1906.
August 27.

Present : The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Middleton.

COREA *v.* PIERIS

D. C., Kurunegala, 2,740.

Malicious prosecution—Actio de injuria—*Acquittal*—*Onus*—Animus injuriandi—*English Law*—*Roman-Dutch Law*—*Counsel giving evidence for their clients.*

In an action *de injuria* arising out of a criminal prosecution, the fact that the plaintiff has been acquitted does not throw on the defendant the onus of justifying the prosecution.

Both according to the principles of the Roman-Dutch Law and the English Law, in an action for malicious prosecution the onus is always on the plaintiff to prove—(1) that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made; (2) that there was a want of reasonable and probable cause for the prosecution, or, as it may otherwise be stated, that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause; (3) that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice.

Abrath v. The North-Eastern Railway Co. (1) *and Moss v. Wilson* (2) followed.

There is no rule of evidence which prevents counsel from giving evidence on behalf of their clients.

THE plaintiff sued the defendant for damages for malicious prosecution. The District Judge (Allan Beven, Esq.) gave judgment for the plaintiff for Rs. 10,000. The defendant appealed from this judgment. At the trial Mr. Van Langenberg, who appeared with Mr. Schneider for the defendant, proposed to call Mr. Schneider as a witness for the defence to show that the defendant in instituting criminal proceedings acted on Mr. Schneider's advice.

The District Judge, on objection taken by the plaintiff's counsel, refused to allow Mr. Schneider to be called as a witness, as he was one of the counsel for the defendant. But the Supreme Court in Appeal (disagreeing with the District Judge's ruling) heard and considered Mr. Schneider's evidence in deciding the appeal.

Van Langenberg (*Schneider* with him), appeared for the appellant.

H. J. C. Pereira (*E. W. Perera* with him), for the respondent.

Cur. adv. vult.

(1) (1883) 11 *Q. B. D.* 440.

(2) (1905) 8 *N. L. R.* 368.

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This is an appeal from a judgment of the District Judge of Kurunegala awarding plaintiff Rs. 10,000 as damages for malicious prosecution by defendant. The conditions which are necessary to success in an action of this kind are laid down as follows by Lord Justice Bowen in *Abrath v. North-Eastern Railway Co.* (1).

In order to establish his cause of action it is incumbent upon the plaintiff to prove—(1) that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made; (2) that there was a want of reasonable and probable cause for the prosecution, or, as it may otherwise be stated, that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause; (3) that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice.

It is not disputed that the plaintiff has complied with the first of these conditions. He was discharged by a competent Court, and he is entitled to the full benefit of the discharge. The appellant now contends that the plaintiff has failed to prove that the charge was made without reasonable ground and from any indirect and improper motive.

The respondent, it should be noticed, contended, upon the strength of a passage at p. 145 of M. de Villiers' Translation of Voet's title *De Injuriis*, that where the criminal charge has failed it is incumbent upon the defendant in an action for malicious prosecution to justify the prosecution.

It is only necessary to state with regard to this contention that the passage relied on, which appears to be based on a treatise published by Weber, a German Jurist, in 1820, does not represent the law which is in force in Ceylon. It is well settled by decisions of this Court, the last of which is the case of *Moss v. Wilson* (2) that the law of Ceylon is in this respect the same as that in force in England.

The material facts are the following:—

The defendant, who lives in Colombo, owns estates in the districts of Chilaw and Kurunegala. The plaintiff, who is an advocate practising at Chilaw, owns considerable estates in the same districts. There have been land disputes between plaintiff and the defendant, and an action was pending on appeal with regard to another land at the time when the plaintiff was charged with criminal trespass on a land known as Madugasagara.

(1) (1863) 11 *Q. B. D.* 440 *at p.* 455; *affirmed by the House of Lords.* (11 *Appeal Cases* 247).
(2) (1905) 8 *N. L. R.* 368.

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The title of the defendant to Madugasagara depended upon a donation by the original owner and a conveyance by the donee to the defendant; that of the plaintiff upon a revocation of the deed of gift and a subsequent conveyance of an undivided half share.

Since 1902 negotiations had been pending for a settlement of this dispute, and the defendant's manager, Joseph Pieris, seems to have agreed to refer the matter in dispute to the arbitration of Mr. Martin, who had acted at different times as proctor for both parties. On the 6th February, 1904, Joseph Pieris telegraphed to the Assistant Government Agent of Chilaw that the plaintiff accompanied by a large force of men had on 4th February forcibly entered Madugasagara, broken the door of the bungalow, and removed furniture, fowls, and goats to the value of Rs. 500. Inquiries were made with the result that Joseph Pieris was cited before the Police Magistrate to make good his charges, and bail was taken for his appearance on the 2nd March.

The District Judge has, I think, fairly described Joseph Pieris' position at this stage. He was practically on his trial for giving false information to a public servant, and was forced to go into Court more for his own sake than for his master's. It is not suggested that the defendant was in any way responsible for the original complaint to the Assistant Government Agent, which was the foundation of the subsequent proceedings. Joseph Pieris then despatched one Usubu Lebbe, who had been for many years a kangany in defendant's service, to defendant, who, after receiving Usubu Lebbe's statement and consulting his lawyer, gave instructions for the institution of criminal proceedings.

The liability of the defendant in this action depends upon the view which is taken of the action which he took on Usubu Lebbe's complaint.

Usubu came as the messenger of Joseph Pieris. His statement was to the effect that the plaintiff had forcibly entered his bungalow at Madugasagara, broke furniture, and carried off goats, fowls, and other property. Usubu did not pretend to have been a witness of the alleged offences. He stated that he had visited the premises subsequently and had seen broken furniture and indications of the raid; and he gave the names of the witnesses who could prove the charge, including that of Meera Lebbe, the conductor at the estate, and that of the village headman. Defendant at once took Usubu Lebbe to Mr. Schneider, his standing counsel, and Mr. Schneider advised criminal proceedings, which were thereupon instituted in the Police Court of Kurunegala.

At the trial before the District Court the Judge would not allow Mr. Schneider, who appeared as junior counsel for the defendant,

to give evidence, but in view of the importance of obtaining Mr. Schneider's testimony as to the conduct of defendant at this crucial point in the case, and in the absence of any *rule* of evidence to the contrary, we have allowed Mr. Schneider to be examined and cross-examined before us.

The question whether defendant had or had not reasonable grounds for taking criminal proceedings largely depends upon the inherent improbability or otherwise that a gentleman in plaintiff's position would have been guilty of the alleged offence.

If the charge had been one of ordinary larceny, of stealing fowls and goats, the improbability of plaintiff's guilt would have been so great that nothing short of the strongest evidence would have justified criminal proceedings. But, although charges of theft were subsequently formulated against plaintiff, Mr. Schneider tells us that he regarded the plaintiff's alleged acts as being in substance an attempt to obtain possession of the estate by force, and the alleged thefts as having been committed by the plaintiff's followers in execution of the plaintiff's project. When it is remembered that the plaintiff has on three other occasions, as the District Judge finds, been charged with criminal trespass, in one case on the complaint of the defendant, it is not surprising that neither the defendant nor his legal adviser saw any great improbability in Usubu Lebbe's complaint being well founded. Whilst it is true that a person in defendant's position cannot shelter himself behind his legal adviser, it is nevertheless a circumstance that tells in his favour, that before initiating proceedings he submitted the information at his disposal to an experienced lawyer and acted on his advice. In doing so he did what a man of ordinary prudence would have done.

The evidence, in my judgment, does not warrant the finding that the charge was made without reasonable ground. The complaint was made at the instance of a responsible person, namely, the defendant's manager, Joseph Pieris; it was corroborated by the statement of a servant of many years' standing, who gave the names of witnesses who were prepared—as they subsequently did—to support the charge. There is nothing to show that any further inquiry which it was in defendant's power to make would have shown the complaint to be untrue.

I am also unable to accept the finding of the District Judge that the defendant acted in bad faith, and I find it difficult to follow the reasoning which has led him to this conclusion. The District Judge seems to favour the suggestion that defendant's object in making these charges was to prejudice the minds of the Judges of this Court in a case between the parties which at that time was on the list for

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hearing in appeal. This suggestion seems to me to be fanciful and far-fetched and to be rebutted by the evidence which shows that the charges were not concocted in the first instance by the defendant, but were the direct outcome of the telegram despatched by Joseph Pieris without the knowledge of the defendant.

The District Judge attaches much weight to the defendant's denial in the Police Court proceedings of all knowledge of the plaintiff's claim to Madugasagara and to his statement that he had no recollection of a letter addressed to him in 1902 by plaintiff's proctor with regard to this claim. The District Judge considers that the defendant deliberately suppressed all knowledge of the receipt of this letter in order to make things look blacker against Corea and to induce the Magistrate to issue process, and that he thus acted *mala fide*.

But the fact that plaintiff had a claim would be no defence to a charge of criminal trespass on land in occupation of defendant, still less to a charge of theft. The evidence of defendant in this respect may have been wanting in candour and even deliberately untrue, but it would be unreasonable to infer from this that defendant in bringing this charge was actuated by indirect and improper motives.

Mr. Schneider tells us that defendant, when he came to consult him with Usubu Lebbe, seemed to be much alarmed, and that he stated that unless he took some steps there would be no protection for any of his estates. I see no reason to believe that defendant's alarm for the safety of his property was simulated. The evidence, in my opinion, points to the conclusion that Joseph Pieris was the person who was responsible for this false charge, and that both defendant and his lawyer were misled by Joseph Pieris' complaint, which was supported by a considerable body of evidence.

The evidence does not in my judgment justify a finding that the circumstances of this are inconsistent with the existence of reasonable and proper ground for the prosecution, or that defendant initiated these proceedings in a malicious spirit.

I would set aside the judgment of the Court below and dismiss the plaintiff's action with costs.

MIDDLETON J.—

The matters to be proved are, I agree, as Lord Justice Bowen puts them in *Abrath v. The North-Eastern Railway Co.* (1).

The learned counsel for the appellant has, however, argued that under the Roman-Dutch Law the burden of proof is on the defendant to justify the step he took on the prosecution of the plaintiff and

(1) (1883) 11 *Q. B. D.* 440 *at p.* 455; *affirmed by the House of Lords.* (11 *Appeal Cases* 247).

quotes the annotations to Villiers' translation of *Voet* (47, 10, 12), derived from the opinion of a German Jurist named Weber, who appears to have written books on *Injuriæ* in 1771 and 1820 published at Leipsic.

If, however, we examine the reasoning of Villiers leading up to this opinion of Weber's we see that it is based on the presumption arising from an act of aggression; that is to say, if A commits an act of aggression on B the presumption is that B intended to injure A, and so that if the act is admitted the burden is on B to rebut the *animus injuriæ*.

But the case of a malicious prosecution, I take leave to think, is different. The prosecution is not an act of aggression, but undertaken as a general rule for the just punishment of an offender against the law, and no presumption of malice arises from its institution. It is said, however, that if the person prosecuted is acquitted the charge must have been untrue or reckless, and that therefore the presumption of *animus injuriæ* arises. It by no means necessarily follows, however, that because an accused person is acquitted by the Magistrate the charge was untrue or was falsely or recklessly made. The case may fail for want of due proof or falsity of the evidence, matters which may be quite beyond the control of the prosecutor or complainant.

I would hold therefore that as no presumption of *animus injuriæ* necessarily arises from the acquittal by a Magistrate of a person prosecuted, that the burden of justifying the prosecution is not on the prosecutor, if sued for malicious prosecution—even under the Roman-Dutch system of law—but that the burden is on the plaintiff of proving *animus injuriandi* as in the English Law.

So far as I can judge from the reported cases cited, it would seem that this Court in cases of malicious prosecution has adopted the principles held to be applicable to such actions in the English Courts, and there does not appear to be any good reason shown why we should take a new departure. I have gone into the evidence in consultation with my Lord, and I agreed that it was important and within our province to hear the evidence of Mr. Schneider. That evidence, in my opinion, had a most important bearing on the motive and intention of the defendant.

On the inferences drawn from the facts and the findings of the District Judge, I agree entirely with the Chief Justice, and hold that the plaintiff has failed to establish both absence of reasonable and proper cause and a malicious intention on the part of the defendant, and I agree that the judgment must be set aside and judgment entered for the defendant, and the appeal allowed with costs.