Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Cox v. The English, Scottish, and Australian Bank, Limited, from the Supreme Court of Queensland; delivered the 23rd February 1905.

Present:

LORD DAVEY.
LORD ROBERTSON.
SIR FORD NORTH.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The action out of which this Appeal arises was brought for the purpose of recovering damages for what is usually called "malicious prosecution." The Plaintiff (the present Appellant) alleged that he had been adjudged insolvent maliciously and without reasonable and probable cause. The jury found a verdict in favour of the Appellant, and gave him 750*l.* damages.

A motion was made before the Full Court that the verdict and Judgment should be set aside and a new trial had between the parties, on the grounds that the verdict was against the evidence and that the damages were excessive. The Full Court, consisting of three Judges, unanimously discharged the verdict and granted a new trial, except on one point, viz., as to the special damage.

Their Lordships have been referred to the case of *The Metropolitan Railway Company* v. *Wright* (11 A.C., p. 152), as laying down the con-

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ditions subject to which, and the principles upon which, the Court should exercise the jurisdiction of granting a new trial on the ground that the verdict is against the weight of evidence. In their Lordships' opinion, the principle cannot be better stated than it was by Lord Selborne in the Court of Appeal in that case (p. 153): "In many cases "the principles on which new trials should be "granted on the ground of difference of opinion "which may exist as to the effect of the evidence "have been considered, both in the House of "Lords, and in the lower Courts, and I have "always understood that it is not enough that "the Judge who tried the case might have "come to a different conclusion on the evidence "than the Jury, or that the Judges in the "Court where the new trial is moved for, might "have come to a different conclusion; but there "must be such a preponderance of evidence, "assuming there is evidence on both sides to go "to the Jury, as to make unreasonable, and almost "perverse, that the Jury, when instructed and "assisted properly by the Judge, should return "such a verdict"; and Judgments to the same effect were delivered on the Appeal in that case to the House of Lords by the present Lord Chancellor, and other noble and learned Lords.

Now it is important to consider what it is in an action of this kind that the Plaintiff has to prove, and what are the respective functions of the Judge and the Jury. The principles applicable in these cases have been laid down for the English Courts in the case of *Abrath* v. *The North Eastern Railway Company*, (11 Q.B.D., p. 440), in which Lord Justice Bowen said (p. 455): "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 circum- "stances of the case were such as to be, in the "eyes of the Judge, inconsistent with the exis- "tence of reasonable and probable cause; and, "lastly, that the proceedings of which he com- "plains were initiated in a malicious spirit, "that is, from an indirect and improper motive, "and not in furtherance of justice." At p. 457 he says: "Now in an action for malicious "prosecution the Plaintiff has the burden "throughout of establishing that the circum- "stances of the prosecution were such that a "Judge can see no reasonable or probable cause "for instituting it."

Their Lordships will take each step of the enquiry in turn. In the first place, they will assume in the Plaintiff's favour that he is innocent, that is to say, that he was not absenting himself from his dwelling-house with a view to delay his creditors, and that his innocence was declared by the Court before which the accusation was made. Their Lordships will assume, for the purposes of the present case, that the Bank Manager and Mr. Hart were mistaken in thinking that he was absenting himself from his dwelling-house with a view to delay his creditors, and that the Supreme Court (in Insolvency), in the exercise of its jurisdiction, intended to pronounce his innocence; but that is not enough. The Plaintiff has also to prove 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.

Now the proceedings at the trial in this case were not conducted with extreme strictness, because the question whether there was reasonable and probable cause was left to the Jury, whereas the Judge ought to have determined that for himself upon the facts found by the Jury. That irregularity is pointed out in the Judgments of the learned Judges in the Full Court. Their Lordships will assume that the learned Judge who tried the case, Mr. Justice Real, in giving Judgment for the Appellant, intended to express his own concurrence in the finding of the Jury to the effect that, upon the facts given in evidence, there was no reasonable or probable cause for the proceedings; but they must remark that if this case is tried again, care should be taken by the learned Judge who tries it, to reserve for himself the duty of saying whether, on the facts given in evidence, there was reasonable or probable cause.

As there may be a new trial in this case, their Lordships do not desire to analyse the evidence with any great minuteness, or to express any opinion upon the effect of the evidence further than that which is implied in this Judgment; but they will deal shortly with the history of the case.

It appears that the Appellant was a customer of the Respondent Bank, and that his account was considerably overdrawn. There had been a change of Managers of the Bank, and the new Manager, Mr. Hooper,—using, as he had a right to use, his knowledge of the circumstances of the Appellant, and of other circumstances bearing upon the question—appears to have been extremely dissatisfied with the state of the Appellant's account, and to have been anxious that the account should be put in order, and the Appellant's overdraft wiped off. Negotiations took place with that view; but without

success, the Appellant—possibly with reason—declining to give a bill of sale over his assets which was what was demanded by the Bank Manager. Ultimately, on the 14th February 1903, Messrs. Flower and Hart, the Solicitors of the Bank, wrote to the Appellant as follows :—

"We are instructed by our clients the English, Scottish, and "Australian Bank, Limited, to demand from you and we do "therefore hereby demand from you payment of the sum of "7,511*l*. 3*s*. 8*d*. being the amount of your own, and the firm "of Cox and Sealey's, overdrawn banking accounts with the "Bank, including interest to date. Unless we receive pay-"ment of the above amount, together with 2*l*. 2*s*. our costs, by "12 o'clock noon on Monday next, the 16th instant, or you "make to us by the time named some proposal satisfactory to "the Bank for the liquidation of the debt at an early date, we "will issue a writ against you on behalf of the Bank for "recovery of the debt without any further notice or delay."

Thus the Appellant had notice on the 14th of February 1903, that a writ would be issued against him. He appears, very wisely, to have consulted his Solicitor, a Mr. Drury, and the latter had several communications with Mr. Hart, the Solicitor of the Bank, the result of which was, according to the evidence of Mr. Hart, that on the morning of the 17th February, Mr. Drury went to Mr. Hart's office and said: "Cox will "not make any further offer. You will have to "issue your writ, and he will file. Mrs. Cox "will distrain for rent." The Appellant was a tenant of his mother, Mrs. Cox, of some property at Pimpana in Queensland, on which large arrears of rent were due. Then Mr. Hart says: "That was at about 9 o'clock in "the morning. I gave instructions then to issue "a writ, and it was issued on the 18th."

Now what happened when the writ was issued? Their Lordships have the evidence, first, of Mr. Maurice Wren who was not cross-examined upon this point. He was the Managing Clerk of Messrs. Flower and Hart, and says: "When I issued the writ I took it to the

" Australian Wine Vaults "—that was Mr. Cox's place of business in Brisbane—" to where I " addressed a letter of demand, and I saw there " Mr. Macfarlane. I asked Mr. Macfarlane if " Mr. Cox was in. He said he was not, and he " also told me that he had not been there for " some days, and that he only called there " occasionally, and he might not come in for " days at a time. I asked him if he knew where " I was likely to find him. He said he did not " know. I believe I asked him, too, if he was " likely to be in there shortly. He told me that " he could not tell me, that he did not know." Mr. Wren then handed the writ to Brown, a bailiff of the Small Debts Court. Brown employed his son, Ernest William Brown, to serve the writ at Mr. Cox's residence near Brisbane, and this is what Mr. Brown the younger says: " On Thurs-" day, 19th February last, my father handed me " a Supreme Court Writ by the Defendant Bank " against the Plaintiff Cox. I went to Cox's " residence on Nudgee Road to serve him. I " left Sandgate at 8 o'clock in the morning and " I got to Hendra in about a quarter of an hour. " At Hendra I asked the station master if he " had seen Mr. Cox. He said that he had not " seen him for some time. My father told me " to go to his (Cox's) house that morning to " effect service of the writ. I went to the house " and I knocked at the door. A young lady " came out. I took her to be the servant. I " asked, 'Is Mr. Cox in?' She said, 'No. He " 'was away at the Tweed.'" (The Tweed River is outside the jurisdiction of the Courts of Queensland.) " I asked if she knew when he " would be back. I am not sure whether she " said he would not be back for a fortnight or " whether she said that she did not know. I " asked her could she tell me his address. She

" said, 'No.' It was about 9 o'clock when I " got to Cox's house. I came to town from " Hendra with my father and told him what had " occurred." Mr. Hart then says that on the 19th Mr. Wren told him that Brown had not been able to effect service, and what he had been told at Mr. Cox's house, and then he goes on: "I then telephoned to Mr. Drury. I said, " 'We have not been able to serve that writ on " 'Cox yet. I suppose you won't accept service " 'for him?" He said, 'No, you had better " 'find him.' I said, 'Well, do you know where " 'he is'? He answered and said, 'No, old " 'man, but he did talk of going to the Tweed. " 'I did not see him all day yesterday.'" That brings the story to the 19th February. There is evidence that Cox was seen by young Brown at the races at Brisbane on Saturday the 21st, and by Wren at a place called Sandgate some distance from Brisbane on the following day. On the afternoon of the 23rd February, Brown having been unsuccessful in serving the writ, the application to declare Cox insolvent was made on an affidavit sworn by Mr. Hooper, in which he said he believed that Cox had left his dwelling-house with a view to delay his creditors. It ought to be mentioned that a distress had been put in by Mrs. Cox for the rent of the Pimpana property before mentioned, and that a sale was to have taken place on the 24th February. On those facts the affidavit was made, and both Mr. Hooper and Mr. Hart swore that they believed that the Appellant was keeping out of the way. So far as their state of mind is material, that evidence appears to have been accepted by the Plaintiff, because there was no cross-examination to test their statements to that effect. The Plaintiff was accordingly adjudged insolvent.

The Jury found that Hooper did not honestly believe that Cox had departed from his dwelling house with intent to delay his creditors. Their Lordships think there was no evidence to support this finding, or if there were a scintilla of of evidence, the finding is against the weight of evidence. And they agree with the learned Judges in the Supreme Court that on the facts in evidence the circumstances were not such as to be inconsistent with the existence of reasonable and probable cause.

It must always be remembered that the onus, in an action of this kind, is on the Plaintiff, to prove that there was no reasonable and probable cause. If there was reasonable and probable cause for the belief by Mr. Hooper and Mr. Hart that the Appellant was keeping out of the way in order to delay his creditors, then, although the truth may be otherwise and his innocence may be established, still the action will fail. It has been contended that the learned Judges in the Supreme Court have usurped the functions of the jury and decided according to their own view of the facts without regard to the verdict of the jury; but their Lordships do not read the Judgments in that way. They do not think that the learned Judges intended to do, or say, anything contrary to the law as laid down in the case of *The Metropolitan Railway Company* v. *Wright.* Bearing in mind the principles there laid down respecting the functions of the jury, and desiring to act on them to the fullest extent, their Lordships agree with the Court below in thinking that the circumstances of this case, as disclosed by the evidence, are not inconsistent with the view that a reasonable man might well draw the inference that the facts were as stated in Mr. Hooper's affidavit.

The Judgment of the Court below directs a new trial. It was not asked that Judgment should be entered for the Defendants, and their Lordships cannot go beyond the Judgment that was given. All they can do, therefore, is humbly to advise His Majesty that the Appeal should be dismissed. The Appellant must pay the costs of it.