GEORGE WILLIAM MEYER (*Plaintiff*) ..APPELLANT;

AND

GENERAL EXCHANGE INSURANCE CORPORATION, LAYTON R. COLBORNE and KEITH CHRISTENSON (*Defendants*) ..... RESPONDENTS.

1961
*Oct. 25, 26

1962
Jan. 23

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Insurance—Fire—Arson charge dismissed—Action on policy allowed.
Malicious prosecution—Action for—Matters to be established—Functions of trial judge sitting without a jury.

The defendant insurance company issued a policy of insurance against fire and other risks on a truck belonging to the plaintiff. Shortly thereafter a fire originating in the truck caused serious damage to the vehicle. The defendant C, an adjuster employed by the insurance company, was instructed by the defendant LC, the company's office manager, to investigate the nature and cause of the damage. Following C's report it was decided to refer the matter to the Royal Canadian Mounted Police. The findings of a police investigating officer were submitted to the Attorney General's Department which advised that there was sufficient evidence to warrant a prosecution. The police officer informed LC of these facts and asked him to lay a criminal charge; LC did so and the charge was dismissed. A statement of claim was subsequently issued, the plaintiff claiming upon the policy and damages against all three defendants for malicious prosecution. A third cause of action asserted against C was that he had "by false and malicious evidence and representations procured" the magistrate at the preliminary hearing to commit the plaintiff on the charge. The action on the policy was allowed, but the action with regard to malicious prosecution was dismissed. The plaintiff's appeal as to the latter having been dismissed by the Appellate Division of the Supreme Court of Alberta, an appeal was brought to this Court.

*PRESENT: Locke, Cartwright, Fauteux, Martland and Ritchie JJ.

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Held: The appeal should be dismissed.

No action lies for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause. Here the trial judge, who sat without a jury, reached the conclusion that LC had acted in good faith and that there were reasonable and probable grounds for his laying the charge. This finding was concurred in by the Appellate Division. The burden of proving malice rested upon the plaintiff and the judges below implicitly found against him on that issue. There were no grounds upon which this Court could properly interfere with the judgment appealed from upon either of these issues. There was no finding in either of the lower Courts as to the claim advanced against C for allegedly giving false evidence and the matter, not having been argued in this Court, should be considered as abandoned.

Abrath v. North Eastern Railway Co. (1883), 11 Q.B.D. 440; *Cox v. English, Scottish and Australian Bank Ltd.*, [1905] A.C. 168; *Lister v. Perryman* (1870), L.R. 4 H.L. 521; *Herniman v. Smith,* [1938] A.C. 305, referred to.

Per Cartwright J.: While, on the issue of the existence of malice, it may be said that the defendants were not responsible for the police officer's lack of care in the investigation which preceded the laying of the information, this could not be said with reference to the question whether or not the defendants had reasonable and probable cause for laying the information.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, dismissing an appeal from part of a judgment of Manning J. dismissing appellant's claim for damages for malicious prosecution. Appeal dismissed.

S. G. Main, Q.C., for the plaintiff, appellant.

D. H. Bowen, for the defendants, respondents.

The judgment of Locke, Fauteux, Martland and Ritchie JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta dismissing the appeal of the present appellant, the plaintiff in the action, from that part of the judgment of Manning J. at the trial which dismissed the plaintiff's claim for damages for malicious prosecution.

The respondent corporation, an insurance company, issued a policy of insurance against fire and other risks on a truck, the property of the appellant, for the period of one year from October 2, 1957. On the 14th day of November, 1957, while standing unattended on the property of the appellant

at Island Lake, Alta., where it had been left a few minutes earlier by the appellant, a fire originating in the truck caused serious damage to the vehicle.

The respondent Christenson was at the time an adjuster employed in the Edmonton office of the respondent corporation and was instructed by the respondent Colborne, the office manager of the company at Edmonton, to investigate the nature and cause of the damage. On November 25 the appellant went to Edmonton and had an interview with Christenson in the company's office and then signed a written statement prepared by the latter, as a result of their conversation. Thereafter, Christenson went to the scene of the fire and examined the damaged truck and had a further interview with the appellant and with the latter's wife, at which interview he expressed doubts as to whether the fire had resulted from accidental causes. There is evidence that, at this latter interview, abusive language was used by both the appellant and Christenson, the latter questioning the truth of various statements made by Meyer during their interview in Edmonton on November 25.

The respondent Christenson reported his findings to the respondent Colborne and it was decided to refer the matter for investigation to the Royal Canadian Mounted Police at Edmonton. As a result, Corporal Paley (later Sergeant), an experienced motor mechanic who had been charged with the duty of investigating automotive fires for the police since 1953, carried out an investigation. Before doing so, he interviewed the respondent Colborne and advised the latter that the policy of the Mounted Police in such investigations was to submit Paley's report to the Attorney General's Department and that, if the latter advised that there was sufficient evidence to prosecute, to ask the person requesting the police to investigate to lay a criminal charge. At that time Colborne agreed that if a prosecution was advised by the Department he would do this.

Paley proceeded to Athabaska where the truck had been placed in a garage and conducted a thorough examination in an endeavour to form an opinion as to the origin of the fire. The result of this examination was explained in great detail at the trial. The truck which had been bought by the appellant second hand was in many respects in poor mechanical shape. The piston in the 6th cylinder was seized

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and in that condition the truck could not be operated. The gas tank situated behind the seat in the cab contained 4 gallons of gasoline which was intact and there was no leak in the tank. A gallon can of motor oil in the body of the truck was also found to be intact. There had, according to this witness, been but slight damage to that portion of the truck between the firewall and the radiator but the cab itself was extensively damaged, showing evidence of there having been a very intense fire there which occasioned very considerable destruction.

Paley was aware of the statements that had been made by the appellant to Christenson during their interviews, including a statement that it had looked like a gas fire, but appears to have formed the opinion that fire had been set by the appellant, from the nature of the damage to the truck and the admitted fact that the appellant was the last person who had been in it prior to the fire and was only a short distance away conducting an examination of the cabins owned by him at the time the fire commenced.

Paley prepared a written report of his findings and submitted it, with statements of certain witnesses, to Mr. J. W. Anderson, a solicitor in the Attorney General's Department whose duties included prosecuting criminal cases and who had several consultations with Paley. As a result Mr. Anderson said that:

> My recommendation after due consideration was that there was sufficient evidence available to warrant taking the matter to a preliminary inquiry on a charge of arson.

and he wrote a letter to the officer commanding the division of the Mounted Police to that effect. He did not mention in giving his evidence-in-chief and was not cross-examined as to the evidence submitted to him upon which he based his opinion, other than as above stated. Paley said that he informed the respondent Colborne of these facts and asked him to lay the charge and Colborne did so.

The charge as laid was that the appellant:

> did unlawfully and wilfully and for a fraudulent purpose, namely to defraud the General Exchange Insurance Corporation, set fire to a 1955 G.M.C. truck, property of the said George W. Meyer, contrary to the provisions of Section 374(2) of the Criminal Code.

At the preliminary hearing both Christenson and Colborne gave evidence and the appellant was committed for trial.

On October 8, 1958, the charge against the appellant was tried by McLaurin C.J. at the criminal sittings at Edmonton who dismissed it without calling upon the appellant to present any defence.

The statement of claim was issued on November 13, 1958, the appellant claiming the sum of $1,400 under the fire insurance policy and damages against all three of the respondents for malicious prosecution. A third cause of action asserted against the respondent Christenson was that he had:

> by false and malicious evidence and representations procured the said Magistrate Pearce to commit the plaintiff upon the said charge to the next Criminal Sittings of the Supreme Court of Alberta, to be held at Edmonton.

Damages were not claimed separately in the prayer for relief upon the last mentioned claim, nor was it alleged that the respondent corporation or the respondent Colborne were parties to the alleged wrongful acts of Christenson. On the other hand, Christenson had not laid the information nor is there any evidence in the extensive record to show that he did anything more than to investigate the claim and report the matter to Colborne.

By way of defence to the action upon the policy, the respondent corporation pleaded that the appellant had made wilfully false and fraudulent statements in the written statement given to Christenson on November 25, these including, *inter alia,* that he had left the truck after turning off the motor on the morning in question and that the fire in the truck was fed from the gas tank. It was further alleged that the appellant had refused to sign a statement that the loss did not originate by any act, design or procurement on his part, that he had not filed a statutory declaration proving the loss as required by the statutory conditions and that the fire and any loss suffered had been caused by the appellant's "wilful act, neglect, procurement and contrivance." The defence pleaded by all three defendants to the count for malicious prosecution was a general denial and an allegation that Colborne had reasonable and probable cause for laying the information. To the count alleging that Christenson had given false and malicious evidence at the preliminary hearing, the defence was a straight denial.

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After a trial lasting some eight days, the learned trial judge, Manning J., gave a short oral judgment. Dealing with the claim upon the policy, he said that he was not satisfied that the statements complained of were made fraudulently and if they were inaccurate it was probably the result of careless use of language. As to the defence that the appellant had not furnished a statutory declaration proving the loss, the learned judge held that, as the respondent corporation had failed to provide the required form, it could not rely upon this as a defence. Judgment was given against the respondent corporation for a sum of $796.75.

The issue raised by the defendant corporation's claim that the fire had been caused by the wilful act or procurement of the appellant was not dealt with. Despite the acquittal of the appellant by McLaurin C.J., this defendant was entitled to insist upon this ground of defence and, as the record shows, a great deal of evidence was given which, if accepted, might have justified a finding that the appellant had by his own act brought about the fire. While the learned trial judge did not either refer to this defence or in terms make any finding upon the issue, it is obvious that he was of the opinion that this defence failed since he gave judgment upon the policy for the amount of the loss. As to the issue of malicious prosecution, the reasons do not differentiate the position of the respondent Christenson, who neither signed the information or was shown to have been responsible in any way for bringing about the institution of the criminal proceedings, from that of the other defendants. Saying that the insurance company had made an investigation and come to the conclusion that there were grounds for suspicion and handed their file to Sgt. Paley, the learned judge said:

> Sergeant Paley is a man who specializes in the investigation of fires. He investigated and concluded that there was a proper case for prosecution. I have obviously not agreed with the conclusion of Sergeant Paley because I have declined to give effect to the insurance company's claim of false and fraudulent statements; but I think I am bound to say that Sergeant Paley appeared to me to be a very competent man and a very reasonable man. When an official of the Royal Canadian Mounted Police, like Sergeant Paley, makes a careful investigation and advises that a prosecution should be commenced, it does seem to me that there are reasonable and probable grounds for following the suggestion that he makes. I think I would feel that way if Sergeant Paley himself had been the only person involved but Sergeant Paley's advice was considered and concurred in by

Mr. Anderson, a solicitor of the Attorney General's Department and it was following that that the charge was laid. Consequently, I feel that I must dismiss the action with regard to malicious prosecution.

The claim for damages against the respondent Christenson by reason of the evidence given by the latter at the preliminary hearing was not mentioned by the learned judge and there is no finding as to whether the evidence complained of was true or false. Since, however, the action was dismissed against Christenson, it must be assumed that the learned judge was of the opinion that the allegations made against him in the pleading had not been made out.

The appeal to the Appellate Division was heard by Macdonald, Johnson and Kane JJ.A. and the judgment of the Court was delivered orally by the last named at the conclusion of the argument. There had been no cross-appeal from the judgment delivered against the respondent corporation on the policy and the reasons delivered do not indicate that the claim against Christenson in respect of the evidence given by him at the preliminary hearing had been argued before the Court. In the brief reasons delivered the Court found that if there had been a want of care by Paley in his investigation the respondents were not liable for it and, as to Christenson's investigation, that "any failures on his part in respect of his investigation are not of the type from which malice must necessarily be inferred." It was further found that "the conduct of those concerned was a matter for consideration by the trial judge. This conduct does not in itself raise an inference of malice such as would require us to say the trial judge was wrong". The reasons concluded:

> Considering all the evidence there is evidence on which the learned trial judge could find, as he did, that the respondents had reasonable grounds for laying the charge in the reasons stated by him. It is, therefore, a finding of fact.

The matters to be established by a plaintiff in an action for damages for malicious prosecution are as stated by Bowen L.J. in *Abrath v. North Eastern Railway Co.*[1]:

> This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise 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; and,

[1] (1883), 11 Q.B.D. 440 at 455.

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lastly, 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.

At p. 457 that learned judge said further:

> Now in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it.

This statement of the law was approved and adopted by the Judicial Committee in *Cox v. English, Scottish and Australian Bank Ltd.*[1]

The respondent Colborne did not know the appellant and obtained the information upon which he acted from the respondent Christenson and from Sgt. Paley, and swore that these facts indicated to him and there was no doubt in his mind that the fire was "intentional" and that in laying the charge he relied upon the advice of the Attorney General's Department, communicated to him by Paley.

No action lies for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause (*Lister v. Perryman*[2]). Reasonable and probable cause means a genuine belief based on reasonable grounds that the proceedings are justified. This action was tried by the learned judge without the intervention of a jury and it was accordingly for him to find both the facts as to the matters which the complainant believed and upon which he relied, and also whether the facts so believed amounted to reasonable cause (*Herniman v. Smith*[3], Lord Atkin at 317).

While it would have been of assistance if the learned trial judge had dealt in somewhat more detail with this aspect of the matter, it appears to me to be clear that he reached the conclusion that Colborne had acted in good faith and that there were reasonable and probable grounds for his laying the charge. The learned judges of the Appellate Division have concurred in that finding.

The burden of proving malice of the nature referred to by Bowen L.J. rested upon the plaintiff and while the learned trial judge does not deal with this aspect of the matter in terms, it appears to me implicit in the reasons given that he found against the appellant on this issue. I consider that the reasons delivered by Kane J.A. are also to be construed as finding against the appellant on that issue.

[1] [1905] A.C. 168 at 170. [2] (1870), L.R. 4 H.L. 521.
[3] [1938] A.C. 305, 1 All E.R. 1.

My consideration of the very lengthy evidence in this case leads me to the conclusion that there are no grounds upon which we may properly interfere with the judgment appealed from upon either of these issues.

As to the claim advanced against the respondent Christenson for allegedly giving false evidence at the preliminary hearing and doing so maliciously, there is no finding in either of the courts below and the matter not having been argued before us should, in my opinion, be considered as abandoned.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Locke and wish to add only a few words.

In the brief oral reasons of the Appellate Division delivered by Kane J.A. there is the following statement:

> As to Sergeant Paley, the respondents cannot be held liable for his shortcomings, if in fact there were any shortcomings.

On reading the reasons as a whole, I think it clear that the sentence quoted has reference only to the argument that the existence of malice on the part of the respondents should have been inferred from lack of care in the investigation which preceded the laying of the information. If it had had reference to the question whether or not the respondents had reasonable and probable cause for laying the information it is my present view that I would disagree with it; but as I am satisfied that it does not have reference to that question I do not pursue the matter further.

I would dispose of the appeal as proposed by my brother Locke.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Main, Dunne, Nugent & Forbes, Edmonton.

Solicitors for the defendants, respondents: Duncan, Miskew, Dechene, Bowen, Craig & Brosseau, Edmonton.