[IN REVIEW.]

1907.
October 2

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

COREA *v.* PIERIS.

D. C., Kurunegala, 2,740.

Malicious prosecution—Want of reasonable and probable cause—Malice—Power of Supreme Court to take new evidence—Admissibility of evidence of counsel appearing in the case—DOLUS malus—*Point taken for the first time in review—Courts Ordinance (No. 1 of 1889), s. 40—Civil Procedure Code, s. 773.*

In an action for malicious prosecution the plaintiff must prove that the defendant acted maliciously; it is not sufficient to prove mere absence of reasonable and probable cause.

WOOD RENTON J.—It is incumbent upon the plaintiff to prove malice as well as want of reasonable and probable cause. The absence of reasonable and probable cause may be so glaring as to give rise to a presumption of malice. But malice is a distinct and necessary element in the constitution of the cause of action in an action for malicious prosecution.

Under section 40 of the Courts Ordinance the Supreme Court has power to take new evidence at the hearing of an appeal.

There is no law which prohibits counsel appearing in a case from giving evidence on behalf of their clients.

The Supreme Court will not entertain for the first time at a hearing in review a point which was not taken in the Court below or in appeal.

The principle laid down in "*The Tasmania*"[1] followed.

HEARING in review of the judgment of the Supreme Court reported in 9 *N. L. R.* 276, where the facts are fully stated.

H. A. Jayewardene (*with him H. J. C. Pereira*), for the plaintiff, appellant.

Van Langenberg, for the defendant respondent.

Cur. adv. vult.

October 2, 1907. HUTCHINSON C.J.—

The appellant is the plaintiff in an action for malicious prosecution of the plaintiff by the defendant. The facts are fully set out in the judgment of the District Judge, who gave judgment for the plaintiff. On the hearing of the appeal from that judgment, Lascelles A.C.J. and Middleton J. thought that it was desirable to take the evidence

[1] 15 *App. Cas.* 225.

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of a witness whom the defendant had wished to call at the trial, but whom the District Judge had refused to allow to give evidence. The refusal was on the ground that the witness was one of the defendant's counsel. But neither chapter XI. of the Evidence Act nor any other law or practice makes that a ground for rejecting a witness' evidence; and the Supreme Court has power under section 40 of the Courts Ordinance to admit new evidence; and the evidence of this witness was therefore rightly taken.

The witness, who is an advocate practising in Colombo, deposes that shortly before the prosecution, of which the plaintiff complains, was instituted, the defendant came to him in Colombo, accompanied by a man called Usubu, and told him that the plaintiff and others had gone to one of his estates in the Kurunegala District and raided the bungalow and smashed furniture and removed things. The witness questioned Usubu, who he understood had gone to the estate after the row and had seen broken furniture. He was told by the defendant that Usubu was an old servant, and that Meera Lebbe, who was said to have been eye-witness of the alleged offence, had been with him for forty years, and that he relied on them; he then advised the defendant to bring a charge in the Police Court. A few days afterwards the defendant saw him again with a letter from his Kurunegala proctor and a copy of Meera Lebbe's evidence before the Magistrate, the cause of the visit being that the Magistrate was reluctant to issue process against the plaintiff until the defendant's evidence was recorded, and that the proctor wanted the defendant to go to Kurunegala for that purpose. The witness appeared for the defendant in the subsequent proceedings before the Magistrate at Kurunegala and Chilaw in the investigation of the charge against the plaintiff.

In my opinion the evidence taken at the trial did not justify a finding that the defendant acted maliciously, and, when supplemented by the evidence taken on the hearing of the appeal, it seems to me to show that he believed that the charge against the plaintiff was well founded.

Upon this hearing in review the appellant took an entirely new point, to which no reference was made in the District Court or at the appeal. He contends that, even if the defendant is not liable for having maliciously and without reasonable and probable cause instituted the prosecution, he is liable for the act of his servant, Joseph Pieris, who was the real originator of the prosecution. There is, however, no statement in the plaint that Joseph Pieris prosecuted the plaintiff maliciously or otherwise, or that in doing so he was the defendant's agent, or that the defendant was liable for his act; and no issue was settled or evidence taken on any of those points. In the present action therefore this contention cannot be maintained.

I think that the decision under review should be confirmed, and that the plaintiff should pay the costs of this hearing in review.

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MIDDLETON J.—

I do not consider it necessary to add much to the judgment I have already delivered in this case, which, I think, should be affirmed and the appeal dismissed.

As regards the liability of the defendant for the act of his servant, Joseph Pieris, it is sufficient to say that this is a point which was not raised until this hearing in review; that there was no evidence directed to show that the institution of criminal proceedings came within the scope of his employment, or that he acted maliciously or in a way from which it may be inferred he so acted.

No issues were settled on these points, and no findings have been arrived at.

I think, therefore, it is not competent for this Court at the present stage to consider this entirely new point, in accordance with the ruling of Lord Herschell in "*The Tasmania*,"[1] where that learned Judge is reported to have said that a Court of Appeal ought only to decide in favour of an appellant on ground put forward there for the first time, if it be satisfied beyond doubt that it has before it all the facts bearing upon the new contention as completely as it would have been the case if the controversy had arisen at the trial.

WOOD RENTON J.—

I think that the judgment under review should be affirmed; and I will only touch upon the main points in Mr. Jayewardene's argument.

(i.) It is hopeless to contend now, after the decision in the case of *Abrath v. N. Eastern Ry. Co.*,[2] that it is not incumbent upon the plaintiff in an action for malicious prosecution to prove malice as well as want of reasonable and probable cause. The absence of reasonable and probable cause may be so glaring as to give rise to a presumption of malice. But malice is a distinct and necessary element in the constitution of the cause of action with which we have here to deal; and mere recklessness will not establish it (see *Brown v. Hawkes*[3]). In this connection I desire to add that I do not think that either *Moss v. Wilson*[4] or the judgment under review in any way altered the pre-existing law as to the burden of proof in actions for malicious prosecution. These judgments only decide that there rests on the plaintiff the eventual burden of making out every element (malice included) which the law requires him to plead. *Cox v. English, Scottish and Australian Bank, Ltd.*,[5] is no authority for dispensing with proof of malice in an action for malicious prosecution. On the contrary, it expressly adopts the passage in *Abrath v. N. Eastern Ry. Co.*, in which that necessity is affirmed.

[1] 15 *App. Cas.* 225.
[2] (1883) 11 *Q. B. D.* 455 and 11. *App. Cas.* 247.
[3] (1891) 2 *Q. B.* 718.
[4] (1905) 8 *N. L. R.* 353.
[5] (1905) *A. C.* 168.

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(ii.) I think that, under section 40 of the Courts Ordinance (No. 1 of 1889) and section 773 of the Civil Procedure Code, it is competent for the Supreme Court, on the hearing of an appeal, *ex mero motu*, to call before it for examination not only witnesses who have, but persons who have not, been examined in the Court below, and to examine any witness, although the Court below had rejected him as incompetent, provided always of course that in the judgment of the Supreme Court no such incompetency exists. The Supreme Court was therefore within its rights in the present case in taking the evidence of Mr. Schneider, the respondent's counsel, although he had not only not been examined in the District Court, but had been held by the Judge to be incompetent as a witness.

(iii.) With regard to this later point, no objection to the reception of Mr. Schneider's evidence was taken on behalf of the appellant, when Lascelles A.C.J. and Middleton J. intimated their intention to examine him. He was in fact examined and cross-examined in the usual way. Moreover, as the respondent had tendered him as a witness and examined him in the Appeal Court, I think that there was on his part a sufficient express consent to the admission of Mr. Schneider's evidence to satisfy the provisions of section 126 of the Evidence Ordinance, if that section is applicable to the present case.

(iv.) On the facts, I have nothing to add to the judgments of Lascelles A.C.J. and Middleton J., except that, in view of the relations between the parties, the fact that the acts attributed to the appellant are not in the nature of common theft, but are acts of a kind not unlikely to occur in the course of land disputes, and the evidence of Mr. Schneider as to what passed between him and the respondent (I have excluded from consideration Mr. Schneider's expression of a personal opinion on the point), I think it is impossible to say that the respondent acted in bad faith. Great weight would have attached to Mr. Jayewardene's argument that we ought not to reverse the finding of the District Judge on this point (see *Metropolitan Ry. Co. v. Wright*;[1] *Cox v. English, Scottish, and Australian Bank, Ltd.*[2]) but for the facts that the District Judge seems to have considered that *dolus malus* results irresistibly and necessarily from the absence of reasonable and probable cause, and that we have now before us the evidence of Mr. Schneider.

(v.) Mr. Jayewardene's final point was that even if proof of *dolus malus* was not forthcoming against the respondent, it was clear that his servant Joseph Pieris had acted in bad faith, and that therefore the respondent was liable, as master, for his servant's tort. Mr. Jayewardene relied, in support of this contention, on the recent English decisions, in which it has been held that an action for

[1] (1886) 11 *A. C.* 152.

[2] (1905) *A. C.* 168.

malicious prosecution or malicious libel (*Cornford v. Carlton Bank*, *Citizens' Life Assurance Co. v. Brown*[2]) will lie against a corporation. *Cornford v. Carlton Bank* seems to me to have no application to the present case. It had been held by Fry J. in *Edwards v. Midland Ry. Co.*,[3] contrary to the opinion of Alderson B. in *Stevens v. Midland Countries Ry.*,[4] that an action for malicious prosecution would lie against a corporation. In the argument of *Abrath v. N. Eastern Ry. Co.* in the Court of Appeal, Sir F. Herschell, S.G., counsel for the Railway Company, stated in effect that, if necessary, he should contend that Fry J.'s judgment in *Edwards v. Midland Ry. Co.* was unsound.[5] The Court decided the case, however on the ground that there was reasonable and probable cause. In the House of Lords Lord Bramwell in an elaborate speech[6] enunciated the view that no action for malicious prosecution will lie against a corporation, inasmuch as "a corporation is incapable of malice or of motive." Lord Fitzgerald[7] and the Earl of Salborne, L.C.,[8] however, expressly declined to commit themselves to this proposition. In this state of the authorities the question was directly raised before Darling J. in *Cornford v. Carlton Bank*, and it was held in substance by that learned Judge[9] that, although in a sense a corporation is as incapable of malice as it is of wit, yet in view of the fact that corporations are for civil purposes regarded as persons, the ordinary doctrines of agency may fairly be applied to them. He held, therefore, that the action for malicious prosecution lay. In the Court of Appeal[10] it was conceded at the Bar that the ruling of Darling J. on this point was right, and the law was laid down in similar terms as to malicious libel by the Privy Council in the case of *Citizens' Life Assurance Co. v. Brown* (*ubi sup.*). It is obvious that, so far, none of the authorities I have been dealing with have any bearing on the present case. They merely decide that malice in law may be imputed to a body which is incapable of entertaining malice in fact.

But *Citizens' Life Assurance Co. v. Brown* involved another point. In that case a superintendent of the appellant Company issued a circular in regard to the respondent containing statements which he knew to be untrue. He had no actual authority, express or implied, to write the libel complained of. But the Privy Council held, on the construction of the terms of his engagement by the appellant Company, that the act came within the scope of his employment, and that the Company, on the principle of the cases of which *Barwick v. English Joint Stock Bank* [11] *is the locus classicus*,

[1] (1899) 1 *Q. B.* 392; (1900) 1 *Q. B.* 22.
[2] (1904) *A. C.* 423.
[3] 6 *Q. B. D.* 287.
[4] (1854) 10 *Ex.* 352.
[5] 11 *Q. B. D. at p.* 446, *note* (7).
[6] 11 *A. C. at p.* 250.
[7] 11 *A. C. at p.* 254.
[8] 11 *A. C. at p.* 256.
[9] (1899) 1 *Q. B.* 392.
[10] (1900) 1 *Q. B.* 22.
[11] (1867) *L. R.* 2 *Ex.* 259.

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was answerable for it. I will assume that it could be shown, on the evidence before us, that the institution of criminal proceedings for the protection of the respondent's property came within the scope of Joseph Pieris, employment. But even so, it must be established judicially that he acted maliciously before we impute his malice to his master. No such finding exists here. The plaint is innocent of any alternative suggestion of vicarious malice. As I have pointed out already, the District Judge has considered malice mainly as the necessary result of the absence of reasonable and probable cause, and, in the form in which the case was presented to him, his attention was centred on the conduct of the respondent as the point on which the decision must turn. On the hearing of the appeal the same ground was maintained. It is only now, on the hearing in review, that we are invited to decide the case on an issue which has neither been tried nor framed. In his petition for leave to appeal to the Privy Council, the appellant relies on the statement of Lascelles A.C.J. that "the evidence points to the conclusion that Joseph Pieris was the person who was responsible for the false charge." The Acting Chief Justice, however, does not say that Joseph Pieris made the false charge in question maliciously. He proceeds immediately to add that it was "supported by a considerable body of evidence." I cannot regard any dictum of this kind as a decision which can entitle us now to give judgment for the appellant on the ground of imputed malice.

Judgment in appeal upheld.