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*Oct. 27, 28, 29.
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HARRY GRAVES CURLETT (PLAINTIFF) APPELLANT;

AND

CANADIAN FIRE INSURANCE COMPANY AND OTHERS (DEFENDANTS).... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Malicious prosecution—Claim for damages for—Issue as to absence of reasonable and probable cause for prosecution—Questions relevant to that issue—Trial Judge's charge to jury.

On a claim for damages for malicious prosecution, plaintiff recovered judgment at trial, on the findings of a jury. The Supreme Court of Alberta, Appellate Division, [1942] 1 W.W.R. 646, set aside the judgment and ordered a new trial, on the ground, as stated by Ford J. A., that the

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

trial Judge's charge to the jury "may have resulted in confounding the real issue of the absence of reasonable and probable cause for the prosecution with the question of the guilt or innocence of the plaintiff, and that the learned Judge failed to keep in mind that it is the facts, honestly and reasonably believed to exist and to be true, operating upon the mind of the prosecutor, as distinct from the explanation made at the trial by the plaintiff, which alone are relevant on the issue of the absence of reasonable and probable cause."

Plaintiff appealed to this Court, asking that the judgment at trial be restored; and defendants cross-appealed, contending that, on the evidence, and in view of requirements of the law as to facts to be proved, the action should be dismissed.

Held: (1) Plaintiff's appeal should be dismissed, on the above ground stated in the Appellate Division.

(2) Defendants' cross-appeal should be dismissed (Davis J. *dubitante*).

APPEAL by the plaintiff from the judgment of the Supreme Court of Alberta, Appellate Division (1), which, on appeal by the defendants from the judgment of Ewing J. at trial, on the findings of a jury, in favour of the plaintiff on a claim for damages for malicious prosecution, set aside the judgment at trial and ordered a new trial. The plaintiff asked that the judgment at trial be restored. The defendants cross-appealed, contending that, on the evidence, and in view of requirements of the law as to facts to be proved, the action should be dismissed.

N. D. Maclean K.C. and *Gerald O'Connor K.C.* for the appellant.

H. H. Parlee K.C. for the respondent companies.

H. W. Riley for the respondent individuals.

The judgment of Rinfret, Hudson and Taschereau JJ. was delivered by

HUDSON, J.—This action was brought by the appellant claiming damages for alleged (1) conspiracy to injure him in his business; (2) libel and slander; and (3) malicious prosecution.

The action was tried before Mr. Justice Ewing and a jury. At the opening of the trial, counsel for the respondents moved to have the issues tried separately but, as the issues of fact were closely connected, severance was refused and the trial proceeded on all three.

(1) [1942] 1 W.W.R. 646.

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At the conclusion of the evidence, questions were submitted by the Judge to the jury: four questions in respect of the conspiracy issues, and four in respect of the charge of libel and slander. These were all answered favourably to the respondents and no longer require consideration.

Eight questions were submitted in respect of the malicious prosecution. These were all answered favourably to the appellant, and on such answers the learned trial Judge directed judgment to be entered for the appellant for $16,667.90 and costs.

On appeal, this judgment was set aside and a new trial ordered on the ground of failure by the trial Judge to properly instruct the jury on questions of fact relating to reasonable and probable cause.

The appellant here asks that the judgment at the trial be restored and the respondent asks that the appeal be dismissed and, by way of cross-appeal, asks that the action be dismissed.

The actual prosecution of which the appellant complains was initiated by a police officer under direct instructions from responsible officials of the Attorney-General's Department in Alberta. The proceedings throughout were conducted solely by Crown counsel.

The appellant alleges that the respondents induced such action by false reports and fraudulent concealment of material facts and without reasonable and probable cause procured the laying of information, and that one of the defendants, Nash, had actually committed perjury in giving evidence at the trial.

On the criminal charge the appellant was committed for trial but, subsequently, before a jury was acquitted. An appeal by the Crown from this acquittal was dismissed by the Court of Appeal in Alberta, two of the Judges of that court dissenting.

On the trial of the present action, questions were submitted to the jury by the trial Judge and answers were given as follows:

(B) MALICIOUS PROSECUTION:

The CLERK (Reading):

1. Q. Did the defendants procure the plaintiff's prosecution or did the Attorney General act on his own motion in prosecuting the plaintiff? —A. The defendants procured the prosecution.

2. Q. Did the defendants place the facts fairly before the Officers of the Attorney General?—A. No.

3. Q. If the defendants did not place the facts fairly before the Officers of the Attorney General were the Officers of the Attorney General misled?—A. Yes.

4. Q. Did the defendants neglect to take reasonable care to inform themselves of the true facts before procuring the prosecution?—A. No. (Afterwards corrected to "Yes".)

5. Q. Did the defendants have an honest belief in the probable guilt of the plaintiff?—A. No.

6. Q. Upon the facts in their knowledge were the defendants justified in such belief?—A. No.

7. Q. Were the defendants, as far as the prosecution is concerned, actuated by malice as legally defined?—A. Yes.

8. Q. If you find for the plaintiff at what sum do you assess the plaintiff's damages for malicious prosecution?—A. Special damages, $6,667.90; General damages, $10,000.

The judgment of the Court of Appeal directing a new trial proceeded upon the ground as stated by Mr. Justice Ford:

> The ground upon which the verdict and judgment cannot be allowed to stand is that, with great respect, I think it may fairly be said that the learned Judge's charge to the Jury may have resulted in confounding the real issue of the absence of reasonable and probable cause for the prosecution with the question of the guilt or innocence of the plaintiff, and that the learned Judge failed to keep in mind that it is the facts, honestly and reasonably believed to exist and to be true, operating upon the mind of the prosecutor, as distinct from the explanation made at the trial by the plaintiff, which alone are relevant on the issue of the absence of reasonable and probable cause.

Careful perusal of the evidence and the charge of the learned trial Judge to the jury has convinced me that the defendants are at least entitled to a new trial on the ground thus stated by Mr. Justice Ford.

The respondents, however, go further and press strongly for a dismissal of the action, and this raises a more difficult question.

The basis of the respondents' contention is that it appears that three responsible officers of the Crown charged with the administration of criminal law in the Province of Alberta were witnesses at the trial and stated in clear and unequivocal language their justification for the prosecution of a suspected wrongdoer. It is further submitted that the Crown officers say that there was no pressure brought upon them to prosecute the appellant, nor were they misled in any way by the reports made by or on behalf of the respondents.

The appellant here answers this by referring to the answers given by the jury, that the defendants procured

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the plaintiff's prosecution, that they did not place the facts clearly before the officers of the Attorney General, that the officers of the Attorney General were misled, that the defendants neglected to take reasonable care to inform themselves of the true facts before procuring prosecution, that the defendants did not have an honest belief in the probable guilt of the plaintiff and were not justified in any such belief by the facts in their knowledge and were guided by their malice.

It is also contended that there was evidence that, in order to induce the Attorney-General's Department to prosecute, the respondents had furnished completely false statements.

These issues were all placed before the jury, perhaps not so clearly as they should have been but, undoubtedly, the learned trial Judge was of the opinion that there was evidence to justify submission of the questions. The learned Judges in appeal were also of that opinion. Mr. Justice Ford says:

> There was, in my opinion, some evidence to submit to the Jury upon whose finding thereon the trial Judge might have found an absence of reasonable and probable cause, and I think it is improper, in this appeal, to dismiss the action as asked for by the appellants, there being also some evidence to support a finding of malice.
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> There was also evidence upon which it could be found that the defendants procured the prosecution of the plaintiff on the charge upon which he was acquitted.

If the jury had understood clearly that in making their answers they were in effect saying that they did not believe the evidence of Crown counsel, their answers might have been different. However, these are questions of fact and, on the state of the record, I am not disposed to interfere with the course directed by the Court of Appeal and should, therefore, dismiss the appeal and cross-appeal with costs.

DAVIS, J.—The only claim, amongst several in the action out of which this appeal arises, with which we are concerned is the claim for malicious prosecution, in respect of which judgment was given at the trial, upon the verdict of a jury, for the appellant (plaintiff) against all the respondents (defendants) in the sum of $16,667.90 and costs fixed at $5,000. The Court of Appeal for Alberta set aside the judgment and directed a new trial. Both parties appealed to this Court; the appellant seeking to

have the trial judgment restored and the respondents seeking by cross-appeal to have the action dismissed.

The action was brought against eleven defendants (seven fire insurance companies and four individuals who were employees of a fire insurance investigation bureau). There were two claims of conspiracy: one of an alleged conspiracy to injure the plaintiff in his trade and business, and the other an alleged conspiracy to procure him to be prosecuted for obtaining money by false pretences; three claims for slander; claims for twelve separate libels; and a claim for malicious prosecution. Some of the issues were withdrawn before trial, others were dismissed by the Court during the trial, and others dismissed on the jury's answers to questions submitted to them. The only claim that remains is the claim for malicious prosecution.

The criminal charges had been that the plaintiff in this action did, with intent to defraud by false pretences, obtain from the insurance companies certain sums of money contrary to the provisions of the *Criminal Code*. Each of the charges was laid by a Detective-Corporal of the Royal Canadian Mounted Police at Edmonton upon directions from the Department of the Attorney General of Alberta. The fire which had destroyed the plaintiff's home and its contents had occurred in November, 1933; the loss was adjusted and the companies paid in February, 1934, on the basis of the adjustment; subsequently, on investigation, the defendants or some of them desired to have the plaintiff arrested on a charge of receiving the moneys under false pretences. The matter was brought by them to the attention of the Attorney General's Department but the law officers of the Crown undertook an investigation of their own into the matter. Mr. Henwood, the Deputy Attorney General, and two counsel in the Attorney General's Department, Mr. Frawley and Mr. McClung, all experienced law officers who have been with the Department for many years, came to the conclusion that the charges should be laid and they were laid on October 2nd, 1935. Counsel from the Attorney General's Department took the preliminary inquiry and also prosecuted at the trial. When the plaintiff was acquitted at the trial, the Attorney General appealed to the Court of Appeal for Alberta and by his law officers prosecuted the appeal before that Court. The Court of Appeal dismissed the

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appeal but two of the Judges dissented from this judgment. The Attorney General then applied to the Court of Appeal for written reasons of judgment in order that he might consider a further appeal in the prosecution to this Court. See [1936] 2 W.W.R. 528. It does not appear that an appeal was brought to this Court.

The criminal proceedings were initiated and continued throughout by or on behalf of the Attorney General of Alberta. At the trial of this action in October, 1940, the law officers of the Crown, Mr. Henwood, Mr. Frawley and Mr. McClung, all gave evidence and it is plain from their evidence that the decision to prosecute and the prosecution itself lay entirely in the hands and under the control of the Attorney General's Department and that they thought they had had reasonable cause for their belief in the guilt of the accused and had not been misled (or "let down" as the phrase is used in the evidence) by any of the information or reports that originally had been furnished to them by the defendants or some of them.

I find it very difficult on the evidence to accept the contention that a jury might properly come to the conclusion that the defendants were the prosecutors and equally difficult on the law to conclude that a right of action for malicious prosecution lay against the defendants, but as the other members of the Court who sat upon this appeal are not prepared to go farther than the Court of Appeal did, which directed a new trial, I shall not dissent from that disposition of the appeal and cross-appeal.

KERWIN, J.—In my view, the respondents are entitled to a new trial for the reasons stated by Mr. Justice Ford. As there is to be a new trial, I refrain from discussing the evidence. The respondents are not entitled to a dismissal of the action for malicious prosecution and on this point also I agree with Mr. Justice Ford. The appeal and cross-appeal should be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitor for the appellant: *Neil D. Maclean.*

Solicitors for the corporate respondents: *Parlee, Smith & Parlee.*

Solicitor for the individual respondents: *M. M. Porter.*