioneers, or even themselves again, and so such common interest in the

circumstances of that case, entitled them to claim qualified privilege for the publication. The defendants published through a broadcasting company a defamatory matter concerning a named person, in good faith. The broadcast was for the purpose of locating a thief who had given to the auctioneers an assumed name and occupation which was similar to that of the plaintiff, Boston, and the defendant was protected on the grounds of qualified privilege, as there was neither proved or inferrential malice.

(4) In the instant case, the second named defendant, Mr. Sibblies, though having an interest to protect, that is an interest to protect himself from an attack made on his integrity etc., did not have a common interest on that ground with either the first named defendant or the public, though the interest that the first efendant was entitled to protect involved a matter of public interest and concern which would also be of interest and concern to a public media in disseminating news of such matters which affected the Security Forces of Jamaica and would be for the public benefit, concern and interest.

In such circumstances, the question of privilege arises, where one is making a publication to protect himself from a defamatory attack made on him at a police demonstration and published in the press, and the other, namely the same press in which the first article was published, disseminating news of public importance, interest and concern, but in doing so, neither he nor any publisher can be justified if, without an honest mistake made on reasonable grounds, deliberately maligns a named person, or by innuendo, an easily identifiable person who was not shown to have attacked the defendant or the person first defamed, especially if such identifiable person has produced evidence in an effort to substantiate his innocence. If such be the case malice may be inferred from the article itself, and the qualified privilege which existed would be destroyed, even though it remained to be considered a privilege until destroyed, and if the defamation is actionable per se,

as in this case, the plaintiff, Rainford Smart would in such circumstances be entitled to recover, and unlike the defendant Broadcasting Company in the cited case of Boston v Bagshaw et al, who might have got a judgment in their favour if they had not settled, in the instant case, I hold that the first defendant, The Gleaner Company Limited cannot claim the protection of Section 9 of the Defamation Act 1961 and its Schedule for two specific and uncontradictable and simple reasons which I shall show later.

I also hold that if they published a defamatory attack on the plaintiff, Inspector Smart, falsely and without justification, they would not be able to succeed on any other ground, and I am fortified on this latter point by the dictum of Lord Loreburn, L. C., at pages 23 and 24 of the case of E. Hulton and Company v Jones (1910) A.C. 20 when he said, and quote:

> "A man in good faith may publish a libel believing it to be true, but in fact the statement was false. Under these circumstances he has no defence to the action, however excellent his intention ..... Just as the defendant could not excuse himself from malice by proving that he wrote it with the most benevolent spirit, so he cannot show that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His intention in both respects equally is inferred from what he did. His remedy is to abstain from defamatory words."

In other words a man cannot excuse himself from malice, if he wrote falsely about the wrong person, and a man charged with libel cannot defend himself by showing that he intended in his own mind, heart or breast not to defame, or that he intended not to defame the Plaintiff, if he did both.

It was Mr. David Muirhead, Q.C., who on the hearing of this case referred the court to the Defamation Act, 1961, Jamaica, Section 9, Subsections (1) and (2) and to Section 14 of Part III of the Schedule to this Act to show that privilege attached to the publication in the first defendant's paper for the reason stated in Section 9 of the Defamation Act and the said Schedule, as the publication was a copy or fair and accurate report or summary of a notice or other matter issued for the information of the public by or on behalf of an officer of the government, namely Superintendent Sibblies, he being an officer

of Government.

Mr. Muirhead also referred the Court to paragraph 678 of Gatley on Libel, 6th Edition, dealing with "Loss of Statutory Protection" and also cited the case of Khan v Ahmed (1957) 2 Q.B. 149, to show that once the privilege is attached in respect of a publication in a news paper, persuant to Section 9 of the Defamation Act and Section 14 of Part III of its Schedule, the privilege cannot be lost unless a request is made by the plaintiff to the news paper defendant in terms of the statutes and the defendant news paper refuses to comply with the request.

Before dealing with the cited case of Khan vs Ahmed, I shall quote from, and analyse the statute as it affects this instant case, and also relate the English Statute as it affects the cited case or cases.

Section 9 of our Defamation Act reads as follows:

"9 (1) Subject to the provisions of this section, the publication in a news paper 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.

(2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part III of the Schedule, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the news paper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable, having regard to all the circumstances.

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

In analysing section 9 of the Defamation Act, one must bear in mind that the protection conferred on news papers by this section does not apply, if as is stated in Sub-section (4) of this section, the publication of a particular matter is prohibited by law, or the published matter is not of public concern or is not for the public benefit.

I must say that, subject to sub-section (4) of Section 9 of

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this Act, that it is quite clear and without a doubt that sub-section (1) of Section 9 of the Defamation Act applies to all three schedules to the Act, including the first schedule, which first schedule deals only with interpretation, consequently, the privilege conferred on publications in news papers of matters mentioned in the schedule Parts II and III of the Act can be destroyed if it is proved that the publication is made with malice.

It is also clear that Sub-section (2) of Section 9 of the Defamation Act only applies to matters mentioned in Part III of the Schedule, and in regard to such matters mentioned in Part III of the Schedule, no protection is afforded a defendant news paper on the ground of privilege if it is proved that the defendant has been requested by the plaintiff to publish in the news paper in which the original publication was made a reasonable letter or statement by way of correction or explanation etc.

The only differences between the United Kingdom Defamation Act 1952 and the Defamation Act in Jamaica are:

(a) that our Act was passed at a later date; and

(b) our Section 9, Sub-sections (1), (2), (3) and (4) written out above is numbered in the United Kingdom Act as Section 7 Sub-sections (1), (2), (3) and (4); and

(c) the omission from line three of our Section 9 (1) of the words "..... to this Act ....." which appears between the word "Schedule" and the words "shall be privileged...." in the said Section 7 (1) of the English Defamation Act 1952.

(d) Instead of the word and figure "Part III" of the schedule as appears in Sub-section (2) of Section 9 of our Act, the word and figure in Section 7 (2) of the United Kingdom Act is "Part 2" of the Schedule and the omission from our Act in this Sub-section of the words "..... to this Act ....." after the word "Schedule....".

In other words the equivalent to Section 9 of our Defamation Act 1961 is Section 7 of the United Kingdom Act and the equivalent

schedule to our Part III of the schedule is Part 2 of the Schedule in the United Kingdom Defamation Act 1952.

Again, although the wording in the respective Schedules of the United Kingdom Act and the Jamaica Act are nearly the same, like the Sections of the Act they are numbered differently.

Section 14 of Part III of the Schedule to the Defamation Act 1961 which is relied on by Mr. David Muirhead, Q.C., for the first named defendant in the instant case, is numbered in the United Kingdom Defamation Act 1952, as Section 12 of Part II of the Schedule.

Our Part I of the Schedule, the interpretation portion, is Part III of the Schedule in the United Kingdom Act.

Again with reference to the cited case of Khan v Ahmed (1957) 2 Q.B. 149, relied on by the first named defendant in support of his claim to privilege under Section 9 of our Defamation Act 1961 and the schedule thereto, the section of the schedule relied on in the Khan case is Section 9 and the equivalent section in Jamaica is numbered Section II and both schedules read alike as under.

I shall now record in this judgment the wording of Section II of Part III of the Schedule to the Jamaica Defamation Act which wording is similar to Section 9 of Part 2 of the Schedule to the United Kingdom Defamation Act 1952, with the exception of the words "the United Kingdom" for the words "this Island" appearing in the United Kingdom Act.

> "Part III, Section II: 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 the admission to the meeting is general or restricted."

In the instant case of Smart v Gleaner Company Limited et al the claim to privilege was not made under this Section II of Part III of the Schedule to the Defamation Act, and indeed it does not apply to the instant case, however, this Section may be relevant in order to explain the circumstances of the cited case of Khan v Ahmed (1957) 2 Q.B. 149 and to explain the necessity for a request to be made.

I shall now also record the wording of both Section 14 of Part III of the Schedule to the Jamaica Defamation Act as well as Section 12 of Part II of the Schedule of the United Kingdom Act, as each of these sections of the respective schedules are slightly different but at that very slightly.

Section 14 of Part III of the Schedule to the Jamaica Defamation Act reads as follows:-

> "14. A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any government department, officer of government or local authority."

Section 12 of Part II of the Schedule to the Defamation Act 1952 of the United Kingdom reads as follows:-

> "12. A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any government department, officer of state, local authority or chief officer of police."

I shall now narrate as promised earlier, why I say and held, and I say, and correctly, that the claim to privilege by the first defendant under Section 9 of the Defamation Act and Section 14 of Part III of the Schedule cannot stand.

(1) A Superintendent of Police is not an officer of Government for the purposes of the Schedule to the Act nor to the Act itself. In the United Kingdom Defamation Act 1952, the word is "Officer of State" instead of "Officer of Government" as in the Jamaica Defamation Act 1961. The United Kingdom Act specifically includes "Chief Officer of Police" although the word "Officer" had already appeared in the section of the Schedule as "Officer of State", and the Jamaica Act, although it has "Officer of Government" it makes no mention of the police.

(2) In Foster v Watson (1944) S.R. (N.S.W.) 399 the State Reports of New South Wales (not cited during the trial) per Jorde, C. J., the privilege covered only "Statements of a genuinely official nature formally issued for the information of the public, and that it does not apply to mere interesting gossip supplied to journalists by the publicity officer of a Ministry for the purpose of keeping his Minister's Department prominently in the public eye."

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In other words the statement supplied to the Press must be of a genuinely official nature formally issued etc. In the instant case, even if Superintendent Sibblies could have been regarded as an officer of government for the purpose of the Defamation Act, Mr. Neita, the Managing Editor of The Gleaner Company Limited stated, under cross-examination by Dr. Barnett who represented the plaintiff, Smart, that when he received the letter, Exhibit 10, from Mr. Sibblies, and which he edited, the letter was written on plain paper. That he Mr. Neita was familiar with the use of official letter heads by officials, and that it was also usual when writing officially to designate the post the signer has on his office.

In the instant case, Exhibit 10 was written on plain paper and not on an official letter-headed paper, and the writer Mr. Sibblies, did not in signing the letter, designate there-under his post or office. Mr. Neita however stated that such letter, Exhibit 10, and quote, "Came with a covering letter which would have been destroyed. This letter, Exhibit 10, has no address - an address was placed on it by me".

It can therefore be seen from this evidence and from the Foster v Watson case, that what Mr. Sibblies did was to supply to the Gleaner Company Limited, an interesting and news-worthy item, or easy unconstrained writing about, "an element in the force", as detailed in paragraph 9 of Exhibit I, not as an official release formally issued, but a mere interesting allegation for the defensive protection of his reputation.

The first defendant news paper, not being able on this account to take advantage of the Defamation Act, will have to depend on other defences to escape liability.

Having explained and stated what I hold is the correct position in this case as regard the claim to privilege under the Defamation Act, made by Mr. David Muirhead, on behalf of The Gleaner Company Limited, the first named defendant, I must in deference to him as he submitted that Section 9 of the Defamation Act along with Section 14

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of Part III of the schedule thereto applies to this case in regard to privilege, deal with the matter as though Mr. David Muirhead was right on this point. In doing so, I am mindful of the fact, that someone else in the future may also try to do the impossible by interpreting the words "Officer of Government" to include a Superintendent of Police in similar circumstances, in the context of the Defamation Act, Jamaica or if it be the case, attempting to interpret "Officer of State" as appears in the Defamation Act 1952 of the United Kingdom to include Superintendent of Police.

In other words I shall now proceed as though Section 9, sub-section (2) of the Defamation Act in combination with Section 14 of Part III of the schedule as submitted by Mr. Muirhead applies to this case.

First of all these two sections just quoted are to the effect that if they apply to the particular facts of the case and so confer privilege on the news paper publisher, such privilege cannot be used as a defence if it is proved that the defendant news paper has been requested by the plaintiff to publish in the news paper in which the publication was made, a reasonable letter or statement by way of explanation or contradiction, and the news paper defendant has refused or neglected to do so etc.

Put another way, if Mr. Muirhead is right that Section 9 (2) of the Defamation Act along with Part III of its schedule, provides his client the news paper company with a defence to this action, then this defence remains a good defence:-

(1) If the plaintiff did not request the news paper to publish an explanation or correction.

Now, I must ask, what is the position in this case in regard to whether a request in terms of Section 9 (2) was made by the plaintiff Mr. Smart to the first defendant news paper, if one should regard Section 9 (2) of the Defamation Act as applying to this case.

Mr. Clarence W. Walker of the legal firm of Daley, Walker and Lee-Hing, wrote to the Editor of "The Daily Gleaner", The Gleaner Company Limited, a letter on behalf of the Plaintiff,

Superintendent Rainford U. Smart and which was tendered in evidence as Exhibit 2 pointing out the publication in their paper of Sunday the 3rd February, 1976, and especially quoting the words as are now to be found in paragraph 9 of Exhibit I, as well as in Exhibit 2, and informing the Editor that the words are completely untrue and that they constitute a grave libel on their client, and stating why the publication was considered a grave libel.

The letter to the Editor of the first defendant company ended thus:-

> "We are, therefore, writing to ask whether you are prepared (1) to sign a suitable withdrawal and apology in terms to be approved by us on our client's behalf and (2) to indemnify him in respect of the costs to which he has been put in the matter. We are also instructed to inquire what sum you will be prepared to pay by way of damages for the very serious injury to out client's reputation.
>
> We must ask you to let us have a reply within ten days of the date hereof. In the meantime it must be clearly understood that our client reserves all his rights in this matter."

Now it is quite clear to me and to anyone, that what I have just quoted from the plaintiff's Attorney-at-Law's letter to the first defendant's Editor is not that type of request as is envisaged in paragraph 9 (2) of the Defamation Act. A similar situation arose in the case of Khan v Ahmed (1957) 2 Q.B., p.149 cited by Mr. Muirhead in support of his contention that the privilege which he incorrectly claimed that his client the first defendant enjoyed under the protection of Section 9 (2) and Section 14 of Part III of the Schedule to the Defamation Act was not as a defence defeated, as no request was made of his client in the terms of the Defamation Act.

In the Khan case, the claim to privilege was based on Section 7(2) of the Defamation Act 1952 of the United Kingdom Act, which is as stated earlier is equivalent to our Section 9 (2) of our Defamation Act 1961, the Khan case was based also on Part II of the Schedule of the United Kingdom Act which is equivalent to our Part III Schedule, but the Section of the Schedule relied on, was not Section 12 of Part II of the Schedule of the United Kingdom Defamation Act which is the Schedule and Section equivalent to our Section 14 of Part III of our

tion at Harmon Barracks on February 12, 1975. Plaintiff, Smart said he was not.

In the Khan's case, the claim to privilege was under Section 7(2) and Section 9 of the Schedule, Part II of the United Kingdom Defamation Act which relates to the publication of a fair and accurate report of the proceedings at a public meeting. It was fair and accurate to say that the plaintiff, Khan, was present at the meeting and that he did take part by speaking from the floor, and the jury held that what was published by the news paper was a fair and accurate report of the proceedings at the meeting, having also held that a reasonable person would identify the plaintiff with the alleged libel.

So in the Khan v Ahmed case (1957) 2 Q.B. p. 149, presided over by Lynskey, J. and a jury, it was held that Section 7 (2) contemplated a special request that there should be published either a contradiction or an explanation in the words of a letter or in terms put forward by the person alleging that he had been libelled, and that a general letter asking for a full apology and withdrawal, such as that written by the plaintiff's Solicitors was not a request in accordance with the Sub-section. Accordingly the defence of privilege provided by Section 7 was open to the defendant.

Lynsky, J. at page 153 of the cited case of Khan, had this to say about the Plaintiff's Solicitor's letter, and quote:

> "It was a letter demanding a full apology and withdrawal of the publication. Again as a matter of law, I must direct you that that is not a "request" within the meaning of Section 7 (2) because what is there referred to is a "Special Request" that there should be published either a contradiction or an explanation in the words of the letter or in terms put forward by the person alleging that he has been libelled, and in this case that was not done. All that was done, was to write a general letter asking for a full apology, and I rule that that was not a compliance with the section.
>
> The result is that the publication is privileged if you think that it was a fair and accurate report of the proceedings at the meeting, and this is one of the questions you will have to decide if you think a reasonable person would identify the plaintiff with the alleged libel."

On the issues left to them, the jury returned a verdict for the defendants.

So in the instant case of Sibblies vs the Gleaner Company Limited et al, if "Officer of Government" meant Superintendent of Police or included a Superintendent of Police and the publication in paragraph 9 of exhibit I was a fair and accurate report or summary of a notice or other matter issued for the information of the public by or on behalf of an officer of government then Mr. Muirhead's claim to privilege under Section 14 of Part III of the Schedule to Section 9 (2) of the Jamaica Defamation Act would prevail, as no request was made on the First Defendant by the Plaintiff in terms of the statute.

However, as stated earlier, I hold that Section 9 (2) and Section 14 of Part III of the schedule to the Jamaica Defamation Act 1961 is not available to the first named defendant, The Gleaner Company Limited, as "Officer of Government" does not include a Superintendent of Police, so whether or not a request was made in the terms of Section 9 (2) of the Defamation Act, privilege on this ground would not be available to the Gleaner Company Limited.

Having settled the question of the claim to privilege under Section 9 of the Defamation Act 1961 and under Sections 11 and 14 of Part III of the Schedule. (Sections 7 of the Defamation Act 1952 of the United Kingdom and under Sections 12 and 9 of Part II of the Schedule to the United Kingdom Act) , once and for all in regard to this case and other similar cases, I now proceed with my judgment on all the other aspects of the case including the question of the submissions made at the close of the plaintiff's case and the rulings therein.

Now going back to the writer of the original offending article Mr. Sibblies, the second defendant, it was submitted by Mr. Frankson on efendant, Sibblies' behalf, after the close of the plaintiff's case, that once it is held that Mr. Sibblies felt that he was obliged to reply in his own interest to an attack made on his character, then it would be irrelevant for the purpose of the Court's ruling as to whether the occasion was a privileged one that the article defamed

Act, but on Section 9 of Part II of the Schedule to the United Kingdom Defamation Act, which is similar to Section II of Part III of the Schedule to the Jamaica Defamation Act, which reads as follows substituting "the United Kingdom" for "in this island".

> "Section II. A fair and accurate report of the proceedings at any public meeting held in this island (the United Kingdom), 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."

In the Khan v Ahmed case (1957) 2 Q.B. pp.149 and 153 the Solicitors for the plaintiff wrote to the Defendants a letter as in the instant case, which letter was dated January 5, 1955, and after complaining in the letter about the article, and alleging that it referred to the Plaintiff and would involve him in serious repercussions stated:

> "In our opinion your article constituted a most serious libel on our client and he therefore requires that you should arrange to be published forthwith a full apology ..... such apology to be framed in a manner satisfactory to our client. In the absence of such apology our clients will take such steps as he may be advised to protect his interests."

As in the instant case, as Exhibit 4 which is the reply of the lawyers for the Editor of the first defendant paper, to the lawyers of the plaintiff will show, no apology or explanation or contradiction was published in the news paper, and in an action by the plaintiff, claiming damages for libel contained in the report, the defendant pleaded, inter alia, that the publication of the report was privileged under Section 7 of the Defamation Act 1952.

In the Khan case, the plaintiff pleaded that the words "Some communist rowdies tried to create disturbance at the close of the meeting etc", that those words, were by innuendo, referrable to him and was defamatory of him, as he was the only person who spoke from the body of the hall.

It should be noted that whatever the plaintiff, Khan did at that meeting, he did speak at that meeting being himself present, and so stated by him. In the instant case, it is in dispute as to whether the Plaintiff, Mr. Smart was present at the noisy demonstra-

Mr. Smart or not. Mr. Frankson then went on to submit that there were only two situations which would be relevant to my ruling (prior to the start of the second defendant's defence) as to whether the publication was made on a privileged occasion or not and they are:

(1) is that the defendant, Sibblies was actuated by malice - that is express malice and;

(2) that the defendant did not believe the truth of what he was saying.

Mr. Frankson further submitted that neither of these two conditions was present.

Now I wish to state at this juncture that the latter of the two situations in this submission by Mr. Frankson that malice on the part of a defendant or his non-belief in the truth of what he was saying would be relevant at that stage of the case as to my ruling on the question of whether the occasion was a privileged one, is not supported in law or on the cases relied on. The cases have made it quite clear to me especially the Horrocks v Lowe case, that once there is privilege or rather that the occasion was privileged, the privilege can only be destroyed if it is proved by the plaintiff that the defendant's motive in making a defamatory statement is an improper one and such improper motive is a dominant one. So once it is decided that the occasion is privileged the benefit of the privilege enjoyed by defendants can only be defeated by evidence coming from the plaintiff. In other words the privilege remains but remains as a defeated one, after proof by evidence from the plaintiff has been given and so my ruling, at the stage that the application for such ruling was made, that the occasion was a privileged occasion could not be affected in the two instances mentioned by Mr. Frankson in the previous paragraph supra.

To quote from the judgment of Diplock, L.J., as he then was, at page 669 of the case of Horrocks v Lowe (1974) 1 All E.R. (H.L.) at letter "C" in respect to the protection afforded a defendant on a privileged occasion, and quote:

> "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 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

'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 for the defamatory publication. 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 ligitimate interests.

The motive with which a person publishes defamatory matter, can only be inferred from what he said or knew. If it be proved that he did not believe that what he published was true, this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own ligitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

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 though tautologously termed 'honest belief'. If he publishes untrue defamatory matter recklessly without considering or 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."

It is unfortunate that Mr. Sibblies, the second named defendant, did not give evidence as to what he knew, if he in fact knew anything at all in this regard.

The emphasis placed by Lord Diplock in the above quotation, is that where the privilege exists, the privilege can only be destroyed by proof by the plaintiff that there was express malice as defined above. Proof can only mean legal proof.

The Gleaner Company Limited cannot, in the circumstances of this case, independently to the second defendant, Superintendent Sibblies' claim to privilege, claim privilege under the Defamation Act and its Schedule, for as stated earlier in this judgment, such a claim is on a mistaken interpretation of the words "Officer of Government", and even if it was entitled to claim privilege in relation to a published reply to an article which they the first defendant previously published about the second defendant, Sibblies, and which article did not mention the name of the plaintiff, Smart, in this case, such qualified privilege would be defeated by what is referred to in law as 'express malice' if they published, in the published reply a false and defamatory allegation about the plaintiff without justification.

Put in the light of paragraph 671 of the 6th Edition of Gatley, as the court was referred to, and of Eggen v Chelmsford (1965) 1Q.B. 248. If the occasion for the publication was privileged, even if the published statement was false and defamatory of the plaintiff the defendant would have a complete answer to such publication, unless he the plaintiff proves that the defendant was actuated by express malice. Only when the occasion is not one of qualified privilege that a false and defamatory statement is presumed to be done maliciously by the publisher, and no burden lies on the plaintiff to prove malice.

In the instant case, the court holds that both the first and second defendants enjoyed a qualified privilege together. The additional qualified privilege claimed by the first defendant under the Defamation Act, being erroneously claimed by them, and on their behalf thus leaving the claim to qualified privilege based on a duty to publish in defence of one's interest, and a public duty to inform on a matter of public interest and concern.

Has this privilege been defeated or destroyed by the plaintiff proving express malice against each defendant?

Once the plaintiff has shown that he was not at Harmon Barracks at the time that Mr. Sibblies was verbally attacked and that he took no part in such an attack and consequently the evidence showing that the defamatory article - Exhibit I - defaming Mr. Smart was not really necessary for Mr. Sibblies' vindication of his integrity, then in the absence of evidence from the defence, negativing the plaintiff's claim to innocence in such an attack on Mr. Sibblies, then the plaintiff would have discharged the burden cast upon him of proving express malice.

In regard to paragraph 765 and 767 of Gatley, 6th Edition, it has been submitted that proof that the words are false, is not evidence of malice. I hold that that may be so in regard to a person or for that matter a group of persons actually involved in the matter which requires that some words be used by the person first attacked about that person or group but that would not entitle a

defendant to use false and defamatory words about a person who is a stranger or not being a party to the occasion being talked about. If a defendant does that, then he is abusing the occasion of the privilege, and if he abuses the occasion of the privilege then he may be said to be speaking or writing maliciously.

The instant case can therefore be contrasted with all the cases cited on this point, as the cited cases are all dealing with carelessness or deliberate attacks on persons directly involved in the matter spoken or written about by the defendants and not as in the instant case to a person who on the evidence presented, is not involved in the matter which resulted in the defamation.

No such evidence of involvement by the plaintiff was presented to the court by the defence so as to create doubt in the plaintiff's evidence, nor indeed did it came out in cross-examination.

In paragraph 775 of Gatley, 6th Edition, as cited by Mr. Frankson for the second defendant, in his submission that failure by a defendant to inquire which enquiry might verify or falsify his statement is not by itself evidence of malice.

The witness for the first defendant, Mr. Neita, told the court that he made no enquiries as to who the article, Exhibit 10, paragraph 9 of Exhibit I referred to, though if he had telephoned the Commissioner of Police or asked the second defendant, Sibblies himself, he might have discovered the truth or falsety of the statement, or rather whether it referred to the plaintiff, Mr. Smart or not. In all this, the court is left without any evidence from the defence of the second defendant as to whether or not any inquiry on the defendant's part was necessary or whether he had made any inquiries or not. The same paragraph 775 of Gatley, 6th Edition, referred to, supra, went on to say:

> "A belief induced by intentionally shutting one's eyes to all the facts which tell in the opposite direction is not an honest belief; it is no belief at all. (Per Cotton L.J., ibid. 47 L.J.Q.B. at 233). So where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown that the imputation was groundless, or where he deliberately stopped short in his

inquiries in order not to ascertain the truth, a jury may rightly infer malice."

The cited case of Egger v Chelmsford (1964) 3 All E.R. 406 is a case dealing with vicarious liability of a superior to his agent, on the principle of respondeat superior, and not the other way around, and the question of how each person's malice, if any, on a privileged occasion is to be considered.

Mr. Frankson for the second defendant, Mr. Sibblies, submitted at the close of the plaintiff's case, and after the first defendant, The Gleaner Company Limited had closed its case, that persuant to paragraph 592 of Gatley, the court ought to rule at this stage, that is at the close of the plaintiff's case on his application, that the occasion was privileged, and that as the facts on which he bases his submissions are not in controversy, the court should rule at this stage as to whether the occasion was privileged.

Dr. Barnett, on the other hand, opposed the application based on his submission: (1) that Mr. Frankson was making a no-case submission and that that cannot properly be done at the stage where one of two defendants has already closed his case. That if such is done then the court should request the person making the submission to make an election whether to rest on his submissions or not.

Secondly, that there is no distinction between a no-case submission and what Mr. Frankson is doing, that is, asking for a ruling at such a stage as to whether the occasion was a privileged one.

In support of such opposition by Dr. Barnett, he has referred the court to paragraphs 1301 and 1302 of Gatley, 6th Edition, and submits, that as there is no such distinction, then the rules in relation to a no-case submission should be applied, namely - that where a judge is sitting without a jury as stated in Alexander v Rayson (1936) 1 K.B. p 169 at pages 177 and 178, that a judge should not be asked to take that responsibility. In further support of his submission Dr. Barnett referred the court to the cases of Marbe v George Edwards (1928) 1 K.B. p. 269 and 277, and of Cleghorn v Saddler (1945) 1 K.B. 325 and 328, and stated that those decisions show that the court could

postpone its ruling until the evidence for the defence had been called.

Thirdly, Dr. Barnett further submitted that the case of Young v Rank (1950) 2 K.B. 510 at pp 512, 513 and 514 is of importance and that it makes a clear distinction between when a judge is sitting alone and when sitting with a jury, and that it shows that a ruling should not be entertained without requiring Mr. Frankson to stand on his submissions.

Doctor Barnett then dealt with paragraph 1327 of the 6th Edition of Gatley, one of the paragraphs relied on by Mr. Frankson in his Mr. Frankson's submission that a ruling as to privilege can be made at the close of the plaintiff's case and before the defendant who is represented by Mr. Frankson begins to give evidence. Doctor Barnett submits to the court that the elementary proposition in paragraph 1327 of Gatley is, that although the primary burden of proving privilege rests on the defendant (and that would be when the defendant has presented such evidence in the witness box) the defendant after having given or presented his evidence may take advantage of any proof of privilege that had been established in the plaintiff's case.
Dr. Barnett in his argument further submitted that paragraph 1327 merely established that the question of privilege when coming from the plaintiff's case enables the defendant to submit at the end of the plaintiff's case on a no-case submission:

(a) that the occasion was privileged and;

(b) that there is no evidence of malice.

That in such a situation the judge when sitting alone should invite the defendant to elect whether he rests on his submission, and that if the defendant does not so elect, then the ruling should be postponed until the end of the case.

Dr. Barnett further submitted that:

(a) the viciousness of the attack on Mr. Smart went beyond any apparent need for the defence of Mr. Sibblies and therefore this raised the inportant and fundamental controversy as to whether the occasion was privileged;

(b) that paragraph 564 of Gatley, 6th Edition, shows that privilege only applies when the person who is attacked in a response, is the person who had attacked the publisher of the reply;

(c) that paragraph 568 of Gatley is also relevant to show that the privilege does not extend to cases where fresh accusations are made against the person who allegedly made the attacks which were being replied to;

(d) that all these matters are in controversy, and in accordance with paragraph 592 of Gatley's 6th Edition where the facts are at all in controversy the judge will postpone his ruling as to privilege.

Mr. Frankson for the second defendant in reply to all these submissions stated, that the facts are not in controversy and insists that he is only asking for a ruling as to whether the publication was made on a privileged occasion and that he has not asked for any ruling on the question of malice.

I have already ruled in relation to all these submissions that the publication was made on a privileged occasion but stated that I would make no ruling at that stage as to whether malice in fact existed or not.

On the first submission (a) that Mr. Frankson was making a no-case submission and (b) that that could not properly be done at the stage where one of two defendants has already closed its case, I wish to state re (a) that Mr. Frankson made it quite clear in his submissions, despite the wording of it, as taken from paragraph 1327 of Gatley, 6th Edition, which is similar to paragraph 1309 of Gatley's 7th Edition that he was only asking for the court's ruling as to whether the occasion of the publication was privileged or not. Although Mr. Frankson had given the impression that he was asking that the Defendant, Sibblies, be dismissed from the action at the close of the plaintiff's case, against him, and which impression could be gathered from the wording of the early part of his submissions,

he later made it quite clear orally, that he was only asking for the court's ruling as to the question of privilege, and to quote from Mr. Frankson's submission: "All your Lordship is asked to say, whether at this juncture - upon the evidence from the plaintiff's case, is whether the publication is privileged". Mr. Frankson referred the court to paragraph 1329 of Gatley, 6th Edition, which is similar to paragraph 1311 of the 7th Edition of Gatley and which states that as soon as the judge has ruled that the occasion is privileged, the defendant may anticipate an effort on the part of the plaintiff to rebut the presumption that the publication being made on a privileged occasion, was made without malice and bona-fide and may give evidence of any facts which go to prove that he honestly believed that the change was true.

Of course, whether Mr. Frankson had asked for a ruling on both limbs, namely privilege as well as malice, or on privilege only makes no difference, if the judge deferred his ruling on malice until all the evidence is in.

What paragraph 1309 of Gatley's 7th Edition is saying, as supported by the case of Hebditch v Kawaine (1894) 2 Q.B. 54 is that before any burden is cast upon the plaintiff to prove malice, the defendant must first prove the facts and circumstances necessary to create or prove that the occasion was privileged and that the defendant may be able to establish this proof through the cross-examination of the plaintiff or his witnesses. That if the facts which gave rise to the privilege are elicited in cross-examination of the Plaintiff or his witnesses, counsel for the defendant will be in a position at the close of the plaintiff's case to submit that the occasion was privileged, and also that there is no evidence of malice to go to the jury.

Further, that if the defendant succeeds in his submissions, both as to privilege as well as to malice, his counsel need not put either the defendant or his witnesses in the witness box to establish that which the judge has already ruled on, as existing.

This paragraph further means that if the defendant is successful on both these limbs of his submission to the judge, then he would avoid the necessity of calling the defendant to establish the privilege and avoid also the risk of affording in cross-examination, evidence of malice which might defeat the privilege.

In the instant case of Smart v The Gleaner Company Limited et al, I deferred my ruling as to whether malice had been established or not but I ruled that the occasion of the publication was privileged.

What paragraph 1311 of the 7th Edition of Gatley cited by Mr. Frankson to the court as paragraph 1329 of the 6th Edition says, is that once the occasion of the publication is ruled by the judge to be privileged, or the occasion is privileged, the defendant need not rely on the presumption in his favour that malice does not exist. That means that the defendant can rely on such presumption and I presume that that decision by the defendant would depend on the state of the evidence presented by the plaintiff so far, or as closed, should the plaintiff's evidence show, not only that the libel concerning him is untrue, but also that the defendant did not honestly believe that the charge was true. This will be dealt with later on the facts and circumstances of the instant and similar cases.

This paragraph of Gatley makes it also quite clear that on a privileged occasion, even if the allegation against the plaintiff was false, the plaintiff must also show from the evidence he has presented to the court, that the defendant did not believe that the charge against him the plaintiff was true, before the defendant need give any evidence at all.

Mr. Frankson for the second defendant, Sibblies, took that risk as to whether such proof by the plaintiff existed as to the rebuttal of the presumption of no-malice, and refrained from putting his client in the witness box to show any facts which would go to prove that he honestly believed that the charge was true, even if the effect of that evidence was to prove that the charge was true.

This paragraph 1329, along with paragraph 1327 of the 6th Edition of Gatley or paragraphs 1311 and 1309 of the 7th Edition clearly shows that in libel cases a ruling can be made at the close of the plaintiff's case as to whether privilege existed or not. In relation to submission (b) I do not accept that where two persons are sued jointly, that the 2nd defendant is debarred from making his submissions unless he interrupts the first defendant and makes his submissions before the first defendant gives evidence.

In fact, the court having ruled as to privilege, Mr. Frankson stated that he proposed to open his case and to tender evidence on such issues as remain unresolved, that is on the question of malice.

With reference to Dr. Barnett's second submission that there is no distinction between a no-case submission and what Mr. Frankson is doing, and that if there is no such distinction, then Mr. Frankson should be called upon to elect whether he rests on his submission or to call evidence. Dr. Barnett cited the following cases in support of this submission, Alexander v Rayson (1936) 1 K.B. p. 169 at pages 177 and 178; Marbe v George Edwards (1928) 1 K.B. p. 269 and 277; Cleghorn v Saddler (1945) 1 K.B. p. 325 and page 328 and Young v Rank (1950) 2 K.B. 510 at pp 512, 513 and 514.

Before dealing with these cases, I wish to say (a) that as stated supra, paragraphs 1327 and 1329 of Gatley, 6th Edition, is a complete answer to that second submission, in addition, paragraphs 591 and 592 of the same edition of Gatley also supports the fact that a submission as to privilege can be made and ruled on by the judge at the close of the plaintiff's case where the facts, as opposed to the law, are not in controversy.

Further, that such a ruling can be made by a judge whether he sits alone or with a jury.

The cases cited above have laid down the following principles. The case of Marbe v George Edwards (Daly's Theatre) Limited and another (1928) 1 K.B. Division 269 is a case involving the interpretation of contracts, especially theatrical contracts and in which case an action of libel also arose.

In that case, the Marbe case, it was decided, in the libel portion of the action, that in an action of libel, where the defendant established a qualified privilege for the publication, and the plaintiff fails to adduce any evidence of malice, the judge is not obliged then and there to withdraw the case from the jury, but if the defendant proposes to call evidence, may in his discretion defer ruling on the question of malice until he has heard the evidence for the defendant. That in the exercise of this discretion, the position of a defendant who has to adduce evidence upon other issues in the action should be considered. Lord Justice Banks stated at pages 277 and 278 of the above cited case, and quote:-

> "Taking the libel first, it is clear that this court is bound to hold that there was a publication of the letter of July 29, and that it was published on an occasion of qualified privilege. But Mr. Neilson for the defendants contended that at the end of the plaintiff's case there was no evidence that the defendants in publishing the letter were actuated by malice; that it was for the judge to rule at that stage, whether there was evidence to go to the jury, and that if he had done that, the plaintiff must have failed. That argument has been addressed to the court on several occasions and it has been held, and I repeat now, that according to the present practice, the judge has a discretion whether he will rule on the matter at the close of the plaintiff's case or whether he will defer ruling until the whole of the evidence has been called. In the latter event the defendant's counsel must then elect whether he will rely on his objection that there is no evidence of malice, or call evidence for the defendant at the risk of supplying evidence for the plaintiff which the jury may accept as proving malice etc."

It is clear from this cited case that the question of privilege can be decided by a judge whether sitting alone or with a jury at the close of the plaintiff's case, and that he has a discretion whether to defer his ruling as to malice until the whole of the evidence has been called, and that if the ruling on malice has been deferred, that the defendant's counsel must elect whether he will rely on his objection that there is no evidence of malice. This case shows quite clearly that there is no question of the plaintiff at this stage re-opening his case so as to prove malice or additional malice.

In the instant case, Mr. Frankson submitted that qualified privilege had been established in the plaintiff's case, at least

through cross-examination, and the court has so ruled, and on the authority of the above cited case of Marbe, the court, once there is publication proved, ought to rule whether the publication was done on a privileged occasion, and may do so at the close of the plaintiff's case, and had a discretion whether to defer its ruling as to whether malice existed or not. Thus I deferred my ruling on malice and rightly so.

In the case of Cleghorn v Sadler (1945) 1K.B. Division 325 the judge based his ruling on the facts of that particular case when a submission was made at the close of the plaintiff's case that there was no case to answer. That case has decided that a court can make its ruling at the close of the plaintiff's case, or postpone its ruling when a submission is made at the close of the plaintiff's case until all the evidence is heard. In that case, Croom-Johnson J. stated that he would postpone his ruling if evidence was being called for the defence. In the Cleghorn case supra, a submission was made at the close of the plaintiff's case by Mr. Paget for the defence, that as neither special damage was pleaded or proved, in a case where the defendant was saying that the action was not one that was actionable per se, that a ruling should be given at that stage that there was no case to answer, and it was held that the decision should be postponed, as it was necessary for the defendant to be given an opportunity to be heard so that the court would be able to decide whether the plaintiff held any office, before deciding whether or not the rule as to the necessity for proving special damage applied.

The Cleghorn case has definitely decided that in a libel case a judge can make a ruling at the close of the plaintiff's case that there was no case to answer on a submission by counsel for the defendant that there was no case to answer, although the reply from the bench was often, "I shall not rule now; I shall wait until the conclusion of the case".

Again, the Cleghorn v Saddler case (1945) 1 K.B. 325 at pages 328 and 329 as cited by Dr. Barnett for the plaintiff, has also made

it quite clear that the general rule that when a submission is made at the close of a plaintiff's case that there is no case to answer, that a judge when sitting alone should call on the defendant's counsel to elect whether he will call evidence or not, does not for example apply to cases of libel or slander. That in a defamation case, the judge may rule or postpone his ruling until the conclusion of the entire case, depending on the circumstances of the particular case.

This cited case also showed that there may be exceptions to Goddard L. J.'s dictum as stated in Parry v Aluminum Corporation Limited (1940) 162 L.T. Reports, when he said that in defamation cases he believed that there was authority for saying that, if it is submitted that there is no evidence of malice, the judge is bound to rule. Also that in slander cases the judge must rule if the submission is made that the words are not actionable without proof of special damage and no special damage is alleged. The exception pointed out in the Cleghorn case, to such dictum, was where all the evidence had to be heard, in order that the court might ascertain whether the plaintiff held any office to which he could have been affected by the slander, to see whether the rule as to the necessity of proving special damage applied. This postponement of the judge's ruling in the cited case of Cleghorn v Saddler was no doubt in the interest of justice, and for the benefit of the defendant so as to give him an opportunity of showing that special damages had to be proved before the plaintiff could succeed.

In the instant case, the postponement of the ruling, which ruling, according to the decided cases in suits for defamation could have been made at the close of the plaintiff's case, whether the judge was sitting alone or with a jury, was done in the interest of justice and for the benefit of the defendant so that he may produce evidence if possible, to justify his honest belief in the truth of the charge contained in the attack on Mr. Smart and so dispel any allegation of malice which the court may have found at that stage to have been proved by the plaintiff in discharge of the burden cast on him of

proving malice in the defendant where the publication is held to be made on a privileged occasion, or on an occasion of qualified privilege.

Mr. Frankson for the Second Defendant, although at first intimating to the court that he would be calling evidence, exercised an election as was his right, if he so wished, not to call any witnesses as on a no case submission, by announcing that he would not be tendering any evidence, although the rule as I understand it, is that in defamation cases the judge may, as an exception to the general rule in other cases when sitting alone, either rule or postpone his ruling until a all the evidence is in.

The general rule as laid down by the decided cases other than defamation cases, is for a judge, when sitting alone to postpone his ruling on a submission made at the close of the plaintiff's case and call upon the defendant's counsel to elect whether he is calling any evidence.

On the basis of the exception in defamation cases I made my ruling on the obvious situation that the occasion of the publication in the instant case was privileged, but postponed my ruling as to the question of malice. There was no express invitation made to counsel for the defence to make any election, as is the normal practice in cases tried without a jury, but Mr. Frankson for the second defendant exercised an election voluntarily, which he could do if he so wished, and cannot be heard to say later that he was not given an opportunity to justify the publication or to rebut any proof that may have been given by the plaintiff that the publication was done maliciously.

Although as gathered from the case of Young v Rank (1950) 2 K.B. 510 that a judge when sitting with a jury can rule at the close of the plaintiff's case whether there is any case fit to go to a jury or not, a careful reading of the case and on logic, the judge would only be ruling on a question of law as to whether the question of fact, should be left to the jury and it is his duty so to rule. That, when a judge is sitting alone, he is not only the judge as to law but the judge of fact, and being also the judge of fact a judge should not as in the

case of a jury who is the judge of fact, be asked whether there is any evidence on the facts to be left to himself until he as judge of fact has heard all the facts in the case.

This case of Young v Rank also suggests that, normally in defamation cases whether the trial is with or without a jury, the judge should make his ruling on questions of law when such ruling is asked for at the close of the plaintiff's case but generally it might be better to wait until all the evidence is in, before ruling, so that if a court of appeal disagrees with the ruling, it may itself re-hear the case as all the evidence would be before the court of appeal if the trial is by judge alone, or send the case back for a re-trial if the case was heard by a judge and jury. That in cases, other than defamation cases, a ruling on law at the close of the plaintiff's case should only be made when the trial is by judge and jury, but when the trial is before a judge alone, the judge should not rule but should place the responsibility on the defendant's counsel to elect whether or not he will rest his case or whether he will call any evidence. That in any case, it is always possible for a judge to postpone his ruling until all the evidence is in, unless of course the defendant wisely or unwisely rests his case on his submissions, so that the court of appeal in the former instance may send the case back for re-hearing, or in the latter case where the trial is by judge alone re-hear the case itself.

Dr. Barnett, again in opposition to the court making a ruling or rather in support of his submission that a ruling should not be made at the close of the plaintiff's case when such court is sitting without a jury without first calling on defendant's counsel to elect whether he will call any evidence, cited the case of Alexander v Rayson (1936) 1 K.B. 169.

That case made, apart from its decision on other issues, observations as to the inconvenience of the practice of asking a judge, when sitting without a jury, to rule at the conclusion of the evidence of the party on whom the onus of proof lies, that there is no case to answer. This case, like other cases cited on this point, only

reiterates the fact that when a judge is sitting without a jury, he should not be asked at the close of the case of the person whose duty it is to open the case, and on whom the onus lies, to rule at the request of the other party to the suit that there was no case to answer, but if asked, the judge should call on the counsel of such person who make that request to elect whether he will call any evidence, as the responsibility for not calling rebutting evidence should be upon the other party's counsel and no one else. (This case of Alexander v Rayson did not deal with the exceptions in the case of defamation, as was considered in Marbe v George Edwards (Daley's Theatre) Limited and another (1928) 1 K.B. Division 269, Cleghorn v Saddler (1945) 1 K.B. 325 or Young v Rank (1950) 2 K.B. 510, which latter cases are to the effect that such submissions on points of law and possible otherwise, may be made at the close of the case of the party whose duty it is to open the case, and the judge when sitting alone may make his ruling or postpone it until all the evidence is in.)

In the Alexander v Rayson case, the Court of Appeal (Greer, Romer and Scott L.Js) stated in the judgment prepared by Romer L.J. and read by Scott L.J. at page 178 of the judgment, a case in which the burden was on the defendant to open his case, and in which opening, and evidence tendered by the defence thereon, such tendered evidence alleging absence of consideration and the presence of illegality on the part of the plaintiff. To quote from the judgment:

> "In these circumstances, one would have expected the plaintiff to take the earliest opportunity of going in the witness box to repel, if he could the serious charge that had been made against him. This course was not adopted. At the conclusion of the defendant's evidence, the plaintiff's counsel submitted that there was no case to answer upon the two issues which at that stage had alone been presented to the court, that is to say, the issues of no consideration and illegality. Where an action is being heard by a jury, it is of course, quite usual and often very convenient at the end of the plaintiff's or of the party having the onus of proof, as the defendant had here, for the opposing party to ask for the ruling of the judge whether there is any case to go to the jury who are the only judges of fact. ..... in actions tried by a judge alone. We think that this is highly inconvenient. For the judge in such cases, is also the judge of fact, and we cannot think it right that the judge of fact should be asked to express any opinion upon the evidence until the evidence is completed."

In the Alexander v Rayson case it is to be observed that the case was one of contract, and had nothing to do with defamation cases, and that this case was cited with approval by the Court of Appeal in Jamaica in Broady v Davis 4 J.L.R. 38 at p. 39, yet another case not having anything to do with libel or slander.

In the instant case of Smart v the Gleaner Company Limited and Sibblies, as in the cited case of Alexander v Rayson, the defendant Sibblies should have taken the earliest opportunity of going in the witness box to repel or rebut if he could, the serious allegation of unjustifiable allegations and malice which the plaintiff whose burden it was to prove may have done, especially as I, as judge, unlike du Parcq J. in the Alexander v Rayson case refused to rule on the question of malice at the close of the plaintiff's case.

Again in the instant case, a case of libel, the second defendant's counsel sought the ruling of the court at the close of the plaintiff's case, as he was entitled to do in any libel or defamation case, on one of two issues of law, namely "privilege", and he, the counsel for the second defendant, retained the responsibility of proceeding, or not calling any evidence as to the second defendant's absence of malice, in rebuttal of any proof of malice by the plaintiff that he might have been successful in establishing, and which the court had not ruled on, unlike the cited case of Alexander v Rayson, where the plaintiff made a definite and full submission that there was no case to answer in law, and the court ruled that such submission was not only irregular but a most inconvenient procedure.

I may add, that even if it could be argued that Mr. Frankson made a no-case submission in the instant case, he was so entitled, as the case was one of defamation, but on the evidence as it stood, I for obvious reasons refused to make a ruling on the issue of malice at that stage, and Mr. Frankson accepted the responsibility of not seeking the opportunity of refuting malice should such proof by the plaintiff existed, by putting the defendant in the witness box. This procedure having been followed by defence counsel for the second

defendant, I as judge was left with no other alternative but to rule on the facts presented, without having an opportunity of hearing the defendant. Such was defence counsel's responsibility and he took that risk.

In the Alexander v Rayson case cited the case of Ritchie v Smith (1848) 6 C.B. 462, was referred to in regard to a judge's ruling and it was stated at p. 185 of the Alexander v Rayson case and quote:

> "If the court there had refused to listen to the defence, they would have been helping the plaintiff to enforce something which lay in contract, namely, the payment of rent, when both parties to the agreement were intending to apply the premises to an illegal purpose, and the plaintiff was seeking to enforce the performance of an illegal agreement."

In the instant or present case of libel, between Inspector Smart v The Gleaner Company Limited et al, if the court had ruled and decided on the issue of malice at the close of the plaintiff's case adversely to the defendant, it would have been helping the plaintiff, Inspector Smart to establish the issue of malice without hearing the defendant. The court would have liked to have heard the second defendant on that issue, but defendant's counsel, Mr. W. Frankson, decided not to put the second defendant or his witnesses, if any, in the witness box.

Dr. Barnett's third submission about the distinction that arises when a judge sits alone and when he sits with a jury has been dealt with in the paragraph supra, and therefore nothing further need be said on that point.

Dr. Barnett's fourth submission is in relation to the interpretation to be placed on paragraph 1327 of Gatley's 6th Edition or paragraph 1309 of the 7th Edition. He says that the correct interpretation of the paragraph is that it enables a defendant at the close of the plaintiff's case to make a no-case submission, once privilege has been proved through the mouth of the plaintiff, and thus calling for an election by the defendant as to whether he will stand on his submissions.

The court, or I must say that, I do not agree with this interpretation in the least, but I do hold, that the correct interpretation

of paragraph 1327 of Gatley's 6th Edition, which is similar to paragraph 1309 of the 7th Edition, in relation to a libel action, where controversy as to the facts do not arise, excludes the question of an election by the defendant as to whether he will stand on his submissions on a question of law, namely privilege, which is a matter for the judge to rule on, but it still leaves the defendant the option, if he also, along with that submission as to privilege, submitted that there was no evidence of malice to go to the jury, to elect whether he would rest his case on his submissions, without calling evidence to establish the question of fact as to whether malice did or did not exist on those facts.

Although Mr. Frankson at first stated that he proposed calling evidence, I presumed that what evidence he proposed to call, if it was necessary to call such evidence, was in regard to the question of malice which I specifically stated that I would make no ruling on at that stage - that is, at the stage after the plaintiff's case was closed. Mr. Frankson exercised his election, as if on a no-case submission or as if he was fully satisfied that the question of malice, on the evidence before the court did not exist and was not proved by the plaintiff to exist and so closed his case without calling any witnesses. This he was entitled to do inspite of his earlier announcement, resting his hope on the fact that once it was ruled that the occasion was a privileged occasion, the presumption in his favour is that there was no malice, and that such presumption had not been rebutted by proof by the plaintiff that there had been malice in fact or maybe for other reasons.

Of course, proof by the plaintiff of malice can be gathered from proof by him that the article was false in relation to himself and in addition from the article itself, without proof of other facts forthcoming to negative and or rebut such proof of malice, would leave a defendant to risk whether the judge, as a matter of law would rule that there was proof by the plaintiff that malice in fact arose in the article itself. Mr. Frankson has, I repeat, taken that risk on the

election to stand on his submissions based chiefly on such presumption in his favour.

Paragraph 591 of Gatley's 6th and 7th Edition states, quoting from Lord Atkin in Adam v Ward (1917) A.C. at p. 340:

> "The judge is the person to decide whether the defendant has introduced into the libel any matter wholly unconnected with and irrelevant to, the duty or interest which gave rise to the privilege, and whether it is separable. He it is who must decide whether the occasion is privileged or not, and if that he so he must necessarily decide in respect of what portion of the libel the occasion would be privileged if it stood by itself."

Then per Earl Loreburn L.C. in the same case of Adam v Ward at p. 321:

> "When one part of a libel is held to be protected by privilege and the other part not protected, the jury ought to be told that they cannot give damages in respect of the first part at all unless they are satisfied that it was malicious, which may be proved by the character of the unprotected part or by other evidence."

Of course, if the occasion is privileged, proof of malice by the plaintiff may come from the content of the defamatory matter itself.

Now, in regard to this matter, Lord Diplock in Horrock v Lowe (1974) 1 All E.R. (H.L.) p. 662 at p. 670 stated at letters "e", "f", "g", "h" and "1" at p. 671 and quote:

> "But where ..... the only evidence of improper motive is the content of the defamatory matter itself, or the steps taken by the defendant to verify its accuracy, there is only one exception to the rule that in order to succeed the plaintiff must show affirmatively that the defendant did not believe it to be true or was indifferent to its truth or falsity. ..... The exception is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty or the protection of the particular interest on which the privilege is founded. Logically it might be said, that such irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not, and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which on logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right on which the privilege is founded. As Lord Dunedin pointed out in Adam v Ward [(1917) A.C. at pp 326, 327 (1916-17) All ER. Rep. at p 167] the proper rule as respect irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the

> circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter, the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true, or though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege is based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or from some other imporper motive ....."

In the instant case, in the absence of proof by the defendant to the contrary, or should I say in rebuttal of plaintiff's evidence, the publication Exhibit I defamed Inspector Smart unjustifiably, as on the evidence presented, it does not seem that it was necessary for the fulfilment of the particular duty or the protection of the particular interest on which the privilege is founded to bring in Inspector Smart's name or his character or reputation.

The second defendant, Superintendent Sibblies' counsel elected not to call any evidence, and thus deprived himself of establishing by evidence if possible, that he was justified in saying what he said about Inspector Smart, or from destroying the exception mentioned supra.

Dr. Barnett's fifth submission is to the effect:

(a) that the viciousness of the attack on Inspector Smart went beyond any apparent need for the defence of Superintendent Sibblies, and therefore this raised the fundamental controversy as to whether the occasion was privileged;

(b) that paragraph 564 of Gatley's 6th and 7th Edition shows that privilege only applies when the person who is attacked, in a response, is the person who had attacked the publisher of the reply;

(c) that paragraph 568 of Gatley's 6th and 7th Edition is also relevant, to show that the privilege does not extend to cases where fresh accusations are made against the person who allegedly made the attacks which are being replied to;

(d) that all these matters are in controversy, and in accordance with paragraph 592 of the 6th Edition of Gatley's which I may say is similarly numbered in the 7th Edition,

where the facts are at all in controversy the judge will postpone his ruling as to privilege.

Dealing first with submissions 5 (a) and (d), that the facts are in controversy namely, whether the viciousness of the attack on Mr. Smart went beyond any apparent need for the defence of Mr. Sibblies, and therefore there is controversy as to privilege, and that all the other matters arising in (b) and (c) is in controversy, namely, that the wrong person was attacked, and therefore privilege did not apply, and that privilege does not extend to cases where fresh accusations are made against the person who allegedly made the attack, I cannot see any controversy on the facts as to whether the attack on Mr. Smart was vicious, and if such attack went beyond what was apparently needed for the defence of Mr. Sibblies, such is a matter of interpretation for the court, but there is no dispute or controversy on those facts presented, and in regard to privilege, that again is a matter of law for the court, and not a question of fact as to whether any controversy can arise.

With reference to (b) and (c) above, it is quite clear that there is no controversy as to the fact of the allegation being made, and to quote, "An element in the force ..... who with his body guard (a fringe benefit which he is the only member in the force to enjoy)" and the other portions of Exhibit I as being the subject matter of the suit. In this regard, there can be no controversy, the only matter therein arising, is a question of interpretation, which again is for the court, and that paragraphs 564 and 568 of Gatley's 6th and 7th Edition is only a guide to the court as to when privilege does or does not arise, and paragraph 592 contains an advice to the court as to what should be done when the facts are at all in controversy. The word "facts", is here emphasised by me, and I can see no controversy on the facts, and the question of privilege being a question of law for the court, there can be no controversy about it. And even it could be remotely held, that a question of law such as privilege could be in controversy with reference to the facts and the interpretation

of such facts, Lord Diplock in Horrock v Lowe (1974) 1 All ER H.L. p.662 at page 670 at letters "g" said,

> "Whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not, and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of defamatory matter which on logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right on which the privilege is founded."

So I do hold and rightly so, that even if there is controversy as to interpretation, there is no controversy on the facts.

There is no authority for the suggestion, that where there are two defendants in a libel suit and one of such defendants asks for a ruling on privilege that such a ruling should be postponed until all the evidence is in.

I also find as a fact that the defendant Sibblies had an interest to protect, and such interest extended to the publication in the press of a reply by him to an attack made on him in the press, as is referred to in paragraphs 515, 517 and 525 of Gatley's 6th Edition.

Paragraphs 572, 574 and 553 of Gatley have no relevance to the facts of this particular case of libel. Paragraph 1290 of Gatley, deals with the question of the publication of irrelevant and extraneous matters, which point has already been dealt with in relation to destroying privilege on a privileged occasion. However, if on the evidence and the publication itself, the contents of the publication appears to be irrelevant to the interest or duty to publish, then to preserve the privilege, evidence should be forthcoming later, from the other side, or the publication may be held to be maliciously done. Similarly, in regard to paragraph 1291 of Gatley, dealing with the violence of the language, the same procedure would apply, as unnecessarily strong language may be evidence of malice.

To finally wind up this judgment, I felt it my duty to deal more fully with some of the cases already dealt with in this judgment as well as submissions thereon. I also propose to deal fully with, in my opinion, the apparent misunderstanding on the part of plaintiff's

counsel in regard to what rulings a judge should or should not make at the close of the plaintiff's case.

The case of Cassidy v Daily Mirror News Paper Limited (1929) 2 K.B. Division p 331 was brought to the attention of the court and referred to earlier in this judgment.

The facts in brief in this case are, that the defendant news paper - The Daily Mirror, published in their news paper with the consent of one M.C., a married man, a photograph of himself with a young lady X together with the words, "Mr. M.C. the race horse owner and Miss X whose engagement has been announced".

Unknown to the publishers of the defendant news paper, the plaintiff, who was not mentioned in the publication was, and was known among her acquaintances as, the lawful wife of M.C., but the defendants did not know this. It was held, for reasons which I shall hereafter give, that the publication was capable of conveying a meaning defamatory of the plaintiff, and the jury having found that it conveyed to reasonable minded people an aspersion on her moral character, that she was entitled to damages.

In other words the cited case of Cassidy v Daily Mirror News Paper Limited, decided that the publication of a statement about a person B, which publication on the face of it may be innocent and unobjectionable or innocent of any defamatory meaning, may nevertheless bear a defamatory meaning about a person A who is not mentioned in the publication either by description or otherwise, and indeed, who is not even known by the publisher to exist. That it may even be innocent of any defamatory meaning about the person B who is mentioned in the publication, but understood by reasonable persons who knew B as being defamatory of B, also, apart from being understood by reasonable persons to be defamatory of B, may also be understood by them or other reasonable persons to be defamatory of A who was not mentioned in the publication, but was known to be connected to B in relation to what was said about B in the publication.

This case further decided, that where a publication is capbale

of hearing two or more meanings, one or more being capable of bearing an innocent meaning or a non-defamatory meaning, and one or more being capable of a defamatory meaning, then the judge must decide whether such publication is reasonable capable of hearing both an innocent as well as a defamatory meaning. That if the judge decides that the publication is reasonable capable of bearing those two meanings, then if the judge is sitting with a jury, he must leave the jury to decide which meaning was intended, and I may add to that decision, that if a judge is sitting alone or without a jury, and decides as is his right, that the publication is reasonable capable of hearing both a non-defamatory meaning as well as a defamatory meaning, then he it is who must decide which meaning he finds was intended. That in deciding which meaning was intended, one must not look at what was actually intended by the publisher, but what intention can be reasonable gathered from the words of the publication itself. Of course, I must add at this juncture, that the question of what was actually intended by the publisher when a publication is reasonable capable on the face of it, of bearing an innocent or non-defamatory meaning, may be relevant where the publication is made on a privileged occasion for the purpose of deciding whether or not malice can be inferred, and may be held in such circumstances to be a non-malicious publication, even though a defamatory meaning can be shown by innuendo as a distinct possibility.

In the instant case of Smart v The Gleaner Company Limited et al, unlike the cited case of Cassidy v The Daily Mirror News Paper Limited, there were three differences:

(a) the mention in paragraph 9 of Exhibit I of someone by description appears in the instant case;

(b) that paragraph 9 of Exhibit I could only bear a defamatory meaning, and could not also bear an innocent or non-defamatory meaning as in the Cassidy case and;

(c) In the Smart case the publication was done on a privilege occasion as explained earlier and ruled on, while the

publication in the Cassidy case was not done on a privileged occasion.

Going back to the Cassidy case, I shall now quote from the judgment of Scrutton L.J. to show what was and should be done where the publication is capable of bearing both an innocent as well as a defamatory meaning.

Scrutton L.J. in the Cassidy v Daily Mirror case, quoted from Sir Montague Smith's judgment in the case of Simmons v Mitchell (1880) 6 Appeal Case p156, 158, where that case, like the Cassidy case was tried by a judge and jury, and quote, "....., the jury must decide which of the two meanings was intended;" and Scrutton L.J. went on to say:

> "..... and by "intended," I understand that a man is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not, and that if he scatters two-edged and ambiguous statements, broadcast without knowing or making inquiry about facts material to the statements he makes, and the inferences which may be drawn from them, he must be liable to persons who, knowing those facts draw reasonable inferences from the words he publishes".

Scrutton L.J. went on to lay down what should be the position when the identity of the person defamed in the published article can only be discovered by innuendo. The dictum of Scrutton L.J. on this point has already been quoted earlier in this judgment when I was dealing with Mr. Clifton Neita's evidence that, "The person referred to in Exhibit 10 by Mr. Sibblies was not identified by me at the time I considered the letter for publication, but I will repeat for emphasis."

Scrutton L.J. in the cited case of Cassidy v Daily Mirror News Paper went on to express his full approval of the dictum of Farwell L.J. in Hulton and Company v Jones (1910) A.C. 20 when Farwell L.J. said

> "The rule is well settled, that the true intention of the writer of any document, whether it be contract, will, or libel, is that which is apparent from the natural and ordinary interpretation of the words; and this when applied to the description of an individual, means the interpretation that would be reasonable put upon those words by persons who know the plaintiff and the circumstances."

In the case of Bourke v Warren (1826) 2 C&P 307,309, Abbott C.J. said:

> "The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel, it is sufficient if those who knew the plaintiff can make out that he is the person meant."

In the Cassidy v Daily Mirror News Paper Limited case (1929) 2 K.B. p 331, the reasoning in brief for the decision, was that the publication of the engagement of Mr. M.C. to X could have more than one meaning, a defamatory one, namely, that the plaintiff Mrs. M.C. was not really the wife of Mr. M.C. but was living an immoral life with Mr. M.C. It could also have a defamatory meaning in regard to Mr. M.C., that is, that he a married man is being published as a bachelor in the circumstances of the publication.

The publication could also on the face of it mean, and quite innocently and non-defamatorily, that a man and a woman are engaged to be married. That as there could be two meanings given to the publication, the judge must decide whether the publication was reasonably capable of two meanings, namely, both a non-defamatory meaning as well as a defamatory meaning, and that if he decides that question in the affirmative, then he should leave it to the jury, if he sits with a jury, to decide which of the two meanings is intended, of if he sits alone he should then decide which of the two meanings was intended.

That in making a decision as to which of two meanings is intended, it should be born in mind that a man is liable for the reasonable inferences to be drawn from the words he used, whether he forsaw them or not.

In the instant case for my decision in contrast to the Cassidy case, the words of the publication, the subject of this action, was not reasonable capable of two meanings, but only one, namely a defamatory meaning about someone, and which required no innuendo to establish a defamatory meaning, and evidence could be produced of a person or persons who knew the plaintiff, Inspector Smart, and understood, by innuendo, that the publication referred to the person described in the publication Exhibit I, paragraph 9, as being the

plaintiff.

Therefore, if such publication is held to be defamatory of the plaintiff, and it is also held that the occasion of the publication was privileged, then the question of whether malice existed or not, is important.

I must however add, that if contrary to the situation in this case, if the words of the publication Exhibits I and 10 in the instant case was capable of a defamatory as well as an innocent or non-defamatory meaning then that would have made the proof of malice in the instant case very difficult to establish.

Even in the decenting judgment of Green L.J. in the Cassidy case, he distinguished a publication, where a person is named in the publication or is identifiable by persons who knew him as in the E. Hulton and Company v Jones case, from a case where the plaintiff is neither named in the publication or identifiable on the face of the publication as in the Cassidy case, and to quote from Green L.J's judgment at pages 348 last paragraph and continuing on page 349,

> "..... It seems clear, that the writer took the risk of making defamatory statements about an individual by name when he ought to have known that it was possible that there might be a person bearing that name who would be understood to be meant by the words which were used. ..... As Farwell L.J. pointed out in the Court of Appeal/(in the Hulton case at p 480). 'So the intention to libel the plaintiff may be proved, not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description by which the plaintiff is recognised by his associates, if the description is made recklessly, careless whether it holds up the plaintiff to contempt and ridicule or not. In such a case, it is no answer for the defendant to say that he did not intend to defame the plaintiff, because he had never heard of him; he intended to describe some living person: he can suggest no one else; and the plaintiff proves that he is believed by his acquaintances and friends to be the person aimed at and has suffered damage thereby.'"

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And Russell L.J. at p. 354 of the Cassidy case,said, "Liability for libel does not depend on the intention of the defamer; but on the fact of defamation."

In the light of the Cassidy case, I think it would be appropriate to add in relation to the instant case of Smart v The

Gleaner Company Limited and Sibblies, that if the words of the publication in the Smart's case was capable of a defamatory as well as an innocent or non-defamatory meaning, then that fact would have made the proof of malice by the plaintiff very difficult or possibly, impossible to establish.

Before analysing the other cases cited by counsel on both sides as well as dealing with their other submissions, I thought it best to deal with the final addresses at this stage as such addresses also included submissions made earlier in this fifteen and a half days trial, and would be best dealt with later.

In regard to the question of malice, no ruling was made on that question at the close of the plaintiff and first defendant's case when Mr. Frankson for the second defendant, Sibblies made his submissions, as I felt that it would be unfair and improper to make a ruling on malice without giving the defendant, Sibblies an opportunity to show or rebut by evidence if he could, any proof which the court may feel that the plaintiff has given as to malice in discharge of the burden cast on him the plaintiff, on a privileged occasion.

The allegations in Exhibit I especially paragraph 9 thereof, as it referred to the plaintiff was proved by the plaintiff, Smart to be defamatory and violently so, and therefore without any evidence to rebut such proof by the plaintiff of malice, if such has been held to be proved one has to consider very seriously whether the presumption in favour of the defendants of their being no malice in either or both of them when a publication is held to be made on an occasion of privilege has been destroyed by the evidence tendered by the plaintiff on whom the burden lies of destroying such presumption.

In considering this point, one must ask what was the motive in defendant, Sibblies, mentioning an easily identifiable person in such a violently defamatory manner, as is shown in Exhibit I, captioned "Sibblies Reply".

Was the motive for so doing necessary for his personal defence to a published attack on him, Mr. Sibblies, or was his Sibblies'

publication Exhibit I, necessary for the benefit and protection of the police force as a whole?

If the answer is that such publication in its entirety was not necessary for either of these purposes, then there must be some other motive.

The Clarke v Molyneux case (1877) Q.B.D. Vol. III, p. 237 was cited by Doctor Barnett and commented on by Mr. Frankson. The Clarke v Molyneux case was also referred to in the case of Jenoure v Delmege cited by Mr. Frankson for other reasons.

Mr. Frankson in his submissions on behalf of the second defendant, Sibblies says that any reference to any one in the context of Exhibit I was merely incidental and of such little significance when compared with the wider issue of the security forces to render it impossible to reasonably draw any inference that Sibblies was launching a defamatory attack on the plaintiff or otherwise. That of the sixteen (16) paragraphs of Exhibit I, the complained of document, eleven (11) of those paragraphs namely paragraphs one to four and ten to sixteen inclusive related to the welfare of the police force and thus showed the motive for the publication and what Mr. Sibblies aimed to accomplish and certainly his motive was not to hurt Mr. Smart. This submission may in some degree be contrasted with what Scrutton L.J. said in the Cassidy v Daily Mirror News Paper Limited (1929) 2 K.B.D. p. 331 when he quoted from Sir Montague Smith's judgment in the case of Simmons v Mitchell (1880) 6 Appeal cases pp 156, 158 where that case like the Cassidy case was heard by a judge and jury - and to quote as was done earlier in this judgment for a slightly different purpose, ".....", the jury must decide which of the two meanings was intended and Scrutton L.J. went on to say;

> "..... and by "intended", I understand that a man is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not, and that if he scatters two-edged and ambiguous statements, broadcast without having or making inquiry about facts material to the statements he makes and the inferences which may be drawn from them, he must be liable to persons who, knowing those facts draw reasonable inferences from the words he publishes."

If this submission of Mr. Frankson was to be accepted as correct, it could result in the position arising of anyone wishing to defame another, could very well publish an article three-fourths of which contained matter beneficial to a community, while approximately only one-quarter was defamatory of an individual, and that defamer being held not to have launched a defamatory attack on anyone.

It is significant in relation to Mr. Frankson's submission, that Mr. Neita, a witness for the first defendant said under cross-examination and quote:

> "If the letter Exhibit 10 had named Mr. Smart I would have checked to see if he was one of the persons who had made the allegations against Mr. Sibblies. If he were not one of such persons I would have excised that portion. The excission of that portion might have completely ruined the letter."

Further at page 245 of the Clark v Molyneux case referred to above, Bramwell L.J. said, and quote:

> "I hesitate to say that there was no evidence of malice, because the jury need not ascertain what the wrong motive was if they can say that there was a wrong motive, and if the defendant was actuated by some motive other than that which would alone excuse him, the jury may find for the plaintiff."

Brett L.J. at pages 246 and 247 of the same Clark v Molyneux case stated, and quote:

> "When there has been a writing or a speaking of defamatory matter, and the judge has held - and it is for him to decide the question - that although the matter is defamatory the occasion on which it is either written or spoken, is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege."

To pause here for a moment from quoting from Brett L.J., Mr. Frankson for the second defendant, Sibblies submitted, in accordance with, so he says, paragraphs 787 and 791 of Gatley's 7th Edition, especially paragraph 787, that the court in deciding the question of law as to whether the occasion was a privileged one, must of necessity have considered all the available evidence and the inference to be drawn therefrom, and the court must have found before deciding the legal question, that there was no evidence of malice, or not more than a scintilla of evidence from which malice could be inferred.

This submission, if I may say so with respect, is a most fantastic submission and a complete misunderstanding of the law on this point and of paragraph 787 of Gatley's 7th Edition, and of what Brett L.J. said in his judgment at pages 246 and 247 of the Clark v Moleyneux case just quoted from.

Mr. Frankson further submitted, and rightly so, that the question of privilege can be shown and can arise from the evidence given by the plaintiff, but he does not say whether or not the question of malice can be shown or can arise from that very same evidence.

What Mr. Frankson's submission conveys, is, that if the court rules that the publication is or was made on a privileged occasion, then additional evidence would have to be given by the plaintiff to show malice.

Let me now try to show the fallacy of such a submission if such was intended. Suppose for instance there is a case where all the evidence for the plaintiff had been adduced, and the court has definitely seen from that evidence that the defamatory publication was made on a privileged occasion, and the court also finds or sees from that evidence that the plaintiff has also discharged the burden which lies on him of proving malice in the defendant. Should the court in such circumstances:-

(1) If no submission is made by the defendant at the close of the plaintiff's case as to whether privilege or malice existed, just listen to defendant's case as a matter of formality and disregard any evidence tendered by the defendant and which evidence may negative any evidence of malice or create doubt on such proof of malice presented by the plaintiff on the balance of probability and the preponderance of evidence?

(2) If a ruling is asked for as to privilege only, and the court had ruled as was requested, that the occasion of the publication was privileged, would that result in the position arising, as submitted by Mr. Frankson, that the court in so ruling would have of necessity considered that there was no evidence of malice or only a scintilla of evidence from which

malice could be drawn? Would the plaintiff after such ruling, and after having closed his case then be allowed to re-open his case to prove malice in addition to what may or may not have arisen in his evidence so far, as closed as would appear to be what would result from what was submitted earlier by Mr. Frankson at the close of the plaintiff's case persuant to paragraph 1311 of Gatley's 7th Edition?

Further, in regard to this matter, it becomes necessary for me to make some comments on paragraphs 1309 and 1311 of Gatley's 7th Edition.

It would seem, and I hold that what paragraph 1311 is stating is, that the true position in law is that where prior to a defendant giving evidence the occasion of a publication is held to be privileged, the defendant's counsel may or may not rely on the presumption in defendant's favour that the words complained of were published "bona fide and without malice", depeding on what his counsel thinks the judge, if sitting alone, or the jury, where a judge is sitting with a jury will rule as to whether he plaintiff has at that stage discharged the burden which lies on him of proving malice, and of rebutting such presumption if no further evidence was forthcoming.

It would seem that in such circumstances, that in order to avoid the risk of such adverse ruling being made, that it would be advisable for a defendant's counsel to allow the defendant to give evidence of any facts available to him which would go to prove that he honestly believed that the charge was true, and in doing this, as mentioned in paragraph 1311, he may anticipate an effort on the part of the plaintiff to rebut the presumption, no doubt such effort by the plaintiff being made by cross-examination of the defendant and of any witnesses he may produce whom he says made statements to him.

In combination with paragraph 1309 of Gatley's 7th Edition, it would seem that a defendant's counsel would be well advised to avoid calling the defendant only where a judge has ruled that there is no evidence of malice to go to the jury. The cases of Clark v Molyneux and Jenoure v Delmege cited in this regard concentrated on the fact

that the burden of proving malice on a privileged occasion lies on the plaintiff and not on what descretion the defendant's counsel should exercise.

(3) If, as in (2) above, a ruling was asked of the judge as to the question of privilege as well as of malice, in the supposed or hypothetical case above, and the court in fairness to the defendant when making a ruling that the evidence discloses that the publication was made on a privileged occasion deferred its ruling on malice until after the defence is closed, would that mean that the defendant need not give any evidence?

Yet a fourth proposition may be suggested.

Suppose in the case of Jenoure v Delmege (1890) (P.C.) A.C. 81 cited by Mr. Frankson, counsel for the second defendant, Mr. Sibblies, the appellant Jenoure, who was the defendant in the case at first instance, in performing his duty as an articulate and responsible citizen to protect a person or persons who was or were unable to protect himself or themselves in bringing to the attention of the appropriate authority the alleged neglect of duty by Doctor Delmege in his not attending to a poor woman in labour without his first being paid, and which neglect resulted in the death of the woman, had instead of naming Doctor Delmege in his correspondence or in addition to naming Doctor Delmege had named any other doctor who was innocent of such breach, neglect or unethical conduct, would Mr. Jenoure's counsel on that privileged occasion be able to say that the court could not find that the innocent doctor has discharged the burden cast on him of proving malice, if the innocent doctor had shown by evidence that the defamatory statement made against him was false as regard himself, especially if his evidence had also shown that he had never at anytime attended on that female patient nor was he requested by anyone to attend the patient in labour?

Would Mr. Jenoure's counsel also be able to say, should the judge have ruled at the close of that innocent doctor's case that the occasion of the publication had been privileged, that the presumption

of no malice in the defendant which arises on a privileged occasion had not been proved to have been destroyed by the evidence of the innocent doctor who could only prove that the allegation about him was false and unjust in the circumstances? One only has to ask those two questions to get the appropriate reply.

If Mr. Frankson's submission was accepted as the true and correct proposition, then it could result in the fantastic situation arising where a naturally libellous minded person or an opportunist could sit back awaiting his opportunity for occasions to arise where publications of defamatory matter, if made, in certain circumstances would undoubtedly be held to have been made on privileged occasions, as in the situation stated by the Law Lords at page 77 of the Jenoure v Delmege case, a case from Jamaica which went before the Privy Council and to quote from Lord Macnaghten who delivered the judgment of the four Law Lords:-

> "The Chief Justice told the jury that it was the duty of the appellant, as a justice of the peace, to bring circumstances such a those mentioned in his letter to the notice of the proper authorities. Thier Lordships may observe in passing that, in their opinion, nothing turns on the position of the appellant as justice of the peace. To protect those who are not able to protect themselves is a duty which everyone owes to society."

Thus the opportunist which I mentioned supra, may name in a defamatory manner, if he is so minded, any person who is innocent of any wrong as mentioned in his defamatory statement, be that person high or lowly who could be classified as being a member of such group of which a publication whether defamatory or otherwise could be held to be privileged.

In such a case not even the Commissioner of Police or the Prime Minister, referred to by Mr. Muirhead as the highest authority in the land, or anybody else for that matter could be safe from vicious and damaging defamatory libels, if the nearest a plaintiff could go in attempting to establish malice is to show that he is or was falsely and unjustly named by a person who did not or does not know that such allegation is true.

The position has already been set out and analysed in the case of Cleghorn v Saddler (1945) 1K.B. 325 dealt with earlier in this judgment.

The instant case of Smart v The Gleaner Company Limited et al may be contrasted with the position in Marbe v George Edwards (Daly's Theatre) Limited and another (1928) 1K.B. 269 where the plaintiff had failed to aduce any evidence of malice up to the close of the plaintiff's case, and that did not deprive the judge of his discretion whether to rule or not to rule at the close of the plaintiff's case as to whether malice existed or not.

If the situation existed, as it must in most cases where the publication of a defamatory matter is held to be done on an occasion of qualified privilege, that all the evidence that an innocent plaintiff, far removed from any connection with a defamatory publication could produce were:

(a) proof of the fact that he was falsely accused both as to allegation, place and time of allegation; and

(b) that from the circumstances known to the plaintiff, the def ndant could not have believed his defamatory statement about the plaintiff to be true.

Would a defendant be able to refuse to give evidence and succeed, if a judge should rule that the occasion was privileged when what can only be peculiarly within the defendant's knowledge only was not available to the plaintiff? I might add here, that it would be quite easy to imagine that in most cases, an innocent plaintiff's knowledge of why a defendant should believe the defamatory statement to be true would be limited or non-existent unless he was so informed by the defendant, and it also seems that this would apply to most any plaintiff.

Now to continue to quote from Brett L.J.'s judgment in Clark v Molyneux at page 246:

> "If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect or wrong motive. ..... If the indirect and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was

> malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant, has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive."

See also the dictum of Diplock L.J. in Horrocks v Lowe (1974) 1 All E.R. (H.L.) at p. 669, referred to earlier, when he said at page 669, ... "If he publishes untrue defamatory matter recklessly without considering or 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."

In the instant case plaintiff Smart stated on oath that he was not at Harmon Barracks on the 12th January, 1976, that he never attacked the second defendant, Sibblies in any speech that day as alleged.

This evidence was supported by two witnesses called by the plaintiff Thus on that evidence the plaintiff Smart Smart./has discharged the burden cast on him of showing and proving that the defendant, Sibblies, had recklessly stated that which was false and that on that evidence Sibblies knew the defamatory statement to be false, and on that evidence the plaintiff has also discharged the burden cast on him of showing that the defendant, Sibblies, and the first defendant were acting from some other motive than a sense of duty and published something that they did not know to be true.

It was further decided in the Clark v Molyneux case that the want of care in instituting inquiries were too slight to justify a judge in asking the jury whether the defendant was actuated by indirect motives in making the defamatory statements. In that case inquiries were in fact made about the plaintiff a potential appointee to a religious cure, such inquiries being made from a reliable source which source assured the defendant that certain discredictable and defamatory matters about the plaintiff were true.

The defendant bona fide believed those allegations based on his inquiries to be true and wrote to the vicar about them. Though the inquiries made by the defendant were slight, inquiries were in fact made and he personally believed the allegations against the plaintiff to be true. It was held that his personal belief in the truth of the

allegations in such circumstances was sufficient to show his bona fides in making the publication on a privileged occasion. The defamatory publication was about and concerning an involved person in the circumstances of that case. On this point about the question of checking or making inquiries concerning a defamatory matter, the case of Showler v MacInnis cited by Mr. David Muirhead for the first defendant and referred to earlier in this judgment comes to mind and it was shown in that case that inquiries were made from a reliable source and so the defendant did not act recklessly.

In the instant case of Smart v The Gleaner Company Limited and Sibblies, unlike the cited case, there is no evidence that the second defendant got his information firsthand or got his information from a named source or any source whatsoever, and the first defendant, The Gleaner Company Limited, through their Managing Editor, Mr. Neita, admitted that they made no inquiries though they could have done so either from Mr. Sibblies himself or the Commissioner of Police. In this case the defamatory publication was about and concerning a person who was not involved in anything that was the subject of the allegations.

Of course Mr. Frankson also submitted that Superintendent Sibblies, as he then was, had a right to make an official communication to the first defendant persuant to the Defamation Act. This point has already been dealt with when dealing with the claim by Mr. Muirhead, Q.C., on behalf of a news paper on his submission that a Superintendent of Police is an officer of government for the purpose of the Defamation Act 1961.

Mr. Muirhead has even made bold to say that, as disclosed in the 9th and 10th paragraph of column 4 of exhibit 7 that the highest authority in the land namely the Prime Minister of Jamaica has said in referring to the police, ".....you are officers under the law".

How can any one by the widest stretch of the imagination hold that a mere say so by a Prime Minister can alter or interpret the law or result in a police officer or police man being regarded as an "officer of government" for the purposes of the Defamation Act 1961

and at that by saying, "..... you are officers under the law".

The Statutory Defence as I hold, is not applicable to this case and the plaintiff having satisfied the court that the publication by the first defendant, The Gleaner Company Limited was false concerning him Mr. Smart, a person who had no connection with the demonstration of the 12th January, 1976, it becomes obvious therefore that the plaintiff has discharged the burden of establishing malice in fact, in the first defendant in reference to the false allegations against him.

The other case cited by Mr. Frankson of Jenoure v Delmege (1890) (H.L.) and P.C. AC 81 only reiterates, that once the occasion is privileged, the onus is on the plaintiff to prove malice, and that this onus applies to all cases of qualified privilege, as no distinction can be drawn between one class of privileged communications and another. Another case cited to the court by Mr. David Muirhead for the defence, and on which great reliance was placed, and I for that reason had intended to provide an extensive analysis, however, on second thoughts I do not think that that is necessary. The case is one from British Columbia namely Showler v MacInnes (1937) 1 Western Weekly Reports p. 358. The facts of that case are, for all practical purposes almost similar to the facts in the instant case of Smart v The Gleaner Company Limited and Sibblies.

Here in the Showler v MacInnes case, a manuscript containing the words complained of as defamatory was on the 5th November, 1936, sent by the defendant, MacInnes, to one Rutland, the Manager of the Radio Station C.K.F.C. Rutland, the Manager of the Radio Station, read the manuscript and filed it, he did not know the plaintiff, Showler (who was referred to in the manuscript) and says in evidence, "the name meant nothing to me".

The defendant, MacInnes, the Radio speaker who had handed the manuscript to the Manager of the Radio Station had obtained his information that was in the manuscript from a source that had proved reliable in the past and he had no reason to doubt its reliability on this occasion.

To pause here for a moment, it would appear from the above or last paragraph, that the defendant, MacInnes, had checked on the information that was contained in the manuscript from a source that proved reliable in the past, and so he had no reason to doubt its reliability on this occasion before publishing what was by innuendo held to be defamatory. The emphasis here is on the checking on the information contained in the manuscrip from a reliable source before publishing it.

In support of the fact of checking, so as to eliminate any trace of malice that could be attributed to reckless publication, Manson J. in the Showler v MacInnes case cited, said, and quote:-

> "I cannot find that the defendant in doing what he did acted recklessly or without reasonable enquiry. .... He did say at the trial that he still believed that the plaintiff had uttered the words ascribed to him. He was not cross-examined as to his reasons for so believing."

For these reasons, the court in that case held that no malice existed, and as the publication was on a privileged occasion, the defence of privilege was sustained as there was no malice to cause the privilege to vanish. In consequence the defendant succeeded.

The points of similarity between the cited case of Showler v MacInnes and the instant case of Smart v The Gleaner Company Limited are:

(1) Both publications were held to concern matters of public interest and concern and so was covered by qualified privilege. In the former case of Showler, Manson J. stated:-

> "The whole citizenhood of Vancouver has and at the time of the address in question, a vital concern in the matter of industrial relations in the community and in knowing under what circumstances strikes might be called. The occasion of the address of the defendant was privileged ....."

In the latter case of Smart, the entire citizenry of Jamaica, both resident and non-resident has and at the time of the publication Exhibit 1, a vital interest and concern in the matter of the security forces of Jamaica, in this instance, the police force, and in knowing under what circumstances there was political interference in the police force and 'the leaking of police information about raids to gun men'. In addition, defendant, Superintendent Sibblies had a personal

interest to defend himself from an attack made on him, both orally by certain members of the police force, and the first defendant who had previously published such attack afforded Mr. Sibblies at his request to the Editor, the opportunity to reply in the press.

(2) The Manager of the Radio Station received the defamatory matter in a manuscript from the defendant, MacInnes, in the Showler v MacInnes case and read it before filing it for broadcast.

In the Smart v The Gleaner Company Limited and Sibblies case, the Managing Editor of the Gleaner Company Limited et al received the defamatory matter in a letter from the second defendant, Sibblies, read it and edited it for publication. The points of dissimilarity or which are distinguishable between the two cases are:

(1) The defendant, MacInnes, in the cited case did not act recklessly but checked on the contents of the manuscript by making inquiries from a proved reliable source, and stated at the trial that he still believed the defamatory allegations to be true. No doubt he so stated because of his having made enquiries from the proved reliable source, however this did not come out in evidence as he was not cross-examined at the trial for his reasons for such belief.

In the instant case of Smart v The Gleaner Company Limited v Sibblies, the first defendant, The Gleaner Company made no inquiries through its Managing Editor or anyone else as to the reliability or truthfulness of the defamatory allegations made against the plaintiff and contained in the letter from Superintendent Sibblies to the Editor. Indeed, the second defendant, Sibblies, gave no evidence as to whether he knew, or whether he made any inquiries about the truthfulness or genuiness of the allegations made against the plaintiff, and so he Mr. Sibblies could not be cross-examined as to his beliefs or otherwise.

The Managing Editor believed his source of information to be reliable as says he, it came from a Superintendent of Police.

Here, both defendants in the Smart v The Gleaner Company Limited et al case must be held to have published recklessly, the first defendant because it made no inquiries even from its supposed reliable

source Superintendent Sibblies, and the second defendant as he gave no evidence to the court substanciating any belief he may have had or if he had any at all, so as to weaken or destroy any proof which the plaintiff may have already established in so far as such burden lay on him, or in anticipation of any effort on the part of the plaintiff to rebut the presumption in his favour.

Finally, both in the cited case of Showler v MacInnes and the instant case of Smart v The Gleaner Company Limited et al, the publications were made on privileged occasions and therefore enjoyed the protection of qualified privilege, but in the former case because of responsible enquiries being made it was held that there was no malice, even though the allegation was false and defamatory about the plaintiff. Consequently the plaintiff lost his case.

In the latter case, on the state of the evidence up to the close of the plaintiff's case, the qualified privilege would vanish as there would seemed to be malice in law from publishing a false and defamatory statement about the plaintiff without making any inquiries, or giving any evidence of such inquiries responsible or otherwise and thus recklessly. If this important and similar case of Showler v MacInnes, cited by Mr. David Muirhead, Q.C., for the first defendant was the only case relied on by the first defendant, and possibly also relied on by the second defendant in the instant case, then the plaintiff, Smart, would succeed, as the first defendant, The Gleaner Company Limited, published that which was issued by the second defendant, Sibblies recklessly without checking and thus maliciously.

Following on the 1937 decision in British Columbia of the Showler v MacInnes case, there was the case of Wells v Wellington and C, et al (1952) N.Z. L.R. 12 cited by Mr. Muirhead, Q.C., which latter case, cited with approval the decision in the former case. Incidentally both cases involved suits which concerned respectively a union leader as plaintiff, and in the other politicians as plaintiffs.

In the 1952 case of Wells v Wellington and C., et al, the question of privilege arose, in the circumstances that there was a duty on the

publishers of the defamatory matter to speak out on a matter of public interest and concern, and so that there was a common interest between those to whom the publication were made and those by whom they were made.

It was also decided in the Wells' case that the circumstances giving rise to qualified privilege are not closed, as one does not know what circumstances might arise in the future.

This, no doubt, might have been one of the reasons for also citing that case, and maybe also for emphasis, as the points raised in that case have, it would seem, been adequately dealt with in other cases cited. Possibly as these two cases involved politicians and the Smart case mentioned "playing politics".

What the Wells' case decided were that the circumstances in that case were such that they gave rise to qualified privilege, and that as a matter of public policy such privilege is not absolute, but must depend on the honesty of purpose with which the statement is made.

No allegation of malice was made in the Wells' case and none was proved so as to deprive the defence of the claim to qualified privilege.

Even the reasoning and decision in the Showler v MacInnes case just dealt with was applied in the Wells' case, and it was held that the publications were made on an occasion of qualified privilege without malice, and that that was an answer to the plaintiff's claim.

In the instant case of Smart v The Gleaner Company Limited, malice was alleged and sought to be proved, while, in contrast, the Wells v Wellington and C., et al case, no malice was alleged, neither was it sought to be proved, and as the court held that the publication was made on a privileged occasion without malice, the defendants succeeded. Yet another case that was cited in this suit of Smart v The Gleaner Company Limited was one based on its own peculiar facts and involved privilege volenti non fit injuria, and the question of an innuendo which it was held was inapplicable to that case, unlike a certain innuendo which in contrast, was held to be applicable to the Cassidy v Daily Mirror News Paper case referred to earlier. This cited case is Chapman v Ellesmere (1932) 2K.B. 431 and was a case dealing with the

publication of a report in a certain racing calender, as well as in certain news papers. The publication was that a certain race horse "Don Pat" was doped, and that the trainer of the race horse was warned off/all race tracks that the Jockey Club had jurisdiction over.

The rules of the Jockey Club gave them power to grant licences to officials, trainers, jockeys and race courses; to refuse to allow any person to act or continue as an authorised agent etc; to make enquiries into and deal with any matter relating to racing and to warn any person off New Market Heath; and to authorise the publication in the Racing Calender of their decisions respecting any of the above matters.

The plaintiff who was a horse trainer, received from the stewards of the Jockey Club a trainer's licence to train horses to run under the rules of the jockey club during the year 1930. The licence was expressed to be issued subject to the rules, one of the rules, Clause 17, Rule 3, related to enquiries being held by the stewards of the jockey club, and which rule authorised them to suspend or withdraw a licence of a trainer without giving any reasons, and to publish in the Racing Calender, such withdrawal or suspension. Thus, here we have persons who accept such licences being bound by the rules, including Rule 3.

The Jockey Club published through the Club's agent and press agencies their decision, not only in the Racing Calender, but also in the Times News Paper; the decision as published contained the following:

> "The Stewards of the Jockey Club ..... after further investigations, satisfied themselves that a drug had been administered to the horse for the purpose of the race in question. They disqualified the horse for the race and for all future races under their rules and warned C. C. Chapman, the trainer, of the horde off New Market Heath."

The innuendo sought to be drawn here, was that the article was saying that Chapman himself doped the horse, and the court held that that innuendo could not be drawn, and in any event, the publication, as far as the publication in the Racing Calender was concerned was privileged and published without malice, and in any event volenti non fit injuria applied, and further, the facts published were true, namely that the horse was doped, that the horse was disqualified, and that

Chapman was warned off the track, that it was improper to draw the innuendo that Chapman doped the horse as that would be contrary to the natural meaning of the words, that the publication in the news paper was not priviledge as it was not of national interest, that the publication that a horse was doped, that a certain person was warned off, was a fact, and a reasonable person could not by innuendo say that the publication meant that that person doped the horse. One needs to consider an innuendo only when words in their ordinary meaning are not defamatory. This case may be contrasted with the case of Cassidy v Daily Mirror News Paper Limited (1929) 2 K.B.D. 331, where it was held, that even an innocent publication about the engagement of a particular man to a particular woman, though not defamatory on the face of it, may amount to libel on the man's wife, as the correct innuendo to be drawn was that he is a bachelor and that his de jure wife is living an immoral life with him.

The Chapman v Ellesmere case may also be contrasted with the instant case of Smart v The Gleaner Company Limited as:

(1) the natural meaning of the words in paragraph 9 of exhibit 1 in the Smart case required no innuendo for one to see the defamatory meaning of the words used. The innuendo was only applicable to the person that reasonably fitted the discription given in paragraph 9 of exhibit1; and

(2) in the Smart case, the publication about the police force as contained in exhibit 1 was of national interest and concern.

However, in the Chapman v Ellesmere case Slesser L.J. quoted with approval what Buckley J. said in Adams v Ward (1917) A.C. 332 that, and quote,

> "The public interest in this matter is not, I think, confined to the public in the United Kingdom, it extends to all those who are interested in matters vitally affecting the Military Forces of the Crown. This extends to all subjects of the Crown. Further, the plaintiff's speech was delivered in such circumstances that it might well reach all such members of the public, as would be reached by the publication made of the defendant's libel."

In the instant case of Smart v The Gleaner Company Limited, no innuendo need be considered as to the meaning of the words used in exhibit 1 about an identifiable person who has been identified by persons called to say they understood the article to refer to Inspector Smart, as he then was, and the occasion of the publication being privileged, the fact that it was also published, or that it was most likely published in the overseas editions of the Gleaner Company Limited's publications, would not defeat the privilege on the ground that the publication was too wide as is expressed by Slesser L.J., quoting from Buckly J. in Adams v Ward and quoted in the last paragraph supra.

The question as to whether the publication by the Gleaner Company Limited was too wide, as the article, apart from appearing in the local press would no doubt have appeared in the overseas editions and so defeat any privilege, Dr. Barnett stated that and quote:

> "Apart from the fact that the Gleaner circulates outside of Jamaica - they are as recipients of the publication and have no interest or duty to receive the communication on the grounds it was a matter of public inportance affecting the operation of the Jamaica Constabulary Force stationed and operating in Jamaica."

There is no corresponding duty and interest such as the law recognises as the basis for the privilege even in respect of readers within Jamaica. In other words, Dr. Barnett,is saying or submitting that even if the publication, Exhibit 1, was confined to publication only in Jamaica, the publication would not be privileged, as there is no duty or interest for the Gleaner Company to receive such information about the operation of the police force. Dr. Barnett in his closing address also referred the court to Clark v Molyneux (1877) 3 Q.B.D. 237 on this point of limited publication.

I shall deal first with the question of publication in the overseas Gleaner. If the matter is of public interest and concern, and it would especially be so apart from any other reason if there had been a previous publication in the same or any other press on the same subject matter in which the operation and conduct of the members of the police force had been brought to the attention of the public, whether such publication

is confined to the local press only or also to the overseas press, and which previous publication may affect the publication of the second article calling for a defence.

As mentioned earlier, Slesser L.J., quoting with approval what Buckley J. in Adams v Ward (1917) A.C. 332 said, "The public interest in this matter is not, I think confined to the public in the United Kingdom, it extends to all those who are interested in matters virtually affecting the Military Forces of the Crown." The words 'police' or 'security forces' in the instant case may be substituted for the words 'military forces'.

On this very point, the case of Webb v Times Publishing Company Limited (1960) Q.B.D. p. 535 is of some relevance, especially the statement of Pearson J., at page 569 of that judgment, and which statement I will quote shortly.

In the Webb v Times Publishing Company case it was held: that there was no blanket qualified privilege attached to fair and accurate reports of judicial proceedings in foreign courts, but that if the particular proceedings and report was closely connected with the administration of justice in England, it would create a ligitimate and proper interest to the English news paper reading public. It all depends on the particular type and importance of the foreign trial in relation to England.

Pearce J. at page 569 of the Webb case, quoted with approval the following from the late Fraser J.'s book on libel and slander:

> "This common interest may be in respect to very varied and different matters, indeed the only limitation appears to be, that it should be something legitimate and proper, something which the courts will take cognisance of, and not merely an interest which is due to idle curiosity or desire for gossip."

The Clarke v Molyneux case cited by Dr. Barnett again takes us no further except for emphasis.

In the instant case of Smart v The Gleaner Company Limited et al, the foundation of the privilege in relation to this point as spoken of in the cited case of Webb, is that the contents of the publication was of legitimate and of proper interest to the Jamaica news paper reading

public, whether living here or in large numbers in the overseas countries where the overseas Gleaner is published. The instant case however, unlike the cited case of Webb, is not concerned, on the facts, with a fair and accurate report of judicial proceedings published contemporaneously, but with matters of public interest and concern to Jamaicans wherever they may be, including friends and persons who may wish to visit Jamaica, as to the conduct, state and operation of the security forces in Jamaica, especially the police force, and again, especially where there was a previous publication in the press of what took place amongst a certain branch of the police force on a matter of public concern and interest, and which publication contained disparaging remarks about one of their top officers, the second named defendant, Superintendent Eric Sibblies and other top members of the police force and other members of the force, and which allegations form part of the exhibits in this case.

Which earlier publication would entitle such second defendant and the particular news paper of the first defendant, as a matter of public concern and interest, to publish a reply, provided that they in doing so did not attack a person who was a stranger to the published attack on the second defendant, in other words the publication must be legitimate and proper.

The public interest must not be due to idle gossip, but a legitimate interest, as for example, the state of the integrity of the police force.

At paragraph 559 of Gatley on libel and slander, 6th and 7th Edition, it is stated under the heading "Reply to Attack" that if a person whose character or conduct has been attacked is entitled to answer such attack, and that any defamatory statements he makes about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusation made, and paragraph 564 of the same editions of Gatley says, that the person who is attacked in the press may attack in the press the person who attacked him. Further, at paragraph 567, it is stated, that the right to reply in the press only arises if the attack is made in the press and that such

publication in the press would also protect the press, whether sued alone or jointly.

It should be noted that in all these paragraphs from Gatley on libel and slander, the emphasis has always been on the plaintiff or person who had first attacked the defendant in the press, it has not said anything about a plaintiff who is a stranger to the first attack on the defendant being attacked by the defendant so as to afford that defendant as well as the press any privilege on that ground, whether they are sued separately or jointly.

Now dealing with the question of malice, as well as of privilege together, although both have already been dealt with in this judgment, I am obliged to deal with it from yet another angle because of the case of Webb v Times Publishing Company cited earlier.

In law, malice in libel, is the wrongful intention, and which intention is presumed as accompaning a wrongful act, though such presumption can be rebutted.

If the occasion is privileged, the presumption of malice is normally rebutted, and the plaintiff must then give evidence of malice.

If the publication is prima facie libellous, then it would be for a jury to say, or if a judge sits alone, for him to say whether, under the circumstances it was privileged. First, the matter would have to be something which it would be of interest to the public to know, and secondly, the defendant would have to publish it with the honest desire to afford the public information.

The requirements of public interest is served by publication.

Where an occasion has arisen for publishing a matter to persons who have a right to know, then the occasion is privileged, and is further illustrated by the case of Hunt v Great Northern Railway Company (1891) 2 Q.B. 189 to p. 191. a case where an employer, the defendant, dismissed his employee Hunt, the plaintiff, and published Hunt's name in a monthly circular to the other employees, and stating in that circular that Hunt had been dismissed for gross neglect of duty, and Lord Esher M.R., in his judgment dismissing the plaintiff's claim, held that the occasion

arose for the defendants to do what they did - not that they had used the occasion rightly and therefore the occasion was privileged. The learned judge went on to say that the occasion had arisen, if the communication was of such a nature that it could be fairly said, that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. Further, that if the plaintiff meant to assert that the defendants had used the occasion wrongly, he ought to have insisted that that was the question to be tried, and that there ought to have been some suggestion by the plaintiff of malice on the part of the defendant or wilful misuse by them of the occasion.

Like the paragraphs of Gatley on libel and slander that were cited, one should observe that like all the other cases cited or referred to, the defendants in the Hunt case had published something concerning the right person or right person involved, by name or by innuendo, in the contents of the publication, that is the plaintiff in the respective cases, in addition, in the Hunt v Great Northern Railway Company (1891) 2 Q.B. case, the plaintiff did not allege malice on the part of the defendants or wilful misuse of the occasion.

Lord Esher further went on to say, that when two of the following things co-exist, namely, where the communication was of such a nature that it could be fairly said that those who make it had an interest in making such a communication and those to whom it was made had a corresponding interest in having it made to them, then the occasion of privilege has arisen, and the question whether the occasion was or was not misused is an entirely different one.

Dr. Barnett, in citing the case of Lawton v The Bishop Sodor and Man (1872) P.C. 4 L.R. p. 495 at p. 503 again adds nothing further.

In the instant case of Smart v The Gleaner Company Limited et al, and of the publication in the Sunday Gleaner, exhibit 1, contrary to what Dr. Barnett for the plaintiff Smart, suggests, I hold, and for the reasons contained in what I say that I hold, I hold and correctly so, that the occasion had arisen for the second defendant, Superintendent

Sibblies to make a publication in the same press that had published a matter which amounted to an attack on him Sibblies personally, in relation to and concerning his office as a Superintendent of Police and therefore a privileged occasion had arisen. However, in the instant case, unlike the cited case the plaintiff, Inspector Smart alleged malice and improper use of the occasion.

On the face of and the state of the evidence before the court, it would seem that the plaintiff, Mr. Smart as shown by the evidence he presented should not have been the object of the attacking reply by the second defendant, Mr. Sibblies, and no evidence was called by the second defendant's counsel to show otherwise, so as to destroy even that express malice arising in the publication itself.

To put the whole issue of the facts in this case in simple form, so that lay men and possibly others might more easily understand, a simple illustration might help. For example:-

Take the situation where there is a Sport's Club. Some members of the club may be members of the club for the purpose of playing cricket, others for the purpose of playing tennis, and so on, and others might be interested in all the games played at the club, while others just join the club for relaxation and companionship. This of course, does not mean that the cricket playing, or tennis playing members of the club may not have some greater or lesser interest in the rest of the club.

Now suppose the members of the cricket playing branch of the club were to get together in the absence of their non-playing chairman or non-playing manager of their team and put out a stereo or mona record, or publish a script which is defamatory of, or in parts defamatory of another member of the club who is not a member of the cricket branch of the club, then that defamed club member, may in the interest of his own protection publish in similar manner, by record or script, allegations against the members of or against some of the members of the cricketing branch of the club who took part in the publication of the defamatory record or script about him. That however, would not entitle

such defamed member of the other branch of the club, to publish defamatory allegations against the non-playing chairman of the cricketing fraternity who had not taken part in the defamatory attack on him, as he would be a stranger to the defamatory matter which the other party set out to defend.

The non-playing chairman of the cricketing branch of the club may even, on other occasions, have made representations to the president and managing committee of the club in private meetings or in executive meetings, putting forward what complaints the members of the cricketing branch of the club may have had, but, unless evidence was forthcoming that such chairman instigated or took part in the publication, of the script or record, of a defamatory matter concerning the other member of the club, then this other member of the club would not be entitled to publish a libel on him, the chairman, though the publication of the libel-in-defence by the defamed member of the club would in such circumstances be held to be done on a privileged occasion, though the court may hold from the plaintiff's evidence in this regard that he has proved malice in the defendant, unless, as stated earlier, evidence was produced by this first defamed member, and not rebutted by the plaintiff that such publication about the non-playing chairman of the cricket club was justified because of his bona fide belief in the truth of the charge.

To make the matter even more simple in regard to the facts of the instant case of Smart v The Gleaner Company Limited et al, let me substitute the name "Constabulary Force" for the name "Sports Club" and the words "Mobile Reserve" for the words "Cricketing Branch of the Club" and the words "non-playing Chairman of the Cricketing Branch of the Club" for the words "Chairman of the Police Federation, Inspector Rainford Smart". Then substitute the words "record or script" for the words "publication in the Daily Gleaner" and the words "another member of the club who is not a member of the cricketing branch of the club" for the words "Superintendent Sibblies who is not a member of the Mobile Reserve branch of the Constabulary Force", and also substitute the words "President and Managing Committee of the Club" for the words "Commissioner

of Police".

If that is done, it can be easily seen, that although Mr. Sibblies' defamatory allegations of and concerning "an element in the force ..... "and who with his body guard (a fringe benefit which he is the only member of the Force to enjoy)" and which by innuendo is shown to be referring to Inspector Smart, was done on a privileged occasion, as explained earlier in this judgment, there was no evidence put forward or tendered to the court by the second defendant's counsel in justification of or in proof of his honest belief in the truth of the publication against the plaintiff and which publication on the evidence presented to the court was up to that stage proved by the plaintiff to have been maliciously made against an innocent third party, namely the plaintiff, the then Inspector Rainford Smart, and published without justification by the first named defendant, The Gleaner Company Limited.

Now that the case has, I hope, been put in simple form by an illustration about a Sports Club, I wish to say that on that basis the instant case in my opinion could have been considerably shortened. Even this judgment could also have been considerably shorter, but its length is due to the desire of the court in shortening, if possible, future similar cases.

Having related the facts as appears from the evidence presented in this case, and which facts excludes any evidence from the second defendant, Superintendent Sibblies as he then was, and having considered all the cited cases and the law applicable to this and similar cases, I wish to state the following.

As Mr. W. Frankson, counsel for the second named defendant, Mr. Sibblies, at the close of the plaintiff, Mr. Smart's case, and after the first named defendant the Gleaner Company Limited had closed its case and decided not to put his client in the witness box, or to call any evidence, I wish to state at the outset that there seem to be some misunderstanding, as to the proceedure to be followed by a judge when a submission is made by a defendant's counsel or by the counsel appearing for a person who is required to answer, prior to his putting

his client in the witness box, especially when the case is one of defamation.

What seems to be misunderstood, is, that there is at least one exception to the general rule, that when a judge sits alone, he being both the judge of law and of fact combined in one person, that he being the judge of fact, should not be asked to express any opinion upon the evidence until the evidence is completed. Just as it would not be right, and no one would dream of asking a jury at the end of a plaintiff's case, or at the end of the case of the person who had the right to begin, be he plaintiff or defendant, to say what verdict they would be prepared to give if the defendant or the person who should answer the case called no evidence. See the case of Broady v Davis 4 J.L.R. 38 at page 39, which deals with the situation where a judge sits alone.

In defamation cases, a judge sitting alone, just like the case where a judge sitting with a jury may, at the close of the plaintiff's case, make a ruling on questions of law, such as a ruling as to whether a publication is or is not made on a privileged occasion, or whether a defamatory statement is actionable per se, that is actionable without proof of special damage.

The judge sitting alone may also make rulings at that stage, as to whether malice exists or not.

However, it has been held that in some cases, depending on the circumstances that it might be better as a matter of expediency to postpone the ruling until all the evidence is in.

The question whether a publication is made on a privileged occasion is such an elementary principle of law, that such a ruling would not affect a later consideration by a Court of Appeal, although the question as to whether malice has been proved by the plaintiff may be a somewhat different matter, and in which case, it may be best to wait until all the evidence is in before making a ruling as to malice.

Similarly the question whether a particular job or occupation constituted an office of profit, honour or credit, might best be decided when all the evidence is in. There may also be other instances

when the ruling should await the presentation of all the evidence, and this can be gathered from the cases of Young v Rank (1950) 2 K.B. 510 and Parry v Aluminum Corporation Limited (1940) 162 L.T. Reports 236 which have already been dealt with in this judgment.

Before pronouncing my decision, I would like to quote from p. 1135 of the Boston v W.S. Bagshaw and Sons' case (1966) 1 W.L.R. per Lord Diplock L.J.:

> "This is an ordinary simple case of libel. It took 15 days to try: the summing up lasted for a day, the jury returned 13 special verdicts. The Notice of Appeal sets out seven seperate grounds why a new trial should be granted, the latter being split up into over 40 sub-grounds. The respondents' notice contained 15 separate grounds. The costs must be enormous. Lawyers should be ashamed that they have allowed the law of defamation to have become bogged down in such a mass of technicalities that this should be possible etc."

The instant case of Smart v The Gleaner Company Limited et al lasted some 15½ days of evidence and submissions, excluding the period spent in delivering this judgment, for which I make no comment, as Diplock L.J. was referring to lawyers in the recent past when he made his remarks as late as 1966.

For the reasons given prior to this quote from Lord Diplock L.J. I am satisfied that the plaintiff, Mr. Smart has satisfied the requirements of proof cast on him of proving malice in both defendants on this privileged occasion.

The first defendant published a false and defamatory statement of, and concerning the plaintiff, Smart, recklessly not knowing the matter contained therein to be true, and the second named defendant, Sibblies in defending himself, showed an improper motive in publishing a false and violently defamatory article concerning the plaintiff, a publication about Mr. Smart which was not necessary for such defence.

The plaintiff, Smart, having discharged the burden cast on him of negativing those presumptions arising in favour of the defendants on an occasion of qualified privilege, shifted the onus on the defendants especially the second named defendant, Sibblies, of rebutting that proof if they could. The second defendant did not do so, either because

there was no such evidence available to him and incidentally to the first defendant, or that the second defendant's counsel relied on a misinterpretation or a misunderstanding of the law on this particular point.

Judgment in this case is therefore given to the plaintiff, Superintendent Rainford U. Smart on the claim against both the first and second defendants.

Fortunately or unfortunately no assistance was given to the court in this case as to what the quantum of damages that should or should not be awarded in the event that the plaintiff succeeded. Doctor Barnett, counsel for the plaintiff did ask for judgment in his client's favour and for substantial damages, and both defendants' counsel individually asked for judgment in their favour. I was therefore left with the task unaided of awarding what I consider the appropriate damages in this case.

I therefore consider, that is, if the decided cases had allowed it, that the appropriate damages that should be awarded against each defendant should be approximated the same, the first defendant, The Gleaner Company Limited, acted recklessly and when given an opportunity to retract or to mitigate the damages did not avail themselves of that opportunity, and the second defendant, Superintendent Sibblies, as he then was, launched his attack on Mr. Smart without any justification.

Before stating what the appropriate award in this case should be, I will summarise the legal position to be gathered from the judgment in this case in so far as it affects publications made on privileged occasions.

This instant case of Smart v The Gleaner Company Limited et al and this judgment has now highlighted and emphasised that which could be gathered only from an analytical reading of other cases, especially those cited, namely, that an innocent person, far removed from any circumstances which could possibly involve him in a scandal or defamatory matter, can be libelled, slandered or defamed unjustly, but it also shows that from the limited knowledge and evidence available to that defamed person in the circumstances, he can by that limited available evidence of his innocence, establish that the publication,

has been done maliciously, even though he may by that same evidence establish that the publication was done on a privileged occasion, thus casting on him the plaintiff the burden of rebutting the presumption of malice, which rebuttal he may prima facie have by that same evidence have succeeded in establishing.

This case and judgment also establishes that such defamed person can rebut or further rebut the presumption in favour of the defendant, if any evidence is also tendered by the defendant as to his honest belief in the truth of the facts stated in the defamation, in addition to any prima facie rebuttal of the presumption in favour of the defendant that he may have already established by his evidence, by his showing through cross-examination, of the defendant that there is no basis for his alleged honest belief.

The instant case, as well as the cited cases also establish that it would be more difficult and sometimes extremely difficult or maybe impossible for a plaintiff to rebut the presumption of there being no malice in a defendant, where the publication is made on a privileged occasion, if that plaintiff is in someway connected to the transaction or circumstances spoken of or written about by the defendant, as honest belief in a defendant can easily be appreciated in such circumstances even if it be later shown that what he believed is false.

That such evidence as may be sufficient to rebut the presumption in relation to the first type of plaintiff would most likely, if not of certainty, require additional and specific evidence from the plaintiff of malice in the defendant to defeat the presumption in his favour.

Having said that, I shall now state the appropriate award of damages that is appropriate to award to the plaintiff against the defendants in this case, as well as my stating some of the principles followed in making such award so that counsel may be able the more easily to criticise the award made if they so wish.

I also hope that it is realised that for a member or members of the security forces of any country, be that country large or small,

to act as an agent or agents of political aspirants, and or who clandestine or otherwise take instructions from political aspirants, or in anyway act from political motives in relation to their duties as a member of a security force, would create a most dangerous situation in any country and which could result in counter actions of the most far reaching consequences and make that country an unsafe or undesirable country to live in or even to visit.

Situations like those, apart from being dangerous, are if I may so, not only disgraceful but dishonest, and in breach of solemn oaths, and may even result in the colapse of a government.

It might be praiseworthy for a news media especially as under our laws, the freedom of the press is constitutionally unviolatable, for them to bring situations like that to public notice, but to accuse an individual especially a member of the security forces unjustly of such dangerous, disgraceful and dishonest behaviour can be most painful and distressing to such a person who is so unjustly accused, and may call for substantial damages, whether exemplary or compensatory, to be paid to that person as a solace to his injured feelings and reputation depending on the facts and circumstances in each case, and the legal principles involved in awarding damages.

(a) In awarding damages, one must take into account the estimation in which the plaintiff stands in the estimation of others. If this is any guide, Inspector Smart as he then was, was for three consecutive years elected by rank and file of the police force from inspectors down to the rank of constables to be the chairman of the Police Federation.

(b) The damages must be that which the plaintiff has suffered as a result of the libel, which should include any pecuniary or financial loss, actual and potential as well as damages for the natural injury to the plaintiff's feelings - the natural grief and distress which the plaintiff may have felt at having been written about in defamatory terms. In this respect damages are at large, as it would have been if there was also a case for exemplary damages.

However, in this case, there are no facts which brings it in line

with those cases for exemplary damages and the principles laid down therein for the award of such damages.

One such case in which exemplary damages was awarded was Cassells and Company Limited v Broome and another (1972) 1 All E.R. 801, where the court awarded £15,000 for compensation and £25,000 for exemplary damages, a total of £40,000 or $80,000 which sum, though considered heavy was not disturbed by the House of Lords. In the Cassells and Company Limited v Broome's case, if there was no award of exemplary damages the amount of compensatory or aggravated damages would have been £15,000 or $30,000. The exemplary portion of the award was granted on one of the two principles on which such awards are usually made namely:

(1) oppressive, arbritary or unconstitutional action by the servants of the crown and;

(2) where the defendant's defamatory statement was calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I am sure that in regard to the first principle just mentioned, that neither Mr. David Muirhead, Q.C., nor ex-Superintendent Eric Sibblies would like the court, through me, to now hold, as submitted earlier by Mr. David Muirhead and who represented the first defendant that he Sibblies was an officer of government, or a servant of the crown.

So there, one has a sum of £15,000 or $30,000 being awarded as compensation or aggravated damages in the Cassells and Company Limited v Broome case, and in other cases sums of £35,000 and $35,000 being awarded as compensatory or aggravated damages respectively in the following two instances, namely, Bernstein v Observer Limited and others decided by the Court of Appeal in England in 1976 and Maxwell and others v Forde St. John (1977) 22 W.I.R. a case that was heard in Barbados and referred to in the judgment of Rowe J. in suit number C.L. 1975/C043 Hopeton Caven v Dr. Trevor Munroe, 24th January, 1979.

Rowe J. sitting without a jury awarded Hopeton Caven $25,000 for aggravated or compensatory damages, mentioning in his judgment that no evidence was lead as to the means of Dr. Munroe.

In regard to the instant case of Smart v The Gleaner Company Limited et al, there is no evidence that the plaintiff, Smart, lost financially by the defamatory article, rather, the evidence was that he was promoted from Inspector to Assistant Superintendent since the publication of the article, though this first promotion , since the defamatory article, may have been in spite of the libellous article.

I may also state here, that like the Caven v Munroe case cited above, there was no evidence lead as to the means of The Gleaner Company Limited or of Mr. Sibblies, but the decided cases will show that a persons means is to be considered only where exemplary damages are being awarded as is stated by Lord Devlin in Rookes v Bernard (H.L.) (1964) 1 All E.R. 367 at p 411 letter "E" where Lord Devlin said, and quote, "Thirdly, the means of the parties irrelevant in the assessment of compensation, are material in the assessment of exemplary damages".

"Parties" in this context would seem to include not only the defendant or defendants, but also the plaintiff. There was no evidence given as to the means of any of the parties, in the instant case, and in any event, that would be irrelevant as the instant case is not one for the award of exemplary damages. Further, the Rookes v Bernard case lays it down that exemplary damages should be awarded with restraint.

Having shown that the request for substantial damages as requested by the plaintiff's counsel, Dr. Barnett, does not in this case call for exemplary damages, but rather for compensatory or aggravated damages, I shall now state those facts taken into account in coming to what the court thinks should be the correct award of damages as compensation to the plaintiff as a result of this libel on him.

(1) The first defendant, the Gleaner Company Limited, through their Managing Editor, Mr. Clifton Neita, gave evidence of their belief at the time, in the truthfulness of the allegations contained in exhibits 10 and I, also, though mistaken, that they were protected under the Defamation Act 1961. Of the first defence, they failed to make enquiries which might have helped in the mitigation of the damages or possibly in

the non-publication of the defamatory matter, so there is no ground here in the first defence for the mitigation of damages, especially as no apology or correction was made after request and notification by plaintiff.

Of the second defence under the Defamation Act, the mistake by the plaintiff and his advisers in the interpretation of the Act would, in my opinion, tend to the mitigation of damages but this ground of mitigation would be of little effect or rather would be minimal, again as a result of the non-publication by the first defendant of an apology or correction, of the article when brought to their attention. However, proof that the first defendant was not the originator of the libel, but received it from a source that was named in the article, headed "Sibblies Reply" would go to the mitigation of damages in respect to the first named defendant. In addition, the first defendant as shown by exhibit 4, afforded the plaintiff, Smart, an opportunity to reply to Mr. Sibblies in his defendant's news paper which it would seem would go to mitigation of damages to some extent, but in any event, not to the same extent as an apology, which apology no doubt would have been forthcoming if proper enquiries had been made and the publication carried out inspite of such enquiries.

Paragraph 1333 of Gatley's 7th Edition and Harle v Catherall (1866) 14 L.T. 801 shows that the offer by a defendant news paper to open its columns to the plaintiff to contradict or to explain the imputations against him should be taken into account in assessing damages, though this would not have the same effect as an apology.

(2) In regard to the second defendant, Mr. Eric Sibblies, there was no evidence tendered by him or any facts or circumstances produced by him which would tend to show the absence of any malicious motive or intention on his part with a view, if for no other reason, to mitigate any damages that may be awarded against him.

No apology was tendered by the second defendant with that view in mind, however in view of paragraph 3 of the pleadings of the second defendant and from the nature of the cross examination of the plaintiff by his counsel that the defamatory article did not refer to the plaintiff

no apology could be given or expected in mitigation of damages.

Having stated certain principles being followed in regard to the assessment of damages in respect of the first and second defendant, I must now remind myself that this is an action against two defendants sued jointly as joint tortfeasors.

In such a case, any damages awarded must be one set of damages and the cases have shown that there is no necessity to split the damages between defendants according to blame worthiness and that the sum awarded should be that appropriate for the least blameworthy.

(3) On the evidence available in this case of Smart v The Gleaner Company Limited et al, especially as the second defendant did not give any evidence, the first defendant, the Gleaner Company Limited seems the least blameworthy, and I now have to decide the quantum of damages to be awarded on this basis and on the principles already narrated and now to be added to.

In Rooke v Bernard (1964) 1 All E.R. p. 367 at page 413 letters "A" and "B", Lord Devlin quoting from Lord Atkin in Ley v Hamilton (1935) 153 L.T. at p. 386, and quote:

> "..... It is precisely because the 'real' damage cannot be ascertained that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach; it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation ....."

The 'punitive' element is not something which is or can be added to some factor which is not punitive; and at letter "D" on the same page, Lord Delvin went on to say, and quote:

> "Lord Atkin puts "punitive" in inverted commas. "So-called punitive" is what I think that he means; and read in that way the passage is strong authority for the view that insult offered and pain given are matters for compensation and not for punishment."

As stated in Halsbury's Laws of England, 3rd Edition, Volume II page 312, paragraph 508, in regard to interference by the Court of Appeal where there is an erroneous estimate of damages, and quote:

> "This principle is of general application, but in some cases, such as actions for defamation, the nature of the damages awarded makes the task of establishing an erroneous estimate more difficult than in other types of action where the injury suffered can be more accurately measured."

Though it has been suggested that where a judge sits alone and can, by his judgment, castigate a defendant, that the damages in a libel action may properly be lower than that awarded by a jury because a jury is mute, Lord Greene, M.R., in Bull v Vazquez (1947) 1 All E.R. 334 C.A. stated, "There is, however, no reason why a judge sitting alone should not on that account, in a proper case, award heavy damages".

Taking all these matters into account, I find that the appropriate damages to be awarded to the plaintiff, Superintendent Rainford Smart, by way of compensation for the grave libel published about him should be $15,000, and I so award this amount of $15,000 against both defendants with costs to be taxed or agreed.

H. V. T. Chambers
Judge of the Supreme Court