Beaman J

Judgment

Appeal No. 25 of 1917

Surajmal v/s Hormia

Coram Beaman J delivered on 5-11-17

ap. No. 25 of 1917
ap. No 56 of 1916
Suit No. 337-16

In my opinion here is no libel. Before going into the details of this case I think it desirable to get, and keep, clearly in view some distinctions between the principal defences to a Libel action, which are often confused, both in argument and judicial pronouncement. 1. A deft. may contend that the facts complained of are not libellous. 2. A deft. may claim privilege. 3 Or defend upon the ground of fair comment, 4. or he may justify, that is, plead the truth of the facts complained of. The first of these defences may be neglected. It always was, and still is to some extent, matter of law for a judge and not of fact for a jury. Privilege and Fair comment are frequently confounded even in the dicta of most eminent English judges. Yet they have nothing in common. Privilege implies that the matter complained of is a libel, but, in the circumstances of its publication, and more especially in the relation of parties, is protected. Fair comment never is libel. Speaking generally the defence of privilege is particular to the deft. seeking to avail himself of it, while fair comment is common to everybody. The defence of Truth, implies that the matter complained of is libellous, but if true, there is a complete answer. Fair comment may be true or it may not. The language of the law always seems to me very loose and inexact, in treating of these topics. Any statement in positive form, is pounced upon as a statement of fact, going beyond comment proper, and therefore outside the protection which the law gives to fair comment. But it is clear that if by comment is meant inference from facts truly stated, the process of inference legitimately leads to a conclusion which may be stated in positive form without losing its essential character. Thus, that which in form is a statement of fact may, on examination, turn out to be no more than what English Judges have called a deduction from the facts, and so, itself " fair comment" in no need of justification. Analyzing logically I should prefer the term induction to deduction, but the reasoning of the law, in comparison with the far more rigorous reasoning of logic and metaphysic, is blunt edged, and tends to conform to the notion that the law ought to be, if it is not always, the expression of the average common sense of the society. It is therefore usually couched in the loose and general terminology of average men of average reasoning power, and while here and there it seems to aim at, seldom reaches verbal precision. These observations are not merely academic, prompted by pedantry. This trial affords striking illustration both in the judgments before us, and in the arguments we have heard of the urgent need of a preliminary and very exact analysis of the law in general, and the materials in the case to which that law is to be applied. I have carefully studied the leading English cases cited in the judgments of the trial, and appeal ct, and I do not propose to refer to any of them because that study has convinced me that the attempts at definition which they contain are of very little definitive value. The most famous and now perhaps the most popular for example is that where the defence of fair comment is set up, the judge is first to determine, as pure matter of law, whether the inferences complained of can reasonably be drawn from the true facts, and that being done in favour of the deft, the jury is next to determine whtr. the inferences ought to be drawn. Thus the final judgment is suddenly transferred if not altogether, very largely, from the intellectual to the moral domain. It is, I think, obvious that any inference which can reasonably be drawn, is to that extent a fair inference. It may not be the right inference, but that is not the point. From any given group of facts it is almost always possible to draw more than one perfectly reasonable inference. Only one of them can be the true inference, but the others may be just as fair. And for

2 for all purposes of this limited defence it is the fairness, or reasonableness of the inference or comment which is decisive, not its ultimate proved truth. The latter will often depend upon further disclosure and the disproof of the truth of the facts from which the inference was drawn. All such considerations ought to be rigorously excluded in handling a defence of fair comment. What then is meant by " ought to be drawn"? Nothing more I suppose than that the average common sense of the people either accepts or rejects the inference as, although reasonable, not reasonable enough. Or as appears from two of the judgments before us, that the conclusion reached by the inferential process is too positively expressed, and had much better have been stated in terms of probability. But here again it is clear that we are really deciding upon the reasonableness of the inference and nothing else. All judgments of that kind are probably influenced to a greater or less degree by the then known fact that the inference was untrue. I must pause here for a moment upon the term " inference". Inference is, strictly, a process, from fact A. to conclusion B. But the subtlest reasoning is baffled when it tries to separate the process from the conclusion, and the law which is not subtle at all, carelessly identifies the inference with the conclusion. For all practical purposes the use of inference, for that which is reached by inference must be accepted, and will be found to raise no real difficulty. I find, then, in this dictum no real light or guidance. For it all comes to this that any comment or inference which the Judge thinks the facts admit, must go to the jury, and they are to say whtr. it is fair, that is reasonable or not. In doing so, however, they wd. be affected in all probability by a sense of fair play, and allow the entrance of many factors into the verdict which a more rigorous logic wd. exclude. Remembering that fair comment never is libel, it is hopeless to attempt definitions of what is and what is not libel in that large class of cases. For the plain truth is that the only criterion is the verdict of the jury in each case. If twelve honest butchers, bakers grocers and cheesemongers say that the matter is a libel, it is, and if they say it is not, it is not, and there is the beginning and end of it. Unfortunately Judges in this country are deprived of that flexible but on the whole very ~~satisf~~ satisfactory criterion, deliberately adopted by the common sense of the English people to correct the nice refinements and excessive technicality of the trained judicial mind. How necessary some such rude corrective and standard is, the divergence of judicial opinion, and the reasons which have led to it in the course of this trial amply prove. Another highly prized rule laid down in the English cases is that comment to be fair, must be comment on facts truly stated. The wide play given to this principle in spite of its apparent rigidity, will be seen later when I deal with the actual materials upon which I base my own conclusions. Sufficient to say here, that as a rule, it is almost meaningless. Fair comment is comment upon facts. In this connexion only true facts are facts at all. If a " fact" be untruly stated, it ceases to be a " fact", and cannot therefore be a ground of inference. As commonly applied in argument, and sometimes in judgments, this rule then is pure tautology, and repeats as some thing new and added, what is necessarily implied in the proposition of fair comment. But what was really meant, I think was that the "facts" upon which the comment is founded, must be truly stated, though later they may turn out not to be true at all. For all purposes of this defence a fact may be truly stated and may yet be utterly untrue. In the case we are considering some facts may be of that kind, while others may not, and these must be proved to be true, if they have formed any material part of the ground of inference, or if they are libellous in themselves. Slurring over these distinctions, or, possibly, allowing the final

8. judgment to be swayed by the knowledge that the facts truly stated were after all untrue, accounts I think very largely for the conflict of judicial opinion before us. Much the most difficult part of the case turns upon a right under standing, and a correct application of this factor in the law of Fair Comment. First it is necessary to keep clearly apart the classes of facts I have just mentioned. Here the comment, alleged to be fair is comment upon a trial. All the materials put in evidence at that trial, the plaint, the Written Statement, the evidence, and the trying Judge's comment in dismissing the suit with costs at the instance of the plff are facts as the truth or otherwise of which the deft. ~~the deft.~~ was under no legal obligation to prove. He could take them as he found them and comment upon them. It is quite irrelevant to enquire now whtr. they were true or false. The Deft. had to state them truly, that is all. The comment went a little further, and touched upon an intimately related matter, which as the writer said was not fully revealed at the trial. Here the plff. charges him with having stated a fact which is untrue, and was not put in evidence at the trial, that is to say a fact which the deft. himself adduced and first brought to the notice of the public.. Any fact of that kind must be shown (A.) to be true (B.) to be no more than an induction from the truly stated facts (C.) not libellous in itself (D.) or immaterial in the sense that the comment complained of is in no way strengthened by such fact, and will not be weakened by its dismissal from the ground of inference.. It is only in the latter connexion that I have introduced the qualification that the untrue fact stated must not be libellous in itself.

Although both Macleod and Heaton J.J. have held that the statement, " That Bhagwandas was the creature of Surajmal admits of little doubt" went beyond the limit of fair comment, the greatest difficulty in the case, and by far the greater part of the argument before us centre upon the plff's contention that the Deft. has invented two untrue facts at least, and made them ground of inference against the plff. It appears to me that whatever hope of success the plff. and his legal advisers cd. have had from the beginning to the end of the trial was rooted in their confidence that they cd. easily prove the untruth of these facts, and so, as was said repeatedly by the Advocate General in his argument, the Plff. MUST succeed. But at no time during the ten or eleven hours he was addressing us did the Advocate General appear to me to realize certain qualifications, both upon what was actually stated in the impugned writing, and the rule he relied on with so much assurance, I tried over and over again to bring these possible dangers before his mind, but as far as I was able to judge, wholly without success. If the facts which were thus declared by the plff. to have been untruly stated, to have needed justification and not to have been justified, were eliminated from the case, there would have been very little argument before us upon the isolated question whether the comment was fair or not. I shall presently show that in my opinion no fact was untruly stated that was in any sense material to the comment, and that upon the facts truly stated the comment was fair, and therefore no libel.

Before sorting the materials I am going to deal with on the foregoing principles I must advert to one point which arose for the first time at this late stage. Although the Plff. has so strenuously relied throughout upon the untrue statement of facts, those upon which the first and most serious comment was made went virtually unchallenged. It is true that in Macleod J's judgment we find him of opinion that there was a material omission, and here and there a mis-statement. But such mis-statements will, I believe, turn out on examination not to be so much mis-statements of facts, as themselves comment.

If we begin with the plaint and enquire what was the libel of which the plff. complained we shall find that it does not include the point I am now dealing with. No one should know better than the plff. in a libel action what the libel is by which he feels himself aggrieved. He knows exactly where the shoe pinches. Apart from all other considerations I should be disposed to neglect anything in the writing as a whole which the plff. himself did not allege to be a libel. Now in the group of facts which had to be truly stated as ground of inference before the deft. cd. contend that his conclusion that the plff. in Bhagwandas v. Dadar was really Surajmal himself, was fair comment, there IS one mis-statement. The Written Statement says that it was Shambuprasad who suggested that the pro. note shd. be in his, and not in Surajmal's name, as it wd. not look well were it made out in favour of Surajmal. In the articles the writer says that this was Surajmal's suggestion. I believe myself that this was a purely accidental slip. It makes little or no difference whtr. in fact the suggestion came fm. Shambuprasad, Surajmal's clerk, or from Surajmal himself, if it were made at a meeting at which Surajmal was present, or even were it made later, in his absence, with his knowledge and approval. No grievance was made of this slip at the trial or in the Appeal Court. It is not mentioned in the plaint. It had never occurred to the Plff. or his legal advisers at any time. But towards the close of the Advocate General's opening, this point was given him from the Bench and he eagerly availed himself of it.. If we turn to the judgment of the learned Chief Justice it is apparent that it had not at that time been taken by anybody. There the facts to be dealt with are placed in two groups, and the first. in which this mis-stated fact wd. be included was said to be ~~virtue~~ virtually unchallenged. I do not think we ought, now that the case has reached its final stage here, to pay any attention to this trifling error.

I shall treat all the material facts upon which the inference that Bhagwandas was Surajmal's nominee was based as having been correctly stated,, subject to any criticism or qualification which a close examination of Macleod J's judgment may evoke.

There remain then 1. An alleged material omission in the group of facts upon which inference A. that Bhagwandas was Surajmal's nominee was based 2. Two alleged mis-statements of fact in the second group of facts the general gist of the comment upon which, was that Surajmal had been guilty of writing a letter which was to say the least a calculated suppressio veri, and generally, of professional misconduct. These two facts are 1. That Surajmal paid Dadar his own cheque for 9000 rs, in settlement of the suit Dadar v. Tatia Saheb Holkar, and 2. That " as a matter of fact there was no intervention on the part of any agent" etc. It is admitted that the Deft. made a mistake when he wrote that Surajmal paid Dadar his own cheque. The cheque given by Surajmal to Dadar was Tatia Saheb Holkar's cheque. But even were the mistake material and later on I will show why in my opinion it was not, it was a very natural mistake. In the Written statement, a fact upon which the Deft. had every right to make any fair comment he chose, it is stated that Surajmal gave me a cheque. Now, in every day ordinary

parlance if A. were to say " I had an account with B. which he settled with me personally on the basis of a reduction of ten per cent,and gave me a cheque for the amount" I suppose that ninety nine men out of a hundred wd. take it for granted that B. gave A. his own cheque for the amount. It might turn out that he had a cheque of C. for the amount, which he handed to A. but that wd. be an exceptional case,and anyone writing with only the information before him which was then before Horniman might very well have written in perfect good faith that Surajmal paid Dadar his own cheque. The second of the two facts alleged to be untruly stated will need a little more detailed examination and analysis in its proper place.

I think the plff's case is put at its highest,and is supported by the strongest reasoning by which it could be supported,in the judgment of Macleod J. I do not recollect that anything was added to that judgment which cd. have been of any service to the plff. in the Advocate General's argument before us. In deed by far the weightiest consideration I have been able to discover in support of the conclusion that Horniman's first and most serious inference went beyond the limits of fair comment lies in the fact that two learned Judges, Macleod J. and Heaton J. have been of that opinion. I think,then that the best way of explaining why I have come to a contrary conclusion and giving my own reasons against those on the other side,will be to take these judgments and analyze them critically.I may premise that the libels complained of are really two,and distinct. The first is that Surajmal was the real plff. in the suit of Bhagwandas v. Dadar,and that that suit was ,as brought,an ut terly false claim to Surajmal's knowledge The second is that Surajmal instigated Dadar to file a suit against Surajmal's own client Tatia Saheb Holkar on the understanding that Surajmal wd. use his influence with Holkar to settle the suit for a sum not less than 20000 rs,and that in consideration of Surajmal's procuring such a settlement,Dadar wd. pay him a sum of 3000 rs. Further that not only was Surajmal guilty of gross misconduct in thus setting one of his clients against another,and agreeing to take a secret commission,but that when the settlement was made,although Dadar was in the hands of another Attorney Da Cunha,Surajmal settled with him direct,and then wrote a letter to Da Cunha conveying the idea that the settlement had been made by the parties as much behind his (Surajmal's) back as behind Da cunha's. That Surajmal had thus been guilty of a breach of professional etiquette in settling with the client of another Attorney behind that other Attorney's back,and had been guilty of something much worse,morally,in writing to that Attorney in a strain calcula ted to cover up this breach of professional etiquette.

In the plaint I find the plff. setting forth the innuendos of which he complains, and among them that he is accused of having cheated his client Holkar. There is nothing in the articles or the comments which goes,or as far as I can see, could go that length.It was grossly improper if true,for Surajmal to have insti gated Dadar to file a suit against Holkar. At that time both were his clients. But on the facts as they appear in this suit,it was a perfectly good suit, and,seemingly,Holkar had no defence at all. The only question wd. have been the quantum of damages. If Dadar had gone of his own accord to another Attorney to file that suit,and had claimed 25000 rs damages,and Surajmal acting for Hol kar had settled for 9000 rs even without Holkar's knowledge in the first in stance,provided that Holkar approved of the settlement on those terms,I cannot see that Surajmal wd. have done anything unprofessional,or anything which

6 could possibly have been included logically in the attack which Horniman made upon him in these two articles. It would have been, I believe, an impropriety though a very venial one, were it true that Surajmal when the suit had been brought, settled on behalf of his client Holkar with Da Cunha's client Dadaji, "over the head" of Da Cunha. But there is nothing in all this which is, or comes anywhere near, cheating Holkar. This much the Advocate General conceded when I put it to him in the course of his argument. It is very necessary, it is indeed essential to keep all this in proper focus, and very clearly before the mind, when we have to deal with the alleged mis-statements of fact contained in the passage "As a matter of fact there was no intervention on the part of any agent" etc. For the whole tiresomely re-iterated argument there went upon the ground that Holkar HAD an agent representing him with Surajmal, and therefore it was untrue to say that there was no intervention on the part of any agent. Keeping these two alleged libels apart, for the present, it is to be noted that, so far as its reasoning goes, Heaton J's judgment is confined to the first. There he came to the conclusion that it was not fair comment to say that there was little doubt but that Bhagwandas was Surajmal's creature,, and after that, as the learned judge very rightly said, it was unnecessary to go into the less serious charges. It is unfortunate, I venture to think, that we have thus not had the assistance of Heaton J's clear practical mind upon the natural meaning in its proper context, and as a whole of the passage in which the sentence "as a matter of fact etc" occurs. And I may add that while for purposes of clarity I have separated the libels, which the articles are said to contain, I do not mean to say that, except possibly, in assessing damages, it matters whtr. both, or only one are or is proved. 9

On a first view it might be thought that the facts out of which this suit has arisen, are extremely complicated. They really are not. It would be better to lay out of the case at once and altogether the suit for accounts brought by Dadaji against Surajmal and the criminal prosecution in respect of one of its items wh. he set on foot against Surajmal. It may be conceded as far as I am concerned in this judgment, that both these proceedings were instigated by Nanabai. It may be conceded that Nanabai was hostile to Surajmal. No one denies it. But a great deal of capital seems to have been made out of the fact, partly by way of prejudice, and partly to break down Nanabai's credit as a witness. Nanabai's evidence is only valuable to prove that Surajmal did in fact settle direct with Dadaji, and that this settlement was not effected behind the back of Surajmal, and without his knowledge. Later on I hope to show that the Deft. was not bound to "justify" here at all. I cannot help feeling, after reading the trial ~~in the~~ before Macleod J. that the deft's case was jeopardized by his Counsel's scrupulosity, in avoiding all semblance of justfiication. The Deft. elected to defend upon the ground of fair comment. That is a much easier defence as a rule in such cases as this, than justification. Once committed to it, Deft's counsel fought shy of anything that might seem however remotely to approach justification. He did not even cross examine Surajmal upon the fact which, owing to a step taken later by Deft's legal advisers, it is now contended he knew very well that he must justify. It certainly was in my opinion a serious tactical blunder first to omit all cross-examination of Surajmal, and then at the closing stage of the case, to put in an application for a commissn. to examine Vinayak and Holkar on this very point. Either it needed justification or it did not. If it did then most surely Surajmal ought to have been cross exanined upon it. If it did not, there was no reason at all for examining Vinayak and Holkar about it. Probably Deft's counsel believed that he must succeed on the ground of fair

~~follow from a misuse of privilege~~ comment, and did not ~~misuse~~ justify ~~his~~ risk enhanced damages, shd. this expectation after all ~~disappoint~~ ~~his~~ ~~judgment~~ case upon fair comment,

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comment and did not wish to take the risk of enhanced damages shd. that expecta tion after all be falsified by anything that looked like indirect justification. It does not follow that because a deft. stakes his case upon fair comment, the conclusions so reached must be false. All that such a defence means is that the deft. does not care whtr. the conclusion be true or false, provided only he can show that it is a fairly reached conclusion from the premises available to him at the time he drew it. And he is in a somewhat delicate position when the plff, as in all such cases he must, goes into the box and denies not only the conclusion but many of the premises. Here the deft's position was peculiarly embarrassing since the worst conclusion he drew against the plff. was no more than a repe tition of the Deft Dada's allegation in his Written Statement.. When the plff. swore that it was quite untrue that he was the real plff. in Bhagwandas' suit, and that, in effect, Dadar's written statement was false from beginning to end, what was the deft. to do? If he had cross examined on these points the Judge wd. in all probability have stopped him, pointing out that he had not chosen to justify. If he kept silent, as he did, the record wd. indicate that his conclusion was false, and that Surajmal had been grievously wronged by his infer enee. All that is really irrelevant, but there can be no doubt I think that it exercised a very great influence upon the minds of both Macleod J and Heaton J. But as to this particular statement, which finds no place among the facts put in evidence before Davar J. if it were a new fact, and not an induc tion from such facts duly put in evidence, the deft. wd. clearly have been obliged to prove it. It is regrettable then that he made no attempt to cross examine Suraj mal on the point. The reason is probably discoverable in the uncertainty of his counsel's mind as to his position at the time. There is a sentence in Macleod J.'s judgment which seems to me to support this conjecture. He says that as far as he cd. gather Deft's counsel did not admit that there was any fact which he had to justify. If that were so then a passage in the Deft's Written Statement had better have been wholly omitted or differently worded. In para 6. the deft says " as to such portion of the said words, if any, as are not facts put in evi dence at the trial etc, the same is true in substance and in fact". That certainly suggests that the deft. thought some such portion there might be, and that IT at any rate wd. need justification. If it was not to justify this passage in the arti cle that Nanabai was called as a witness for the defence, it is not easy to under stand why he WAS called. Then three other wits appear to have been examined be fore Macleod J. to prove that Surajmal was really responsible for the withdrawal of Bhagwandas' suit, and after they had been examined, and Strangman for the plff wanted to call evidence in rebuttal, Bahadurji for deft. said that all this evi dence might be struck out, as he was not justifying. Strangman however, on being given an option (presumably of having the evidence struck out at once, or of leaving it on the record and calling evidence in rebuttal) elected to call evi dence, and seems to have been allowed to do so. It is not easy in these circumstan ces to know whtr. this evidence was, in the understanding of the learned trial judge, on the record or not at the end of the trial. I merely mention this to indi cate the uncertainty and confusion which marked the conduct of the deft?s case before Macleod J., and doubtless contributed in no small measure to the conclu sion reached by that learned Judge. Heaton J. puts it quite plainly that the infer ence which Horniman drew, was not only of a most serious and damaging nature, but was not true. It was not contended, the learned Judge adds ,, that it WAS true.

But that is surely laying too much stress on the form of the defence, and looking at the result of the trial where Surajmal, on this ground, was allowed to have it all his own way. I preface what immediately follows, thus. It is admitted that the subject matter of these articles is of public interest. It is admitted that Horniman bore no malice to Surajmal. Nanabai did not go to Horniman of his own accord, Horniman sent for him because he wanted further information. He knew from the record of the case before Davar J. that Nanabai had been Surajmal's managing clerk throughout the transactions which led up to the suit of Bhagwan das V. Dadar. I doubt whtr, where the defence is fair comment, malice or no malice is of much importance. But where it becomes necessary to compute the fairness or unfairness of comment, and the scales ~~were~~ are fairly evenly balanced, it wd. be hard indeed to exclude the influence of such a factor as malice, were it proved in the writer. And there are passages in the judgment of Macleod J. which indicate, to say no more, a feeling against the deft. on the supposition that he was actuated by something very like a malicious desire to discredit Surajmal. I think it is perfectly clear, too, that both Heaton J. and Macleod J were influenced to some extent by what came out at the trial before Macleod J. This is suggested by the learned Chief Justice, and I think that the suggestion is well founded. Yet it is quite clear that every consideration of that kind has to be banished from our minds in deciding whtr. at the time the articles were written and on the facts then before the deft. Horniman, they were or were not fair comment.

It is needless for me to say that I have a very high respect for any considered judgment of Macleod J. Where I find that I am not able to agree with him, that sentiment compels me to state, if only as a matter of courtesy, my reasons at length. ~~And~~ I have read Macleod J's judgment several times since the hearing of this appeal came on. And I will begin my examination of his judgment in detail, by saying that I believe he was much influenced by two dominant notions. First his sense of fair play was affronted by Horniman's method of supplementing the information he had before him in the reports of the trial. ~~Evide~~ Evidently Macleod J thought that had Horniman been anxious solely to see this matter laid before the public in the justest light, he ought to have invited Surajmal's own explanations in the first instance. Instead of doing so he sends for Surajmal's enemy. Was that an honest way, was it a fair way of approaching the elucidation of a matter of public interest? Such I take to have been what was uppermost in Macleod J's mind in more than one part of his judgmt. Yet if it means anything, it means that Horniman was acting maliciously, and this is nobody's case now. The second dominating influence easily distinguishable in Macleod J's judgment and amounting to something like an obsession in the mind of the Advocate General, was that Horniman took some of his facts, and some of his comments from the observations prepared by Mr. Waccha for counsel in the suit of Bhagwandas v. Dadar. Now I want to say here once and for all that I see no magic in the use of " observations". No one denies that Horniman had recourse to the observations. No one asserts that in doing so he cd. claim any protection. If he stated a fact fm. the " observations" which was not put in evidence at the trial, he did so at his own risk, and if it were challenged he wd. have to prove it. If he took comments from the observations and published them verbatim, he made them his own, and they wd. have to be judged fair or unfair on that footing, and that footing alone. It is no part of the law of fair comment that the comment must be the writer's own; he is as much entitled to publish derivative as original comment if it be fair, and he chooses to adopt the former

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make it his own. But throughout his argument before us the Advocate General appeared to think that he clinched his contention that comment was not fair, or that a fact was not true, by showing that it came literatim and by Horniman's own admission from the " observations". This is very strange. Suppose that there had been no observations at all in this case, but that Nanabai had told Horniman orally what was stated in them. Suppose Nanabai had said " Here is a letter of Surajmal. You see it suggests that he did not settle the suit with Dadar direct, and did not even know that the parties had settled the suit till he was told so by an agent of his client Holkar. Now turn to Dadar's Written statement, and you find him swearing there that Surajmal did settle with him direct. Turn again to Surajmal's sworn testimony before Davar J. and you dont find a word about the intervention of any agent of Holkar, but a statement that Surajmal's own managing clerk settled the case with Dadar direct. My suggestion on that is that this letter is a calculated lie, intended to couceal fm. Da Cunha that Surajmal had settled the case behind Da Cunha's back with Da cunha's client." Horniman compares the letter with what appears on the record of the case, and agrees that this is the only reasonable construction which cd. be put upon it. Would he not then be entitled to adopt the suggestion made to him, and express it as his own comment Would it make the slightest difference that it HAD been sugges ted to him, and might never have, else, occurred to him? None whatever that I can see. These observations presumably WOULD have been acted on had the suit of Bhag wandas v Dadar gone on. There can be little doubt that this letter of Surajmal to Da Cunha wd. have been put to Surajmal, and if Dadar's version were true, I do not see what other inference cd. possibly have been drawn from it than that which the deft. Horniman drew. Observations of this kind, I suppose, contain facts and comments, which counsel are intended to use. It may be that the Attorney who drew these observations did not think that this part of them wd. be relevant or at any rate material in the suit. But there they were, and read in the light of what had happened at the trial before Davar J. I do not see why Horniman shd. not have used them if he believed that any fact they stated or any comment they made was true and fair. It is upon that basis that I discuss the question we have to answer, and I cannot help thinking it a pity that the learned Judge who tried the action, and the Advocate General who argued the appeal for Surajmal before us, shd. have been under what appears to me so grave a misapprehension of the sig nificance and weight of a fact which no one denies that Horniman did draw upon these observations, in writing parts of the impugned articles. I will now go over Macleod J's judgment., noting only those passages which in my opinion lead to wrong conclusions. I need not delay over the facts leading up to the suit of Bhagwandas and Surajmal. On the pleadings Macleod J. observes. " It is unfortunate that plff. did not ask for particulars of the statements refd. to in this para (para 6 of the W. S.). For the articles profess to comment only on what was made public at the trial". Is that quite correct? The most debated part of the alleged libel is introduced by the writer's statement " as regards the last named point it may be as well to elucidate the matter a little further on the basis of the deft's allegations, though the matter was not fully revealed in court". When the learned judge comes to deal with the evidence, he remarks, "with that evidence before him (deft) to send for Nanabai was a very indiscreet step on the part of the deft, if he wanted to write a fair comment on the report of the trial, for it is difficult to escape from thinkg. that the deft. must have expected to hear fm. Nanabai something to Surajmal's detriment". Undoubtedly he did. The impression left on his, or for that matter anybody's mind by the report

of the trial before Davar J. must have been most unfavourable to Surajmal. The Judg goes on to say that Deft. might have obtained all the necessary information for an article fm. Messrs Ardeshir Hormusji Dinshah and co. Then follows a long passage showing that Surajmal had every right to regard Nanabai as a bitter enemy. Later the Judge says " Unfortunately for himself Deft. read Mr. Waccha's observations and though it is denied I think it is probable that he had some conversation with Nanabai about them". Observe the word " unfortunately". Certainly it has proved unfortunate for the deft. that these observations ever came under his notice, but I doubt very much whtr. this shd. have been so, beyond of course this, that if Deft. took any fact fm. those observations, he wd. lie under the obligation of proving it. Then the learned Judge asks, " Was then the deft's comment on the report of the trial fair comment, tested by the rule to which I have referred above? In the first place was it based upon facts truly stated, or were there mis-statements of facts, and in this latter must be included the omission of important facts. For unless a report which is being commented on is fairly set out the comment cannot possibly be fair. It cannot be said that the report of the case was properly set out before the comment began". It is to be remembered that the Chronicle had published a report of the case, and no exception has been taken to that report that I know of. It is of course true that that report is not re-produced in full in the articles, but it had been laid before the readers of the paper, and the articles appear to me to give a fairly accurate resumé of it. The judgment continues " True the effect of the pleadings is set out, but pleadings are very different fm. evidence and nothing is said about the evidence given on oath by Surajmal in examination in chief., denying the allegations made against him by Dadar. His cross examination is referred to in language which leads the reader to infer that he completely broke down and the deft. writes, "The case was suddenly withdrawn, the Judge appropriately remarking that the plff. had adopted a very wise course." The Judge used those words for reasons only known to himself. They certainly arenot apparent from the report, but the addition of the word " appropriately" by the first deft. can not be commended.". I shall later resume for myself what appear to me to be the salient features of the case tried by Davar J. Here it is enough to say that what Macleod J. imputes to the Deft. as unjustifiable, is that he did not set forth Surajmal's examination in chief; and that he uses the word " appropriately" in recording Davar J.'s remark upon the termination of the case. I think that the reasons which Macleod J. says were known only to the learned Judge himself, and certainly do not appear on the record, are obvious enough. As to the omission to include in the articles what Surajmal said in examination in chief or a resumé of it, all I need say here is that anyone who had read the report of the case, or who had the information on record there before him, wd. have understood perfectly why Surajmal was called as a witness for the plff, and what he certainly must have said in his examination in chief. His cross examination indicates that pretty clearly, and it is upon his breakdown under cross examination and the sudden collapse of the suit while that cross examination was in progress, that the writer wants to concentrate public attention. Then the Judge goes on " It is obvious that saturated with Mr. Waccha's observations he was ready to pass judgment on a case the trial of which had only just commenced.". That is a curious phrase to use about a case which had ended, but of course the learned Judge meant that the trial of it had barely commenced before the plff. withdrew it and consented to ~~be~~ to a decree against him with costs. The judgment continues " His first remark is" that the plff. was merely the creature of Surajmal admits of little

little doubt in view of the circumstances revealed"." and that Mr. Surajmal shd. have been thus content to have the case withdrawn and the very ugly allega tions made against him left unrefuted,is a matter which demands further enquiry". It must be borne in mind in dealing with all this part of the alleged libel that Horniman inferred fm. the pleadings the evidence,the nature,and the end of the suit that the Deft's version was true. The deft. had stated without reserva tion that Surajmal was the real plff,and Bhagwandas merely his nominee. In the circumstances revealed by the trial,as the writer says he believed that the Deft's declaration to that extent was true,and therefore he merely re-iterates it in the sentence which Macleod J. calls his first remark. No serious exce ption I believe could possibly be taken to the next sentence. Doubtless the writer has already concluded that the suit was Surajmal's suit;therefore if that is fair comment,it follows that the withdrawal of the suit was Surajmal's with drawal,and the whole sentence goes no further than saying that Surajmal's conduct in allowing the suit to be thus withdrawn while the ugly allegations against him were left unrefuted, certainly was a matter which demanded fur ther enquiry. Even were Surajmal not the real plff,as inferred by - the writer, still he was as much interested in the suit as the plff. Bhagwandas,regard being had to the Written Statement and the issues,and the part he had taken in it up to the time of its withdrawal,and it surely was fair comment to say that his conduct in allowing the suit to be thus withdrawn without making any protest called for further enquiry.Macleod J. concedes that if Surajmal were the real plff. then it was he who gave the word to withdraw,,but he adds that " the recorded circumstances nowhere point inevitably to the conclusion,and if unrefuted means disproved by the decision of the court,then Surajmal was con tent that the allegations against him shd. go unrefuted". Now here the learned judge certainly adopts the view that comment to be fair must take the form of an inevitable inference. In my judgment that is not the law. I do not like the use of such a word as " inevitable" in such a connexion. Fair comment,with which alone we are dealing impliedly permits of a much greater latitude than the drawing of inevitable inferences. All that is required is that the inference from facts truly stated shd. be fair,that is,one possibly out of many equally or al most equally fair inferences. If out of three or four inferences,one was inevi table in the strict sense,then all the others wd. cease to be reasonable inferen ces at all,and wd. not fall to be considered under the defence of fair comment. What WAS the inevitable inference from the facts before Horniman? If the infer - ence he drew was not the inevitable inference,and therefore not fair comment,it could only be because there WAS an inevitable inference which excluded all others,and speaking logically,deprived them of any semblance of reasonableness. Dare any one say that there was such an inevitable inference here? unless in deed it were the very inference Horniman drew? I will here without quoting dispose of Macleod J's treatment of the two words " unrefuted" and "unanswered". I re gret that I cannot agree with the learned Judge in saying that the use of these words by the deft. in their respective contexts necessarily means that Surajmal did not even deny Dadar's allegations. So far from that being so I think anyone wd. understand that the writer meant that notwithstanding any denial Surajmal may have given,the break down of the case in the middle of his cross examination, just at a point where he was plainly getting into deep water,and putting himself in a very compromising light,left Dadar's allegations still virtually in possess ion of the field. Merely denying an accusation is certainly not " answering" it in the sense of the writer. Every prisoner who pleads Not guilty denies the charge

but would anyone understand that his mere plea had " answered" it? I think not. The learned judge then sets forth the next two passages on wh. the plff. relies. He sums them up thus " The allegations are that Surajmal after instigating Dadar to file a suit against his own client Tatia Saheb, sends him to another Solicitor to file the suit, but after that had been done arranged the settlement of the suit with Dadar without letting Dadar's Solicitor know what was happening. Truly the matter was not revealed in court, nor in any of the proceedings It was revealed solely in the observations.... which no one had seen except Mr. Waccha and Nanabai. " Now much of this at any rate WAS revealed as immediately appears in what the learned Judge next says, in the Written Statement of Dadar. It is true that there is no mention there of Surajmal having sent him, Dadar, to Da Cunha, but he does most distinctly say that Surajmal instigated him to file the suit against Holkar, and it is hardly necessary to add that Surajmal cd. not very well have acted for both plff and deft. in such a suit. If he really instigated Dadar to bring this suit against Holkar in the manner alleged by Dadar it is certain that by implication he " sent" Dadar to another Solicitor, formally to conduct that suit. The W. S. of Dadar again does most expressly aver that Surajmal settled the suit with him, ~~direct~~. Macleod J. comments upon this as follows " But how can any reasonable person spell out of the passage in the W. S. which I have just quoted. a charge by Dadar against Surajmal of having broken this rule of professional etiquette? And I may note here that there is nothing in the Written Statement abt. Surajmal having sent Dadar to Da Cunha". I have commented on this in anticipation. I own I find it rather difficult to follow the learned judge in the first part of the sentences last quoted. No one ever supposed that Dadar had accused Surajmal of having committed this breach of professional etiquette. It was no concern of ~~Dada~~ Dada's. But he certainly did accuse Surajmal of having instigated him to bring the suit against Holkar, and he certainly did say that Surajmal settled that suit with him. Then when Surajmal's letter to Da Cunha was laid before Horniman, he comments on it in the manner above described. It is, as the writer makes pretty clear I think, a new allegation not revealed in the proceedings before Davar J. but connected with them, and one which might have been revealed or refuted had that trial run its course. That is all the passage in the article seems to me to mean, and if Dadar's allegations were true, a conclusion already inferentially reached by the Deft, then it wd. follow almost of necessity that this letter was of the character imputed to it. Then the learned Judge concludes that Deft. wd. never have written a word of this portion of the articles, if he had not had the " observations" before him. I agree that he wd. not, unless the man who wrote the observations had given him the same matter to use if he chose. But as I have said the mere fact that the observations were Deft's source of information is of no consequence or relevance whatever. The sole question is whtr. the fact upon which the writer is commenting now, is a fact and if so whtr. the comments are fair? . There are ~~reall~~ seemingly two facts, one, Surajmal's letter, the other the assertion that as a matter of fact there was no intervention on the part of any agent at all. Both came out of the observations The one AS a fact, the other I shd. say as a comment upon it., fully justified by the contents of Dadar's Written Statement, provided of course that statement was substantially true. Of course, as the learned Judge says, the charge made in the article is not taken direct fm. the W. S. of Dadar, but from the letter of Surajmal along with the contents of the written statement. But if it be substantially true or at any rate if it were eminently fair comment upon the materials before the writer, what can it matter that he did not take it bodily out of the W. S.,

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The judgment proceeds " But the deft. made a worse blunder.. Even if it can be said that it was alleged in the proceedings that Surajmal settled the whole matter direct with Dadar, it certainly was never alleged anywhere that Surajmal then wrote to the other Solicitor stating etc This was taken direct from the observations, and what is more startling the comment is also taken direct from the observations. What justification was there then for the deft. stating that the contents of Surajmal's letter which he got from the observations were not only untrue but were so written deliberately in order to screen the breach of etiquette committed by him?". The whole passage illustrates perfectly the point of view of the learned Judge, and, in my judgment, the true cause of his having come to what I feel was a wrong conclusion upon the case. He admits or to be more accurate, hypothetically half admits, though with reluctance, that one part of the comment might have been upon facts put in evidence at the trial. But prefacing his next observations with the statement that the Deft. committed a worse blunder he dwells upon what nobody denies that it was not alleged at the trial that Surajmal wrote the letter to Da Cunha, and that it was false, and deliberately written to screen his professional breach of etiquette. What justification, he asks, could there be of that? And the answer is simple. Fair comment on a true fact. If it be assumed that this was a blunder on the part of the deft. the question is pre-judged. But was it? The letter, alleged or not alleged is a fact. It is not denied. It was before the deft, and it appears to me that he had a perfect right to comment on it in the way he did. Its truth was flatly denied by the deft. in the suit before Davar J. in his Written Statement. From the course, what was elicited in, and the end of that trial Deft. had inferred, and I believe we all agree that the inference was upon those materials fair inference, that the W. S. was substantially true. If it was, this letter was false. Not only that but the deft. had the sworn evidence of Surajmal himself, and who should have known better?, that it was false. When Surajmal gave that evidence he had probably forgotten all about this letter. When it had become a prominent feature in the libel suit before Macleod J. he materially modified the evidence he had first given, so as to explain the letter as best he could. But when Deft. wrote he had only the record of the trial ~~of Davar~~ before Davar J. to work upon. And had nothing ever been added to that, is there any one who could deny that the inference that the letter was false, to the extent of at any rate being a suppressio veri, was a fair inference? If so far the inference was not only fair, but to use Macleod J's own term " inevitable" the reason assigned by the writer of the article for Surajmal having written this false letter, whether alleged or not, seems to me to be as clearly fair comment. It is the obvious reason, some reason there must have been, and this feature in the settlement of the suit of Dadar v. Holkar is so intimately connected with the truth as a whole of the Deft's version of the facts in Bhagwandas v. Dadar, that although not elicited in that trial, it became fair matter for comment upon the whole case. The learned Judge appears to have held from first to last that nothing which was not put in evidence at the trial before Davar J. cd. possibly be ground of inference, in commenting upon the character of that case. I do not agree. What was put in evidence there, was closely related to the former suit, and any highly suspicious feature in that suit if true, lent support to the main conclusion which Deft. had formed, that Dadar's defence was substantially true. This breach of etiquette, standing alone, was relatively unimportant, but the reason for it was sinister in the light of Dadar's allegations.

Almost all the Advocate General's force of argument was concentrated upon this much of the impugned articles. It was pressed upon us,over and over again,as though,in that form the point was difficult,instead of being of the simplest,that the fact stated namely that there was no intervention on the part of any Agent was untrue,and that the innuendo that the letter was false was wholly unwarranted,because at the trial of the libel action Surajmal swore that the suit was settled by Holkar's Agent,and the deft. failed to prove by Nanabai's evidence that it was not,and therefore the plff. must succeed. This is very crude reasoning In the first place it assumes that there WAS intervention on the part of an agent in the only sense in which that was denied as a fact in the article;in the next place it assumes this to be an independent statement of fact by the writer of the article,which as fact not put in evidence at the trial before Davar J. he had to "justify", and last,it wholly overlooks the important need of keeping ~~wholly~~ distinct what was before the Critic when he wrote,from anything that may or may not have been proved at the subsequent trial. If it can easily be shown that this apparent statement of a fact,viz that no agent intervened in the settlement between Surajmal and Dadar,was not only a fair inference,but by far the most probable and therefore the fairest inference to be drawn from the materials the writer had to comment upon,the whole of this ~~tiresomely~~ needlessly re-iterated argument falls to pieces,and becomes virtually irrelevant.Let me suppose that the sentence instead of being worded compendiously as it is had been thus cast, " But from the Written Statement of Dadar,and the evidence of Surajmal himself on oath,it is clear that no agent intervened in the settlement between Surajmal and Dadar",could any exception have been taken to it? I do not think so. And yet that is exactly what the sentence taken in its context really means as is made perfectly clear fm. what immediately follows. ~~The point of the passage~~

The point of the passage is to show that Surajmal's letter was in essence false,and so written to conceal from Da cunha his own direct communication with Da cunha's client.If we had not had the evidence taken at the trial of of the libel action before us,I make bold to say we shd. all unhesitatingly have come to the same conclusion. While I do not think that later evidence material or evan in strictness relevant,I may add that,speakg. for myself, it does not satisfy me that the letter was true.Macleod J. is said to have believed Surajmal implicitly and to have disbelieved totally the evidence of Nanabai.I am not concerned really with that evidence taken at that time. I admit that it is usually unwise to interfere with the estimate,of so experienced and able a trial judge as Macleod J,of the value of evidence given befose him. But I shd. say that even were our judgment upon this point to depend upon,or even to be influenced by that evidence,its whole tenor leaves no doubt on my mind but that Surajmal knew perfectly well of the settlement with Dadar before it was completed.He was in no need of being informed of it by Holkar's agent as his letter certainly suggests that he was.And lastly I think it almost absurd to insist that even if Holkar's agent did not intervene,that is to say go to Dadar behind Surajmal's back in effecting this settlement,yet there certainly was an agent of Holkar representing him in his dealings with Surajmal. That might have been taken for granted.There is nothing improper in it.The object of the writer was to show up an impropriety in Surajmal's method of doing business.His remarks must be read in connexion with,and strictly confined to that object.It is no answer to his statement that as a matter of fact there was no intervention on the part of any agent to reply,that between Holkar and Surajmal,the former was represented by an Agent.

The learned judge then proceeds to deal with the second article in which he remarks " that these ~~obs~~ allegations taken from the observations are repeated,with a further fact added that Susajmal paid Dadar with his own cheque. That was admittedly a mistake as I have already said,but I think it is quite an unimportant slip.The judge then comments on this in these words, " It is difficult to see what object the deft. could have had in laying such extraordinary stress on these facts which he had gathered fm. the observations unless he wished whilst making a personal attack on Surajmal on a matter outside the case,to drive home the inference he drew fm. t circs actually revealed,that Bhagwandas was the nominee of Surajmal,and that all Dadar's allegations against him were true". Precisely. That is undoubtedly what the Deft. was seeking to do. But does it deprive him of his rights to comment fairly on these materials too? When the learned Judge used the word " personal" it is plain that he suggested that the attack was in some degree malicious. But it has since been admitted that it was not. He then goes on to say that the Deft after referring to the allegations of the Deft(in Bhagwandas' suit) inclu ding those which were never made,etc.. That is putting the case as strongly as it could be put against the Deft. For while some of the allegations were not made in the W. S. of Dadar,they certainly were made to Horniman,and he had to judge for himself upon the materials before them whether the allegations were probably true or false.What next follows deals with some of the comments in the article,and for my part even after giving the greatest weight to Macleod J's opinion,I am still quite unable to see that they exceed the limits of fair com ment.For example when the learned judge condemns the writer's comments upon Surajmal's lapses of memory,he says that these were singularly unfortunate and supports that by this process of explanation." Surajmal could not remember what he had said to Dadar when dadar heard of Khambatta's agreement and asked Surajmal what he should do,or whether he told Dadar to go to other Attorneys.He could hardly be expected to remember the first,but if he told Dadar to go to other Attorneys as he was acting for Tata Saheb that was the right thing to say". Does this fairly represent what was in the mind of the writer of the articles? Surely not. In judging Surajmal's evidence before Davar J. it is to be remember ed that he had been fully acquainted for months with the nature of the defence. He knew perfectly well what was being put to him in cross examination and why. He knew that when he was asked what he said to Dadar when Dadar came to him about Khambatta's prior agreement,it was being suggested that he told Dadar to file a suit for damages against Tatia Saheb. With that knowledge in his mind there was no excuse at all for giving the evasive answers he did. It is impossible if he really had instigated Dadar to do this that he shd. have forgotten it,or in view of the correspondence preceding the suit of Bhagwandas v Dadar and the Deft's Written Statement therein that he wd. not before going into the witness box have searched his memory for what did pass on the occasion referred to. He could not have been taken by surprise on these points. Presumably he was there to clear his character of the aspersions cast upon it in the Written Statement,and this was one of the most serious of them.He could at least have said ".I donot exactly remember what I said to dadar,after this lapse of time, but I most certainly did NOT instigate him to file a suit for damages against Tatia Saheb". If Dadar had come to Surajmal to file a suit for him against Tatia Saheb,then doubtless it wd. have been right for Surajmal to refuse to act for him and advise him to go to some other attorney.If indeed that could be called advice at all. But that surely is glossing over the real implication of these questions and answers,an implication as well known to Surajmal as to Counsel examining him.The learned Judge admits that Surajmal's inability

to remember whtr. he had drafted the notice to be sent to himself acting as Attorney for Holkar, was suspicious. That is putting it very mildly indeed. The suggestion was not only that Surajmal advised Dadar to file a suit against Holkar, in which of course Surajmal could not act for him, but that he actually drafted notice of suit for him and sent him with it to Da Cunha, in order that this notice which he himself had drafted shd. in due course be sent to him as Holkar's attorney. I ask without fear of contradiction whtr. it is humanly speaking possible that after months in which to prepare himself for cross examination upon the salient fact that he had instigated Dadar to bring the suit, he should have been in any doubt at all whtr. he had himself drafted the notice. I say emphatically that it is not. He knew, he must have known whether he had done such a thing. And if he had not he could have given an unqualified denial to the suggestion. Why did he not? The explanation again is perfectly obvious. We are told that Counsel was flourishing papers when he put the questions to the witness. If Surajmal had not a clear conscience, ~~if he really had drafted such a notice, even~~ if he had really instigated the suit, although he had not in fact drafted the notice, he might not have felt positive that he did not, he might have feared that if he denied having drafted such a notice, Counsel wd. next moment confront him with it. So he took refuge in the answer that he cd. not remember whtr. he had given Dadar such a draft or not. ~~It~~ Macleod J. says that it was proved as a fact that Surajmal did not draft any such notice, but that Da Cunha drafted it under Dadar's instructions. This was in the libel action. But how was the Deft. to know that at the time he wrote the articles? He might very well have presumed, as Macleod J. admits, that counsel had instructions. But whtr. counsel had or not appears to me quite immaterial. For Surajmal's inability to remember whtr. he had drafted the notice for Dadar or not, whatever else it may or may not warrant, certainly would warrant an inference that his conscience was very far from being clear at that time, about the part he had taken in launching that suit. And that was quite enough for the Deft. I am not quite sure whtr Macleod J. meant in the passage I am about to quote to treat the sentence in the article as a statement of fact or as comment on fact. He says " As to the words " other matters of importance, he had also forgotten", they were grossly unfa unfair, and the deft's attempt to explain them was ludicrous". What precedes the words in the second article certainly resumes compendiously the most important points which Surajmal then swore he had forgotten, but there were minor points of detail at any rate, and one of them might fairly be called important, which Surajmal had also forgotten. As I read the words though, they merely sum up the concluding part of the cross examination the gist of which has just been given. It certainly would not have occurred to me on reading the article that the Plff. cd. make a special grievance out of this sentence, in view of the substantial truth of what went before, and the general tenor of the passage as awhole. I shoul have thought that this was too near going over every line and word with a ~~mi croscope~~ microscope, to find the minutest flaw, a method that no jury would ever think of adopting. The learned judge proceeds, " I must hold that the deft. has mis-stated the fact on which his comment is based. He has laid the greatest stress on allegations which were never revealed to the public, to support the conclusions he arrived at and has moreover accepted those allegations as true.". If by " the fact" here the learned Judge really means the sentence « Other matters of importance he had also forgotten", all I can say is that that is on its face comment upon the record. It may go too far, and to that extent it may not be fair comment, but it certainly is not such a fact untruly stated as the Learned Judge had in mind. As to the allegations which were not on the record of the case before Pavar J.

17. I fail altogether to discover more than one which can accurately be so described, and that is the letter which Surajmal wrote to Da Cunha. He did write it. Such other allegations as flow from it will be found on analysis to be no more than inference from facts put in evidence at the trial. It is true that the writer of the articles says that it is alleged etc and that it is roundly alleged etc, and does not make it clear that these allegations were not to be found in the record of the trial before Davar J. But what was the position? It WAS roundly alleged before Davar J. that Surajmal had instigated Dadar to file the suit against Holkar. It was there, too, alleged that Surajmal had settled the suit with Dadar. Then this letter fm. Surajmal to Da cunha is unearthed, and comments are made on it in the W. S.. It is impossible to say how far this part of what was suggested by Deft's attorneys for use in the case might have been brought out and either proved or disproved by evidence had the case gone on. The note by the compiler of the observations in relation to Surajmal's letter, does not conclude the matter. It is almost certain I think that had that suit not come to so premature an end, Surajmal wd. have been cross examined and pretty rigorously about the part he played in the settlement. And I see no reason to suppose that had he then admitted as, he had admitted in a measure that the settlement was his own, though brought abt. by his managing clerk, he wd. not further have been called on to explain this letter. When the learned Judge says that Deft. not only laid the greatest stress on allegations wh. were never revealed to the public, but accepted them as true, it means no more than as I have tried to show already in more than one connexion, that the Deft. took risks of adopting a fact and making it the ground of comment. But in what immediately follows Macleod J. went much further, for he said" I must also find that from the report of the case before the public as far as it went it could not reasonably be inferred that Bhagwandas was the nominee of Surajmal, that is to say using the word infer in its strongest sense". If the learned judge held that view then he would not have allowed this question to go to a jury at all. I can hardly believe that he really meant that. Surely whtr. that conclusion was in the nature of fair comment or not MUST have been left to a jury. For with the materials before him at the time, I doubt whtr. any one could be found to say that the writer's inference was one wh. cd. not reasonably be drawn from the facts, although it is possible that a jury might have thought it one which ought not to have been drawn. Nor do I understand what the learned judge means by " using the term inference in its strongest sense".. An inference is always an inference, whtr. it be a good or a bad inference,, and whtr. an inference cd. be " reasonably" drawn depends upon the degree of proability in its favour. I cannot wholly agree with Macleod J.'s definitions, or test of reasonableness. An inference, if we must use exact terminology, is not a surmise. A surmise is rather a guess, if the word has a place at all in logical ~~dissertation~~ terminology. What Macleod J. appears to be distinguishing is a loose from a close inference. He gives, to illustrate his meaning inferences which might reasonably have been drawn, as for example

"that it wd. have been reasonable to infer from the fact that Bhagwandas withdrew his case, that he was apprehensive that dadar wd. be able to succeed in his defence and prove that Bhagwandas was the nominee of Surajmal., or that it was possible that Bhagwandas was the nominees of Surajmal. It was not reasonable to infer that Bhagwandas was the nominee of Surajmal." Are we not drawing very fine distinctions here? If it were a reasonable inference that Bhagwandas apprehended that Dadar wd. be able to prove that he was the creature of Surajmal, it is very much the same thing as inferring that Bhagwandas was the creature of Surajmal, for if he were not upon what possible ground could he have apprehended that dadar wd.

be able to prove that he was?Then follows this " The former are true infer ences.The latter is a conclusion". Every inference as I have said before ought to reach a conclusion,though that conclusion may be positive and unquali fied or merely probable and qualified. But the distinction here drawn is one without a meaning and if I understand the learned judge aright what he really means is that the deft. was much too positive in stating the result of his infer ence,particularly as it turned out not to be true.I do not agree that the deft. has confused inference with assumption. It is in the main correct to say that he has accepted as true most if not all that was said on Dadar's side in the case before Davar J.,and necessarily therefore,where what Dadar said was in conflict with what Surajmal said,has declined to accept the latter as true. But that fraction was reached by a process of perfectly legitimate inference from what was revealed at the trial as long as it was restricted to matters there put in evidence. As soon as the comment went outside that group of facts it depended upon one ascertained and not controverted fact and a comparison of that with the conclusion inferred from the trial and its contents,viz that dadar's version was substantially true. There again I see no confusion between infer ence and assumption.I do not agree with Macleod J. that " on the given data it was impossible for anyone to draw an inference in the nature of a conclus ion". It may have been impossible for any one to come to a true conclusion by way of inference upon the data then available,because some of them turned out later to be false data,but that is quite another matter and one with wh. in deciding upon the fairness or otherwise of the deft's comment I am not concerned. (See margin) I find the result of this side of deft's examination of what Macleod J. really said,very instructive in the light of the manner in which the Judgment was used before us in argument.The impression left on the mind after a more or less casual reading of Macleod J's judgment is that that learned Judge found that the Deft. had based his comments on one or more material facts untruly stated,and that in one or two particulars,though here the judgment hesitates a little,the writer's comments were not fair .During the argument before us we were told over and over again that the sentence in the first article that there was no intervention etc,and the corresponding sentence in the second article,were utterly false,and that this was found by the lear ned trial judge who had disbelieved Nanabai and had believed Surajmal on the point.But I have not been able to find anything in Macleod J's judgment which goes that length. Indeed upon the most careful scrutiny I cannot find that the learned judge has definitely found a single fact stated as a fact in the alleged libels to be untrue,except that the cheque was not,as stated,Surajmal's own cheque but Tatia Saheb's.I have now been over Macleod J's judgment at least six times in order that I may not unwittingly do that learned judge the least injustice in dealing with his conclusions and the means he has used in coming to them. I gather that the facts which towards the end he says that the deft. untruly stated were. 1 Not a positive mis-statement,but an omission to state a material fact which he ought to have stated,namely that Surajmal had in his examination in chief denied on oath the Deft Dadar's case as a whole. 2. That Surajmal paid Dadar 9000 rs by his own cheque.. 3. That the writer said that certain matters were alleged,giving the public to understand that they were alle ged in the suit of Bhagwandas v Dadar,whereas in fact they were only alleged in the observations prepared for the use of Dadar's counsel in that suit. I canno find that the learned judge definitely points out a single one of these allega tions as untrue. As to the draft notice which Surajmal is now alleged to have written and sent by Dadar's hand to Da Cunha,that is not mentioned in the libel at all.We must confine ourselves strictly to the libel complained of,and so confi

confining ourselves,and to Macleod J's judgment upon it,I believe I am right in saying that I have set down every untrue fact which that learned judge held had been made the ground of comment. It comes to this then,that there is one untrue fact and one only,and that has been admitted from the firsst.It was " roundly alleged" in the suit upon which the comment was made,that Surajmal had instigated Dadar to file a suit against Holkar. It was roundly alleged in that suit that Surajmal settled the suit with Dadar,and not with Dadar's attorney,and also that at the time of that settlement Surajmal demanded the 8000 rs under the promissory note upon which that suit was brought. It was not alleged specifically as a breach of professional etiquette on Surajmal's part,that he had settled the suit over the head of Da Cunha. Nor was it alleged that he had written the letter to Da Cunha,conveying a totally false impresssion of what had really occurred. But these matters were alleged in the observations prepared not by Nanabai at all but by Waccha.And these allegations coming under the notice of the Deft he believed them to be true and utilized them as the ground of one comment,viz. that there was no intervention on the part of any Agent,and one demand that those in authority shd. take the matter up and insist upon Surajmal giving satisfactory explanations. The comment as I have already pointed out was fair,and in my opinion necessary from the materials before the writer in the suit of Bhagwandas and Dadar.Under rigorous analysis then this elaborate and impressive judgment is shown to be almost void of any relevant and important content.

I will now deal,much more briefly with Heaton J's judgment in appeal.It is virtually confined to one sentence in the first article,"That the plff. was the creature of Surajmal admits of little doubt". Before going further I shd. like to point out that isolating the sentence thus from its context has given rise to some want of proportion in handling it for the purpose of the plff's libel suit. It is perfectly clear,when the sentences preceding and following it are also read that what the writer meant was this. The suit had broken down ignominiously after a feeble attempt to prove cash consideration by false evidence,just at the critical point where the cross examination of Surajmal might have been expected to force upon him disclosures which wd. have substantiated Dadar's defence as a whole. The Judge in dismissing the suit had according to the writer," appropriately remarked that the plff. had taken a wise course,and then Deft. adds,connecting this with the next,which is the really important sentence ," that the Plff. was the creature of Surajmal etc,and goes on That Surajmal (now substituted for the nominal plff. Bhagwandas who has just been ruled out) shd. have been content etc. The mere statement standing alone that the Plff. was the creature of Surajmal had the suit in all other respects been bona fide,would not have been libellous at all.But as soon as it became clear that the suit was Surajmal's,that he was the real plff,then it became a matter of vital importance for him to refute the serious charges brought against him in the Written Statement,and not to let the matter drop,just when that matter was being opened. He had to prove that although the pro note was for his benefit,and for reasons of his own had been made out in the name of his clerk Shambuprasad,the transaction was in all other respects honest,or in other words,that there had been cash consideration,and not the consideration alleged by the deft.

A great deal of this judgment deals in generalities upon which I have nothing to say beyond this,that I doubt,with respect to the Learned Judge whtr the standard to be applied in determining whtr. comment is fair or not,varies according to the station of the Plff,and the degree of personality in the libel. I doubt whtr. there IS any standard. And I am sure that if there were it cd. not vary according to the factors

it could not vary according to the factors indicated by the learned Judge. All that is essential in this connexion is whether the subject matter of the li bel is of public importance. If it is it can make no difference whtr the eprson complaining of it is an author a statesman or an attorney. Once that point is settled against the plff.,the resultant ~~c~~comment has to be justified upon exactly the same loose general principles,and sentimental considerations ought to have no play.

The learned Judge says " On the facts appearing I think the writer would have been within the limits of fair comment had he said that the claim made by Bhag wandas was extremely suspicious,indeed probably false,and that the allegations against Surajmal both as to professional misconduct and as to his part in Bhagwan das' suit had not,owing to the collapse of the case,been satisfactorily met,and that they demanded further and fuller enquiry... but Horniman went further than this.He wrote that the plff. Bhagwandas was merely the creature of Surajmal admits of little doubt in view of the circumrtances revealed..This amounts to saying,that Surajmal,there was little dobut,had committed the serious criminal offence of engineering a false claim.It is a grievous thing to say of any man,an atrocious thing to say of a Solicitor,unless it is true,or unless there are the strongest grounds for saying it. It is not true.Horniman does not contend that it is true".I pause here to emphasize,what I am afraid I must have already said more than once,that it was Dadar who said all this,and Horniman merely adopted that,as the truth,by inference from what had occurred at the trial,taken along with the pleadings and issues. The learned judge was evidently greatly influenced by his present conviction that this was all false. But would he have thought so at the time the articles were written and on the materials then available.? It does not follow that the conclusion Horniman reached is not true because he prefers to adopt the comparatively easy defence of fair comment than the defence of justification.It is quite clear from what the learned Judge has declared would have been fair comment,that the dividing line,when the article is read in its na -tural sense,and kept entirely distinct from further information elicited at the trial of the libel suit, ~~that the dividing line~~ is extremely fine.And Heaton J. at any rate certainly would not have gone the length Macleod J. apparently would,of withholding this altogether from the jury on the ground that the infer ence was wholly unreasonable. Indeed in another place he admits that it was quite a reasonable inference,though he thinks that it was too " conjectural",in other words I suppose,an inference which while perfectly reasonable,ought not to have been drawn. And he is careful to point out that he is treating himself as a jury, in coming to his conclusion that the sentence I have so often quoted was not fair comment.He was powerfully influenced again by the gravity of the charge as it pre sented itself to him. He says that it amounts to accusing Surajmal of a serious criminal offence. Here he refers to a section of the penal Code which as far as I know has hardly ever been enforced in any such connexion as this. But the actual conclusion that Surajmal was the real plff. in the suit,standing alone is quite ha harmless and,left there,could not be regarded as a libel at all. It only becomes so,as Heaton J. has perceived,if the rest of Dadar's statement were true. It was however an inference that had to be drawn before any part of the articles need have been written. And it was an inference,as I hope to show,which was not only fair on the materials then availabe,and at the time it was drawn,but by far the most probable inference. It is on this point that I differ entirely from Heaton J. and still more from Macleod J.,when he finds that it was not even a rea -sonable inference.

Still treating himself as a Jury Heaton J. quite correctly sets forth the grounds upon which ~~the inference rests~~

21. upon which this inference as he believes rests. He comes to the conclusion that they are not strong enough to support it, because he sets over against these, other grounds upon which a different inference and one less unfavourable to Surajmal could have been based, and as he evidently thinks ought to have been ba red It seems to me, speaking with respect, that in this balance sheet as it has been called in the argument before us, Heaton J. has greatly undervalued or omitted factors on what we will call the Deft's credit side, and over-valued factors on the debit ~~sheet~~ side.

The result is a view much too favourable in my opinion to the plff.

Heaton J. has omitted from consideration altogether three items which I consi der so important as to be almost decisive. He has paid no attention to the undeniable facts giving rise to antecedent probabilities amounting almost to certainty that the claim was a false claim. He has paid no attention to the dramatic and most significant ending of the suit, and he makes no mention of Davar's J.'s comment. Remembering how intimately versed that learned judge was in all the law's chicaneries, what wide experience he had of the worser sort of attorneys and their ways, and of false claims of this kind, the few words he is recorded to have spoken when the suit, doubtless to his own surprise came to an abrupt end, surely deserve much consideration.

On the other side of the account 1. and 2. are true, as stated. But they seem to me to be quite outside the proper ground of inference, at the time the inference had to be drawn. 3. Of course Surajmal had not directly supported the claim on the promissory note. How could he possibly have done so after acting as Plff's attorney and drawing his plaint? I assume that what Heaton J. means is that he had not directly asserted any interest of his own in the consideration. Else the passage is meaningless.

4. Here I come to what clearly influenced the learned Judge much more in my judgment than it shd. have done in Surajmal's favour, and against Horniman. He believed, although here again I cannot help feeling that this belief has been strengthened by the evidence in the libel suit, that Surajmal was a much injured man who took the earliest opportunity, although it was quite needless for him to have done so, of coming forward courageously to clear his character. If we turn once more to the pleadings, and then to the issues, (which have not been noticed at all by Heaton J) in Bhagwandas' suit, it is pretty clear that every one concer ned in that suit realized that from the first Surajmal was at least as deeply interested in it as the nominal plff. Bhagwandas. Bhagwandas pretended to want 3000 rs. Surajmal was virtually on his trial. The most serious charges had been brought against him. It was not seriously contended before us, when I put that point to the Advocate General, that any inference of the kind Heaton J. was disposed to draw from Surajmal's appearance in the witness box at that stage of the case, was now contended for. I do not see that any such could fairly be drawn.

5. Here again with great respect I think the learned Judge has diverged so widely from what I conceive to be the true line of approach to a just estimate of reasons for and against Deft's articles having been fair comment, as to have wholly missed the sinister significance of the very fact he is setting down to Surajmal's credit. Why was he not cross-examined? As Horniman inferred, and as I think most people wd. have inferred at that time, for the very good reason that he did not care to submit to that ordeal. This of course depends upon the truth of Dadar's allegations that it was Surajmal's suit. If it was, then to use Macleod J's words, he gave the word for its withdrawal. Precisely, and if he did, what was the reason.? At the time the articles were written only one reason would have occurred to anyone That he had got into deep water already, and did not care to risk any further exposure.

6 Much the same criticism applies to this item. And even were it the fact that

Surajmal was not the real plff.,and had no control over Bhagwandas,is it not ~~strange~~ strange,keeping the pleadings and the issues still clearly in mind,that he shd. have entered no protest whatever at this summary termination of a suit,in which he was giving evidence as Heaton J. believed with no other intention than a courageous desire to refute at once and for ever Dadar's calumnies against him just at a point when his evidence was of such a kind as to suggest that the preliminary portion at any rate of these calumnies was true.

7. The point appears to me to be,not so much that Dadar had not been examined and cross examined and therefore that the account he gave in his W. S. had not been tested,as that Surajmal did not insist that it shd. be tested. Of course if Surajmal had nothing to do with the conduct of the suit,it might be answered that that was not his fault but Bhagwandas'. This again seems to me to beg the really important question,as it presented itself when the articles were written.The learned judge,putting himself in the place of a juryman then goes on to say that the view taken by the Deft. that Dadar's version might be true was a view wh. any reasonable man might have taken,but that in his opinion it was too conjectural. All that immediately follows wd. have been quite appropriate had the suit run an ordinary course and ended in a verdict for the Deft. But in that case,the reasons given for this view being too conjectural wd. not have been available, and I find it extremely difficult to follow what was exactly in Heaton J's mind when he wrote this part of his judgment.I do not think that it wd. be useful to advert further to any particular part of that judgment. It will be simpler and serve my purpose better if I now resume all that has gone before in a statement of my own conclusions and the reasons which have led me to them.

These reasons seem to me so convincing and the conclusions so obvious that I have naturally felt much pressed by the simple fact that two of my learned brethren have come to a contrary conclusion,and I have felt obliged to show that I have given the most earnest consideration to their judgments.

Now what were the facts with which the Deft. had to deal when he wrote his first article,the whole foundation of which was the belief he had at that time that Bhagwandas was a mere nominee of Surajmal,and that the claim as presented was utterly false,while the Deft Dadar's version of it set forth in his W. S. was substatially true?

First,look at the nature of the claim. Here is a clerk on 100 a month suing a man worth lacs for a sum of rs. 3000 wh. he alleges he out of his poor means advanced on a promissory note to this wealthy gentleman. This poor clerk was in the employ of Surajmal.To go no further I do not see how any judge of experience cd. have helped having his attention arrested and his suspicions aroused ? . I have no doubt but that Pavar J. did not miss these points,and that even before he had had to consider seriously whtr. the whole of Dadar's story set forth in his W. S. was true,he must have regarded the suit with grave suspicion.On the very face of it,once the relative positions and wealth of the parties to it became known,it must have almost been pre-judged. Then there was the remarkable story contained in the Written Statement. This story had been suggested from the very first in the correspondence. It was finally given there pretty fully.

And this was not the common kind of defence,the deft. did not deny execution,he did not ,while admitting execution merely deny that he had received cash consideration. He frankly admitted the pro. note sued on,and proceeded to explain how it came to be made and why he refused to pay.It was an elaborate story. It revealed

Surajmal from first to last as the protagonist in a subtle piece of roguery. It is idle to say that when the case was suddenly dropped Surajmal had not been examined as to the part he had played in obtaining this pro. note. That had to be introduced by showing the part he had taken in the suit in connexion with which, as a secret commission for his services in which, the amount of 3000 rs was to be paid him by Dadar, and the pro note was given for that sum in advance as security. No one I am sure doubts but that had the case gone on Surajmal would have been examined searchingly on all these points.. But on the very threshold he had broken down so badly, that no wonder he felt the game was up, and that to press the matter further was only courting inevitable and already foregone defeat. The Deft. contended that the nominal plff. Bhagwandas (representing his deceased brother Shambuprasad) had really no interest whatever in this pro. note. The issues raised brought this point of contest out in sharp relief. Everyone concerned in the suit must have known that this was the real issue. It is true that the plff. made an abortive, almost a ridiculous attempt to prove the payment of cash consideration. This pre-supposes that Dadar was in need of 3000 rs and that he did in fact borrow it fm. Shambuprasad. If that were not true, and no one now contends that it was, what alternative explanation of the facts can human ingenuity suggest other than that alleged by Dadar? It is very unfortunate that Shambuprasad died before this suit. Had he been alive he might have been bold enough to bring it, but it is pretty certain that had he tried to support the allegation of cash consideration at the trial he wd. have been exposed at once, and the utter falsity of the claim in the form it had taken wd. have been even more clearly proved than it has been. for Bhagwandas may at least say that he knew nothing about the note. It had come to him as part of his brother's property and he took it for granted that it was genuine and in order. That wd. have been well enough had not Surajmal, who on the alternative case knew perfectly well what the real transaction was, been Bhagwandas' attorney. How Bhagwandas got the wits. t to prove cash payment is not easy to understand unless Surajmal had procured them. Shambuprasad wd. have been in a very different position. Even if the suit broke down utterly, Surajmal might have persuaded Bhagwandas that he ran no risk as he cd always shelter behind his own personal ignorance of the transaction. It would have been extremely awkward for Shambuprasad, had he been plff, and gone into the box to swear to the payment of cash, and then the whole story had turned out to be a deliberately false concoction. Even then the question everyone acquainted with the facts wd. have been asking wd. have been Who is responsible for all this perjury ? This much at least is certain that if Bhagwandas did not know the truth of the note and was persuaded to call in aid false wits to prove that his decd. brother paid cash for it, Surajmal must have known. A very rich man does not make out a pro. note in favour of his own attorney's clerk for 3000 rs, without receiving a penny in cash, without there being some very strong reason for such an extraordinary act, and a reason which it was necessary in the opinion of one at least of the interested parties to conceal. If there was no cash consideration, and this we may take to have been proved beyond doubt, what consideration was there? None that Shambuprasad could have given. But a consideration which Surajmal might have given, and yet dare not avow. Just such a consideration, in short, as that alleged in Dadar's Written Statement. The only possible escape from this dilemma involving as it does the substantial truth of every fact and the complete vindication of every comment in the alleged libels, is that Shambuprasad, in the absence of his Master at Bhabhlesar told Dadar the story which is given in Dadar's Written Statement, without Surajmal's knowledge, and so got the note in his own name

intending to dupe both Dadar and his own master Surajmal. That is a veritable tabu la in naufragio. I do not know whtr. it ever has been actually suggested, but ingenu ity driven desperate might invent it. I hardly think it worth serious consideration. It is so extremely improbable that even had Shambuprasad thought of it, he could have believes himself have been able to carry it through without Surajmal on the one hand and Dadar on the other getting scent of his treachery? I come back then to this question If there was no cash consideration for the note, what WAS the consideration? Dadar tells us in his Written Statement with the utmost candour and abundant circumstan tiality of detail. There was no cash consideration.; no one has pretended at any stage of this litigation as far as I have been able to discover that when this pro. note was made Dadar was in need of money, or that Shambuprasad had 8000 rs to lend. But if the consideration really was that which is set out in the deft's case, and that appears to be almost the only possible alternative, it follows that Surajmal knew perfectly well what was the nature of the suit in which he filed the plaint for Bhagwandas, and acted as his attorney as long as there was any chance of it going through as an uncontested short cause. It is instructive to note Surajmal's conduct in his relation to this suit. I am not sure whtr this was or could have been in deft's possession knowledge when he wrote the articles, and if it was not, strictly speaking it ought not to find a place in the reckoning of factors making for or against the defence of fair comment. It was however laid before us in argument, and as far as I recollect no objection was taken. The suit for accts. brought by Dadar against Surajmal was settled by consent ten days before this suit was brought on. The account suit ended thus; Dadar withdrew all his objections and surcharges amounting to abt. 70000 rs and submitted to a decree awarding Surajmal's counterclaim for 1800 rs with costs. All allega tions made against Surajmal were withdrawn. It is only upon that last term that I dwell a moment, as possibly explaining the plff's hardihood in persisting in this suit. Bhagwandas v. Dadar was filed as a short cause. Correspondence had already indicated to Surajmal who was acting as Bhagwandas' attorney, that Dadar meant to repudiate the claim, and if necessary fight it on the allegations which were afterwards fully set forth in his W. S. The W. S. was only put in at the last moment whan the suit was on for disposal as a short cause. It was then trans ferred to the long cause list, and very shortly after that Surajmal ceased to act as attorney for the plff. It is fair argument that he did not like the look of the Written Statement, and decided that if the suit was going to be fought out, he had better keep out of the contest as much as he could. That was in Septr. 1915. This may not be such good argument, but it is permissible to doubt whtr. the suit wd. have ever come on at all had it not been for the settlement of the account suit. The withdrawal of all allegations in that suit, might have heartened Suraj mal to go on with this suit. He might have thought that Dadar wd. never persist in these allegations so soon after he had withdrawn a number of other serious alle gations in another suit. I say this, because I am trying to put myself in the place of a critic about to comment on the suit before Davar J. just after its dramatic ending. Surely he wd. have been asking himself how if Dadar's version was substantially true as the course and result of the suit seemed to indicate that it was, Surajmal cd. have had the foolhardiness to press it to a definite issue. Some such explanation as this MAY have suggested itself. That is to say, of course, if the intending critic had really known about the account suit and Surajmal's conduct in Bhagwandas' suit as plff's attorney.

Be that as it may the suit did come on in due course. The issues raised at the trial show how deeply Surajmal was implicated. The attempt to prove cash considera

had,as is now conceded all round failed,and failed ignominiously. If the suit had ended then and there no one need have been supprised,although most people who took the trouble to read the pleadings and the Written Statement wd. have drawn their own conclusions,and those conclusions wd. have been uniformly unfavourable to Surajmal.Moreover he cd. hardly have supposed that under so vigilant and experienced a judge his own troubles wd. have ended with the inglorious collapse of a manifestly false suit,in defending which the most serious charges were brought against himself. The least he cd. do was to brazen it out as far as he was personally concerned and by disproving the consideration alleged by Deft. indirectly support the tottering case of the plff.Doubtless he over-rated his own ability and resource as a witness. Members of the legal profession who are ~~constan~~ constantly,if attorneys suggesting lines of cross examination,if counsel attacking hostile witnesses by that method,usually think themselves very well qualified to face so familiar an ordeal.Experience only too frequently shows what very poor witnesses they make.Surajmal was no brilliant exception.Very soon he began to flounder. His conscience could not possibly have been as clear of offence as he wished the court to believe. He could only explain his extraordinary answers,months later by saying that he was frightened. Frightened of what? The point where he broke down most calamitously was upon a chance question whtr. he had not himself drafted a notice to be sent to himself by Dadar's Attorney Da Cunha. He could not remember. He was frightened. Frightened because he saw papers in counsel's hands. But if he knew as he must have known had this allegation been utterly false,that he had never sent such a notice,that he never would have thought of doing such a thing,there was nothing in a paper flourished before his eyes to frighten him. ~~At that~~ At this precise moment,just when he must have felt most keenly that he was making a pitiable exhibition of himself,and that there were many worse rocks ahead,the court rose for the day.On Monday,Surajmal was present in court. The trial as every one thought was going on and without doubt many were waiting eagerly to hear how Surajmal wd. acquit himself under further cross examination. What happens? The Plff. surrenders unconditionally. Consents to a decree dismissing his suit with costs,and the Judge passes it,remarking that the plff. had adopted a very wise course.Does Surajmal,who had in the opinion of one learned judge eagerly accepted the first opportunity of vindicating his character,thus displaying the courage of an honest and injured man,raise any protest? Not a word. He lets his character,which his examination so far had certainly not raised or helped to clear,go at that.When the first of these articles appeared a week later on the 7th of March does he protest? He maintains the same cynical indifferent silence,which he has the hardihood to explain in the libel action by saying that he did not feel in any way concerned about the suit,or care how it ended. It is only when the second article appears,and he realizes that the matter will not be allowed to rest,that in sheer desperation,as it seems to me,and self defence he brings this libel action.The first and perhaps the most important question is,whether upon all the facts disclosed in the pleadings and the evidence at the trial before Davar J.,in view of its curious sudden termination,and the judge's comment,was it a fair inference that as Dadar alleged Surajmal was the real plff,and the nature of the transaction underlying the pro. note was set out with substantial truth in the Written statement.?Speaking for myself I shd. say unhesitatingly that it was not only fair comment,a reasonable inference,but by far the most probable and therefore the most reasonable inference that could at that time have been drawn.Does any one seriously believe that between Saturday night and Monday morning Surajmal was not consulted? Does any one seriously believe that had he declined to consent to the suit being withdrawn,it would have

P. 25. line 14. Insert.

It is common ground throughout all the judgment that it was fair comment to say that the Plff's suit was utterly false,and that the withdrawal at the stage when it was withdrawn indicated that the plff. knew it,and felt that the defence would,or at any rate,might be established,if he persisted.But if the claim as brought was utterly false and that was a perfectly fair conclusion,it appears to me to be just as fair a conclusion from that,that the real plff. was Surajmal and not Bhagwandas. Bhagwandas may not have known how the promissory note came to be given to his Decd. brother Shambuprasad,but Shambuprasad MUST have known. And if it was not given him for cash,as he alleged he would have had to show what it was given for and what interest he had in it.Does anybne suppose that he could have done so after launching the suit on the basis of an ordinary loan transaction,a pro. note for value in cash paid and received? Failing that,what other conclusion was reasonably possible than that Deft's case was substantially true,and that Bhagwandas was the creature of Surajmal, that Surajmal was the only person interested in the consideration for the note,and that the suit was in fact his?

25. ended as it did? When I put these questions in this form I mean them to be answered of course, with reference to the materials before the Deft. when he wrote the articles. Remember that the nominal promisee of the pro note was Surajmal's own clerk. The nominal plff. was a man of no substance at all. Presumably what ever information he got for use in supporting his claim he got from his first Attorney, master of his decd. brother, Surajmal, If such evidence as the plff. thus advised decided to give was all false who shd. have known that better than Surajmal? Who should have known the real truth of the matter better than Surajmal? Who was most interested in refuting the defence set up by Dadar, Bhagwandas or Surajmal? With all these considerations before him would any one have hesitated to conclude that it was Surajmal who decided that the claim had better be dropped before further unpleasant disclosures had to be made? Would any one at that time have hesitated to conclude that in the main at any rate Dadar's defence was true? It is all very well now to say that had the case gone on Surajmal wd. have improved under cross examination, and Dadar wd. have broken down, and failed to prove his defence. That was clearly not the opinion of those in charge of the case. For had they had any hopes of that kind it is as certain as anything in human conduct well can be, that the plff. wd. not have been advised to consent to a decree dismissing his suit with all costs. Apart fm. the charges against Surajmal, what worse fate cd. have overtaken the plff? True he might have had to pay costs of one or at most I shd. think two more days hearing. But that was relatively unimportant. As it was I have since ascertained that his two attorneys bills were taxed against him for an aggregate of over 2000 rs. So that a few hundreds more or less would certainly not have deterred him from fighting to a finish had it really been his suit, and had he been advised that there was still a fighting chance dependent upon the result of Dadar's examination and the conclusion of Surajmal's evidence. And putting myself now in the place of a juryman I feel no doubt whatever what my verdict wd. have been upon that, now generally conceded to have been by far the most important part of the libel. There is no question here of any facts untruly stated. There never has been. It is simply a case for a jury to say whtr. upon the facts, it was fair comment to say that the suit was Surajmal's suit and that the case made out by Dadar in his W. S. was probably true.

I have never felt the least doubt, myself, that that was perfectly fair comment.

As to the rest

But whether the cheque was Surajmal's, or Tata Saheb's, is utterly unimportant. I have pointed out that it was a very natural mistake, such a slip as any one might have made. As soon as we dismiss the idea, which pervaded the Plff. appellant's argument right up to the end of the hearing, that the Deft. was alleging and had any conceivable reason for alleging, that Surajmal had settled the suit with dadar, without Tatia Saheb's knowledge or consent, the unimportance of the slip is self evident. Let us suppose that Surajmal had settled the suit for 9000 rs without consulting his principal Tatia Saheb. It would have been a very daring thing to do, and one which Surajmal cd. not have defended, had Tatia Saheb repudiated the settlement. But he might even then have pleaded that he so settled,, ——— settled in the best interests of his client and in the sure confidence that he wd. ratify the sttlement. Dadar's case fm. the first has been that he expected at least 20000 rs from Tatia Saheb, acting under Surajmal's advice. It is certain I think that he wd. have got some damages. How much was the only question. If Surajmal had ever told Tatia Saheb that Dadar ~~claimed at least~~ must be right on a minimum of 20000 rs damages, he might very well have settled for 9000 rs, reducing costs proportionately, with the certainty that Tatia Saheb wd. gladly consent. But I do not believe that it ever entered the head of the deft. to make such an allegation against Surajmal. He was attacking Surajmal. He was holding up his professional conduct

to public reprobation. He was pointing out that amongst his tortuous dealings he had first instigated one of his clients Dadar, to file a suit against another of his clients, Holkar, and then after for form's sake he had sent Dadar to another attorney Da Cunha he had settled with Dadar over the head of Da Cunha. And that he had then written a letter (~~this wa~~ in this lay the sting of the accusation) to Da Cunha meant to convey a false impression and conceal his unprofessional conduct. There wd. have been no sense at all that I can see in suggesting that Surajmal had settled this suit without Holkar's knowledge, even supposing any one believed that an Attorney COULD do anything of the kind. What was charged against him he could do, and as far as I can see he actually did. Nor was it in itself a very seriour matter. No one wd. have attached any importance to it but for the lying letter which Surajmal next wrote to Da Cunha. To make and bring home that charge two things were necessary, 1 that Surajmal did write the letter. That is admitted. 2. That as between him and Dadar no agent of Holkar intervened. In other words that no agent of Holkar settled the suit with Dadar without Surajmal's knowledge, and only after the settlement had been made, informed Surajmal of it. There the Deft. had Dadar's Written Statement to go upon, and in addition Surajmal's own evidence given before he realized that any such point was going to be made against him. Both if true, and why shd. the deft. not have believed Surajmal himself upon oath regarding this matter, conclusively establish the falsity of the letter. It is only by insisting that the sentence " as a matter of fact etc" shd. be wrenched from its context, and read as an isolated statement literally that the plff. can make any show of a grievance out of it. So read and meaning that Holkar never had an agent with Surajmal, it wd. doubtless be untrue. But I cannot understand how such arguments cd. be used, in face of the plain meaning of the passage as a whole.

This again I consider to be perfectly fair comment. And that disposes of the whole matter, both law and fact. I never was in any doubt after hearing the Advocate General's first day's argument, that there was no libel at all. My only anxiety has been to understand how my two learned brethren Heaton and Macleod J.J. whose opinions I must respect and acknowledge to be fully as deserving of weight as my own had come to a contrary conclusion.

I am of opinion that the plff's suit shd. be dismissed with all costs throughout.

appeal No. 25-17
appeal No 56-
Suit 337 of 1916

Surajmal B. Mehta

vs

B. G. Horniman & ors.

Coram. Beaman J
with Batchelor J & Marten J.
delivered on 5.11.17