Cc
W
Sweetman
(1998) 19
WAR 94

[HIGH COURT OF AUSTRALIA.]

SHARP . . . . . APPELLANT;
DEFENDANT,

AND

BIGGS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1932.

MELBOURNE, *Oct.* 5, 6.

SYDNEY, *Nov.* 21.

Gavan Duffy C.J., Rich, Starke, Dixon and McTiernan, JJ.

Malicious Prosecution—Reasonable and probable cause for prosecution—Functions of Judge and jury.

In a proceeding by B. against S. for use and occupation from 6th February to 20th May 1928 of upstairs rooms in B.'s shop, B. in April 1931 swore that S. was in occupation of the rooms during that period, that he had seen him and his boy going up and down stairs to and from the upstairs rooms, and that sometimes they would have goods in a basket. B. fixed the date 20th May 1928 by reference to a letter written by S. but he was mistaken, and actually the facts to which he deposed had ceased by 1st March 1928, although after that date S. had gone at least once upstairs and had used the basement. S. laid an information against B. for perjury, charging him with swearing that S. was in occupation of the rooms and that he saw S. and his assistant taking goods from the rooms three or four times a day up to 20th May 1928, missing possibly a day or two occasionally during that time. B. was committed for trial but the Attorney-General refused to file a presentment. B. sued S. for malicious prosecution. The following questions were left to the jury :—(1) Has the plaintiff (B.) proved that he was innocent of the charge made against him ? Answer : Yes. (2) Did the defendant (S.) or his assistant carry goods downstairs from the upstairs rooms during the months of March, April, or May, 1928 ? Answer : No. (3) At the time the defendant laid the information against the plaintiff, did he honestly believe that the plaintiff had committed perjury in the County Court action ? Answer : Yes. (4) Was the defendant's

H. C. OF A. 1932. SHARP v. BIGGS.

belief that the plaintiff had committed perjury based on reasonable grounds? Answer: No. (5) When the defendant laid the information, was he actuated by malice? Answer: Yes. On the fourth finding the trial Judge held that the prosecution was instituted without reasonable and probable cause and entered judgment for the plaintiff (B.) for £500 damages. The Full Court of the Supreme Court of Victoria affirmed this decision. On appeal to the High Court by the defendant (S.),

Held, by *Rich*, *Dixon* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Starke* J. dissenting), that the trial Judge rightly decided that in the circumstances of this case there was a want of reasonable and probable cause; and that the appeal should be dismissed.

Per Gavan Duffy C.J. and *Starke* J.: It was doubtful on the findings of the jury whether the precise facts of the case had been ascertained; but in any event the direction to the jury on the fourth question was insufficient.

Per Dixon J.:—The ultimate inference, whether or not the facts of the case amount to a want of reasonable and probable cause, is for the Court, but it is for the jury to determine what are the facts of the case. Reasonable and probable cause does not exist if the prosecutor does not at least believe that the probability of the accused's guilt is such that upon general grounds of justice a case against him is warranted. Such cause may be absent although this belief exists if the materials of which the prosecutor is aware are not calculated to arouse it in the mind of a man of ordinary prudence and judgment.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

The appellant, Walter Henry Sharp, brought an action in the County Court at Melbourne against the respondent, Frederick William Biggs, claiming £100, being the balance of money alleged to be due from Biggs to Sharp and interest thereon at six per cent, amounting to £17 11s. 11d. Biggs counterclaimed for the use and occupation of six rooms upstairs, basement, yard and cottage, all situate at 232 Smith Street, Collingwood, for 103 days, namely, from 6th February to 20th May 1928, at the rate of £1 per day, and also claimed for use and occupation of the said cottage for twenty weeks, namely, from 20th May to 6th October 1928, at the rate of 15s. per week, and also for storage in the basement of a large quantity of goods comprising miscellaneous goods for 139 weeks, namely, from 20th May 1928 to 20th January 1931 at the rate of 5s. per week, and counterclaimed for a total payment of £152 15s. In these proceedings Sharp's claim to recover the £100 was not contested, and Biggs recovered £29 on the counterclaim for use and occupation

of the premises upon the basis that the upstairs rooms were occupied from 6th February to 20th May 1928. In support of his counter-claim Biggs gave evidence substantially to the effect that Sharp was in occupation of six rooms above the shop at 232 Smith Street, Collingwood, from 6th February to 20th May 1928, and that during that period he had from time to time seen Sharp and a boy named Roy Halls removing goods from the upstairs rooms to the basement; that he had seen them taking goods away at intervals; that a day or so might have passed when he did not see them. An appeal was lodged against this judgment, but was ultimately abandoned.

Subsequently to the County Court proceedings Sharp issued an information against Biggs alleging, in substance, that Biggs knowingly and falsely swore that the informant, Sharp, was in occupation of six rooms above the shop at 232 Smith Street, Collingwood, and that he saw Sharp and his assistant taking goods from those rooms three or four times a day to 20th May 1928. They (meaning Sharp and his assistant) may have missed a day or two occasionally in that time. Sharp laid similar informations against two employees of Biggs, which are not material to this appeal. Upon the hearing of the information against Biggs, the Magistrate committed Biggs for trial, but the Attorney-General declined to file a presentment.

Biggs thereupon brought an action in the Supreme Court against Sharp for damages for prosecuting him in the last mentioned proceedings maliciously and without reasonable and probable cause. The action was heard by *Wasley* A.J. and a jury of six. The learned Judge left to the jury questions which, with the jury's answers, were as follows:—"Question 1: Has the plaintiff proved that he was innocent of the charge made against him? Answer: Yes. Question 2: Did the defendant or his assistant carry goods downstairs from the upstairs rooms during the months of March, April or May 1928? Answer: No. Question 3: At the time the defendant laid the information against the plaintiff, did he honestly believe that the plaintiff had committed perjury in the County Court action? Answer: Yes. Question 4: Was the defendant's belief that the plaintiff had committed perjury based on reasonable grounds? Answer: No. Question 5: When the defendant laid the information, was he actuated by malice? Answer: Yes." Damages were assessed

H. C. OF A. 1932. SHARP v. BIGGS.

at £500. Upon motion for judgment the learned trial Judge held that the prosecution was instituted without reasonable and probable cause and entered judgment for the plaintiff for £500. The defendant thereupon appealed to the Full Court, which dismissed the appeal.

From that decision the defendant now appealed to the High Court.

Robert Menzies, A.-G. for Victoria, and *Sholl*, for the appellant. In this action the jury had certain questions submitted to it and answered them. There was no general verdict. The findings of the jury were, in effect, that there was an honest belief in Sharp's mind that Biggs had committed perjury, but that the belief as to the perjury was not based on reasonable grounds. The defendant in this action honestly believed that the statements made by the plaintiff were untrue. The trial Judge found, in effect, that the defendant in this action should have examined the position from the point of view of possible error in identity. Sharp, knowing that the evidence was untrue and knowing that he could demonstrate that it was untrue, was entitled to launch a prosecution for perjury and was not bound to anticipate the defence of an innocent mind on the part of the defendant. A man considering launching a prosecution for perjury is not bound to speculate as to the state of mind of the witness and is not bound to speculate upon possible explanations of innocence.

Gorman K.C. (with him *Cullity*), for the respondent. The facts justified the ruling of the trial Judge and the Full Court that there was no reasonable cause for the prosecution. The question is: Was there reasonable and probable cause in fact? In an action for malicious prosecution a mere honest belief in the mind of the defendant will not exonerate him if there was not reasonable and probable cause in fact. Honest belief on the part of the defendant is not sufficient. There must be reasonable cause in fact. An examination of the evidence shows the defendant to be an eccentric person who acted unreasonably in these proceedings (*Hicks* v. *Faulkner* (1); *Machattie* v. *Lee* (2)). The question is not whether the informant in the criminal proceedings considered there were reasonable grounds,

(1) (1878) 8 Q.B.D. 167.

(2) (1861) 10 N.S.W.L.R. (L.) 182.

but whether the hypothetical reasonable man would have so considered them. There must be reasonable and probable cause, and the belief must be based on reasonable grounds (*Salmond* on *The Law of Torts*, 7th ed. (1928), p. 619). Question 4 was rightly put to the jury. *Abrath* v. *North Eastern Railway Co.* (1) decides nothing to the contrary. It is competent for the trial Judge to help himself by a question of this nature (*Abrath* v. *North Eastern Railway Co.* (2); *Douglas* v. *Corbett* (3)). Questions 1, 3 and 5 should be taken together, and question 2 was extraneous matter which should not have been introduced. The question is what was the state of mind of the informant at the time he laid the information. On the facts of this case there was nothing to justify him in adopting the course he took (*Meering* v. *Grahame-White Aviation Co.* (4); *Shrosbery* v. *Osmaston* (5)).

[STARKE J. referred to *Coxe* v. *Wirrall* (6); *Panton* v. *Williams* (7), and *Bradshaw* v. *Waterlow & Sons Ltd.* (8).]

Sholl, in reply. The trial Judge was wrong in applying a subjective test in this case. The trial Judge put the case in this way: Was there such a chance of mistake that a reasonable man could not say to himself Biggs must be guilty of perjury. If the prosecutor has to ask himself such a question relating to the probable guilt of the plaintiff, it would be unsafe to launch an information for perjury. The question the prosecutor has to answer is: Do I believe after a reasonable investigation of the facts that the plaintiff is probably guilty? The questions asked by the trial Judge were not appropriate. The answers were wrong and there should at least be a new trial (*Hicks* v. *Faulkner* (9)). The belief that is required in the prosecutor is a belief that the prosecution is justified. Everything here pointed to the guilt or probable guilt of Biggs (*Crowley* v. *Glissan* [*No.* 2] (10)).

Cur. adv. vult.

(1) (1883) 11 Q.B.D. 79, 440.
(2) (1883) 11 Q.B.D., at pp. 81, 443.
(3) (1856) 6 E. & B. 511; 119 E.R. 955, 169.
(4) (1919) 122 L.T. 44, at p. 55.
(5) (1877) 37 L.T. 792, at p. 793.
(6) (1607) Cro. Jac. 193; 79 E.R.
(7) (1841) 2 Q.B. 169; 114 E.R. 66.
(8) (1915) 3 K.B. 527.
(9) (1878) 8 Q.B.D. 167.
(10) (1905) 2 C.L.R. 744.

H. C. OF A. 1932. SHARP v. BIGGS. NOV. 21.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND STARKE J. The appellant, Sharp, brought an action in the County Court at Melbourne, claiming certain moneys for goods sold and delivered, and the respondent, Biggs, set up a counterclaim for the use and occupation by the appellant of six upstairs rooms at No. 232 Smith Street, Collingwood, for 103 days at the rate of £1 per day. The question of fact in dispute was whether the appellant was in occupation of these rooms during February, March, April and May 1928. Biggs in these proceedings made statements on oath, which we shall set forth later, relevant to this question of fact, and he recovered a judgment on the counterclaim. An appeal was lodged against this judgment, but ultimately abandoned. In the meantime, Sharp laid an information before a Police Magistrate, charging that Biggs knowingly and falsely swore, in the proceedings in the County Court, that Sharp was in occupation of six rooms above the shop at 232 Smith Street, Collingwood, and that he saw Sharp and his assistant taking goods from these rooms three or four times a day up to 20th May 1928, but that they may have missed a day or two occasionally. The Police Magistrate committed Biggs for trial on this charge, but the Attorney-General entered a *nolle prosequi*. Biggs then brought an action in the Supreme Court against Sharp, alleging that he was innocent of the charge and that Sharp preferred it maliciously and without reasonable or probable cause. The action was tried before a jury, and the learned Judge who presided at the trial put questions to the jury. The questions, and the answers of the jury, were as follows :— " Question 1 : Has the plaintiff proved that he was innocent of the charge made against him ? Answer : Yes. Question 2 : Did the defendant or his assistant carry goods downstairs from the upstairs rooms during the months of March, April or May 1928 ? Answer : No. Question 3 : At the time the defendant laid the information against the plaintiff, did he honestly believe that the plaintiff had committed perjury in the County Court action ? Answer : Yes. Question 4 : Was the defendant's belief that the plaintiff had committed perjury based on reasonable grounds ? Answer : No. Question 5 : When the defendant laid the information, was he actuated by malice ? Answer : Yes." Damages were assessed at

£500. On motion for judgment, the learned presiding Judge held that the prosecution was instituted without reasonable and probable cause, and he entered judgment for the plaintiff for £500, and this judgment was affirmed on an appeal to the Full Court. A further appeal is now brought to this Court, and it is contended by Sharp that he had reasonable and probable cause for his prosecution and that the decision below is erroneous.

"In an action for malicious prosecution, it is necessary, in the first place," said Lord *Esher* M.R. in *Brown* v. *Hawkes* (1), "that the plaintiff should prove a want of reasonable and probable cause for the action of the defendant in charging him, and if he fails in doing this his case is at an end. The question whether there is an absence of reasonable and probable cause is for the Judge and not for the jury, and if the facts on which that depends are not in dispute, there is nothing for him to ask the jury, and he should decide the matter himself. If there are facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, those facts must be left specifically to the jury, and when they have been determined in that way the Judge must decide as to the absence of reasonable and probable cause." (*Lister* v. *Perryman* (2); *Cox* v. *English, Scottish and Australian Bank* (3); *Bradshaw* v. *Waterlow & Sons Ltd.* (4).) The presence or absence of reasonable and probable cause must be determined by the facts which the defendant knew when he instituted the proceedings; the question, however, is not whether the defendant thought such facts constituted reasonable and probable cause, but whether the Court thinks they do. Again, if reasonable and probable cause existed for the prosecution, malice will not render a person liable for instituting it (*Johnstone* v. *Sutton* (5); *Willans* v. *Taylor* (6); *Musgrove* v. *Newell* (7)). Reasonable and probable cause is shown when it appears that the facts which were known to the defendant at the time of the institution of the proceedings, if believed, "would create a reasonable suspicion in the mind of a reasonable man," or would afford a reasonable ground for the institution or carrying on of those proceedings

(1) (1891) 2 Q.B. 718, at p. 726.
(2) (1870) L.R. 4 H.L. 521.
(3) (1905) A.C. 168.
(4) (1915) 3 K.B. 527.
(5) (1786) 1 T.R. 510, at p. 545; 99 E.R. 1225, at p. 1243.
(6) (1829) 6 Bing. 183, at p. 186; 130 E.R. 1250, at p. 1252.
(7) (1836) 1 M. & W. 582, at p. 587; 150 E.R. 567, at p. 569.

H. C. OF A. 1932.

SHARP v. BIGGS.

Gavan Duffy C.J. Starke J.

(*Broughton* v. *Jackson* (1); *Lister* v. *Perryman* (2)). But "no definite rule can be laid down for the exercise of the Judge's judgment. Each case must depend upon its own circumstances" (*Lister* v. *Perryman* (3)).

We must now consider the effect of the facts which have been found by the jury. The answer to the first question put to them is that Biggs was innocent of the charge made against him. No doubt the decision of this Court in *Davis* v. *Gell* (4), dictated the question. But the finding in itself is consistent with several views: (1) That Biggs did not swear to the words alleged or any material part of them; (2) that Biggs swore truly in respect of everything material to which he deposed; (3) that Biggs swore falsely as to the whole or part of that to which he deposed, but that he did not do so knowingly. The following evidence was given by Biggs on the trial of the action for malicious prosecution:—"Question: At the County Court hearing, what did you say about the upstairs rooms? Answer: I said that Sharp was in occupancy of those rooms from 6th February to 20th May 1928, and that I had seen Sharp and the boy going up and down the stairs to and from those upstairs rooms; that sometimes they would have goods in a basket and other times they would have no goods. Question: Did you at any time say in that action that you had seen him three or four times a day? Answer: No. Question: When you said that in the County Court, did you believe it was true? Answer: Yes. Question: Did you in connection with that matter in the County Court say anything deliberately that was false? Answer: No. I still believe that the evidence I gave was true." The second finding of the jury, that neither the defendant nor his assistant carried goods downstairs from the upstairs rooms during the months of March, April and May 1928, is then important. It looks as if the jury were satisfied that Biggs falsely swore that Sharp was in occupation of the upstairs rooms, and that he saw Sharp and his assistant taking goods from those rooms during the months of March, April and May 1928. Perhaps, however, the finding only stresses the fact of carrying goods downstairs from the upstairs rooms, and it may be doubted whether it affirms

(1) (1852) 18 Q.B. 378, at p. 385; 118 E.R. 141, at p. 144.
(2) (1870) L.R. 4 H.L. 521.
(3) (1870) L.R. 4 H.L., at p. 535.
(4) (1924) 35 C.L.R. 275.

that Biggs swore that this took place three or four times a day, but that is not a very material variation. But we rather think that the jury found that Biggs had sworn falsely in fact, but not so to his knowledge. And this, apparently, is the view of the learned Judge who presided at the trial. In his judgment, he said: "It is not a matter which had been dealt with shortly before, it is not a matter in which the plaintiff" (Biggs) "must have said what he knew was untrue if it was not true; there had been a lapse of time and I think it was quite unreasonable for the defendant" (Sharp), "because his recollection of the facts differed from the plaintiff's recollection of the facts, to have jumped to the conclusion that a man swearing to a different set of facts after three years must have been guilty of perjury; I think he should have taken into account the fallibility of human memory." The third answer of the jury, however, affirms that the defendant did honestly believe that the plaintiff (Biggs) had committed perjury in the County Court action. But the answer to the fourth question is that Sharp's belief was not based on reasonable grounds, which means, we suppose, that he had not taken into account the fallibility of human memory. The learned Judge in his charge said: "He" (Sharp) "must have realized that his memory was not of the best, and, before he took proceedings against another man, he should have thought: 'Now, my memory is not too good. I might be making a mistake . . . There was a delay of three years and he might be quite honest in what he says. It may be wrong, but he is honest, and if he is honest there is no perjury.' It is suggested that if the defendant had acted as a reasonable man he would have argued in that way to himself, and that in not arguing that way he merely rushed in and took these proceedings, and that his belief, if he did believe there had been perjury committed by the plaintiff, that belief was not based on reasonable grounds." Authority exists for putting such a question, in some cases, to the jury (*Heslop* v. *Chapman* (1); *Douglas* v. *Corbett* (2); *Shrosbery* v. *Osmaston* (3); *Hicks* v. *Faulkner* (4); *Machattie* v. *Lee* (5)). But if, as *Cave* J. said in *Brown* v. *Hawkes* (6), such a question is to be put in every case, the result will be to

(1) (1853) 23 L.J. Q.B. 49.
(2) (1856) 6 E. & B. 511; 119 E.R. 955.
(3) (1877) 37 L.T., at p. 795.
(4) (1878) 8 Q.B.D., at p. 172.
(5) (1861) 10 N.S.W.L.R. (L.) 182.
(6) (1891) 2 Q.B., at p. 721.

H. C. OF A. 1932. SHARP v. BIGGS. Gavan Duffy C.J. Starke J.

transfer the decision of what is reasonable and probable cause from the Judge to the jury. The question is not whether the prosecution was wise or foolish, well considered or hasty, but whether the facts within the knowledge of a party himself or deduced by him from credible information afforded a reasonable and probable ground of belief that the person accused of the offence was guilty. One cannot conclude that a belief is without reasonable grounds, without considering the facts on which it is founded. The charge of the learned Judge fails, we think, to put this critical aspect of the question to the jury. It suggests no state of facts for the consideration of the jury, and it does not direct the jury to ascertain the facts within Sharp's knowledge and then consider whether those facts established a reasonable basis of belief. All the charge suggests is that human fallibility in Biggs' memory destroys a reasonable basis of belief in Sharp. The facts show how unsatisfactory was the charge in all the circumstances of the case, and if these facts are taken as true, the question was really for the Judge whether they showed an absence of reasonable and probable cause.

Against an admitted claim by Sharp, Biggs set up a counterclaim for the occupation by Sharp of some upstairs rooms at Smith Street, Collingwood, at the rate of £1 per day from 6th February to 20th May 1928. He swore that he saw Sharp and his assistant going up and down these stairs over a period of three months. But it was a false statement, if the jury's finding be as we think it was. And the knowledge of its falseness, so far as Sharp was concerned, did not depend upon communications made to him by others but upon his own personal knowledge and recollection, which had strong support from independent statements and surrounding circumstances. It was also a statement, not as to an hour, or a day, or a week, but a very definite statement as to a considerable period of time, namely, three months. It was, moreover, the critical fact in the case if Biggs were to succeed in his counterclaim, and could not therefore have been made hurriedly or incautiously; a motive for making a false statement was accordingly not lacking. And it is not unworthy of note that Biggs has always asserted that his statement was true, and that he retains the benefit of the judgment in his favour on his counterclaim.

It appears to us a strong thing, in the face of facts such as these, to say that Sharp should have speculated at large upon the fallibility of human memory, and in particular upon the fallibility of Biggs' memory, of which he knew nothing. The prosecution may have been unwise, but the question in the case was whether a state of circumstances existed upon which a reasonable and discreet man might have acted in laying the charge against Biggs. It is doubtful on the findings of the jury whether the precise facts of the case have been ascertained. Is it, for instance, clearly established what Biggs and Sharp swore, what was false, and whether Biggs' innocence, which the jury found, was based upon the fallibility of his memory ? But there is no doubt that the direction to the jury on the fourth question was wholly insufficient, for the reasons already given. And the learned Judge himself failed, we think, to ascertain the true state of the facts or circumstances, and in any case failed to consider whether those facts and circumstances, as they existed, did or did not afford reasonable ground for the prosecution.

In our opinion, the result is that a new trial should be ordered.

RICH J. By the order appealed from the Full Court of the Supreme Court of Victoria, consisting of *Cussen* A.C.J., *Mann* and *Macfarlan* JJ., dismissed an appeal against a verdict and judgment given for the plaintiff in an action of malicious prosecution. The substantial question upon the appeal was and upon this appeal is whether the plaintiff has succeeded in making out a case of absence of reasonable and probable cause. The defendant appellant contends that the findings of the jury in relation to this question, if allowed to stand, are insufficient for the purpose, and that in any case they ought not to be allowed to stand. The charge upon which the respondent was prosecuted was perjury. The evidence upon which the information against him was laid was given by him in the County Court in Melbourne in support of a counterclaim filed by him in an action brought by the appellant against him. The counterclaim was for use and occupation of three portions of a messuage consisting of a shop yard and cottage. The respondent had taken possession of these premises on 16th January 1928. The appellant was the

H. C. OF A. 1932. SHARP v. BIGGS. Rich J.

former occupier and he had not by that date removed the stock-in-trade and goods which were on the premises. With the respondent's assent he stored much of his property in the cottage, much in the basement of the shop and much in some upper rooms above the shop reached by a stairway and gallery within the shop. On 6th February 1928 the respondent gave the appellant written notice that he would charge a rent for this use of the premises of £1 a day. In the County Court the respondent by his counterclaim sought to recover a large sum based upon this notice. The questions at issue upon the counterclaim were (1) whether the plaintiff was entitled to any and what sum for such a use and occupation of each of these three parts of the premises and (2) if so up to what date in the case of each part should the sum be calculated, i.e., when did the use and occupation of each part cease. The County Court trial took place in April 1931. The parties were in conflict as to the date when the appellant vacated the upper rooms. The appellant asserted that he had not occupied them after the date when a particular employee left his service—a date which he fixed as 20th March 1928—and that he had in fact completed the removal of his goods from those rooms about 23rd February 1928, a date he fixed by reference to a letter he had written. The respondent on the other hand gave 20th May 1928 as the date up to which these rooms had been occupied by the goods. In this he was supported by two of his employees. His actual reason for giving that date lay in the contents of a letter which he had received about that time from the appellant, but it does not appear that he stated this reason to the County Court Judge. The respondent's view was accepted and a small amount was awarded upon the counterclaim for use and occupation of the premises including the upper rooms. The appellant at once appealed and raised the question with his legal advisers of a prosecution for perjury. From his cross-examination in the present action it appears that the appellant was the victim of a propensity for persistent litigation, and it is not surprising that his solicitor recorded his advice in writing that he should not appeal, and referred him to the police upon the question of prosecuting the respondent and his witnesses. He does not appear to have aroused any enthusiasm in the police, and in person he presented himself before a Police Magistrate and preferred

informations against the respondent and his two employees. The information charged the respondent that "being a witness upon the trial of an action in the County Court in which the informant" (now appellant) "was plaintiff and one F. W. Biggs was defendant" he "knowingly" and "falsely swore that you (meaning informant) were in occupation of six rooms above the shop at 232 Smith Street Collingwood and that he saw you and your assistant taking goods from those rooms three or four times a day up to May 20th 1928. They may have missed a day or two occasionally in that time." The evidence is conflicting upon the question whether the respondent did in fact swear that he saw the appellant and his assistant taking goods from these rooms three or four times a day up to the day given or said that they might have missed a day or two in that time. The case for the conclusion that he did not so swear is very strong, and probably the jury thought that he did not. There is much evidence of malice which it is needless to go into. The proceedings terminated in a *nolle prosequi* and, as the result of a decision of this Court in *Davis* v. *Gell* (1), the respondent undertook to prove affirmatively his innocence of the charge. In his evidence upon the trial of the present action he persisted in the view that the upper rooms had not been cleared out before or much before 20th May 1928. It was common ground that the plaintiff and his assistant had gone through the shop carrying goods quite often during the period of the occupation. The only question was when did their connection with the upper rooms cease. Both parties relied upon inferences from circumstances in reconstructing the probabilities of a trivial matter occurring three years before. It should be added that the defendant admitted being in the shop and on one occasion at least upstairs after the date he gave for the removal of his goods. On the trial of the present action, however, the appellant relied upon additional circumstances justifying his contention that 23rd February 1928 was the end of the period. His case, however, involved a departure from 20th March, which he had formerly given, as the date when his employee left him. The plaintiff's case was that the evidence he had given was correct, that in any case he honestly believed it to be true and that no reasonable man could have supposed that he did not honestly believe it

(1) (1924) 35 C.L.R. 275.

H. C. OF A. 1932. SHARP v. BIGGS. Rich J.

to be true, and that in any case the defendant did not so suppose. In these circumstances the learned trial Judge, *Wasley* A.J., put questions to the jury. In answer to which they found (1) that the respondent had proved that he was innocent of the charge made against him ; (2) that the defendant and his assistant did not carry goods downstairs from the upstairs rooms during the months of March, April and May 1928 ; (3) that the appellant honestly believed that the respondent had committed perjury in the County Court action, but (4) that his belief was not based on reasonable grounds, and (5) that the appellant was actuated by malice ; and they awarded £500 damages. On these findings the trial Judge ruled that there was an absence of reasonable and probable cause. He agreed with the findings that there were no reasonable grounds for the appellant's belief, but said that he himself would have taken a view less favourable to the appellant of the existence of that belief. The Full Court also thought that there was an absence of reasonable and probable cause, and that the finding was well warranted. The conclusions both of the Court and the jury have been attacked in very many varying ways. At first it was said the findings of the jury involved an inconsistency. If the respondent was wrong in giving 20th May 1928 as the terminal date, how could it be unreasonable in an adversary who was aware he was wrong to believe that he spoke corruptly ? It is to be remarked that the question to the jury was confined to carrying goods up and down stairs in the three disputed months and did not extend to the whole question of occupation. But assuming that the jury meant to find that upon this question the appellant was right and the respondent was wrong I can see no inconsistency in the jury's findings. They probably thought that the respondent swore no more than that the premises were occupied for the longer period, and that during that period goods were taken downstairs by the appellant and his assistant, and that the appellant had no ground for charging him with saying that they went up and down stairs three or four times a day with only occasional omissions throughout that period. They appear to have considered that anybody at the County Court trial would have seen that he was endeavouring to fix the duration of a period when events of three years ago occurred, and was doing so by the aid of recollection. The

events and the duration of the period were confused by the visits of the respondent to the shop and by the presence of his goods in the basement and in the cottage. Upon such a matter I agree with them in thinking it was quite unreasonable for the appellant to base the conclusion that the plaintiff wilfully and corruptly swore to a time which he knew to be wrong. In forming this opinion, if he did form it, the appellant acted in the face of a suggestion of the solicitor's clerk that the respondent might conceivably be mistaken, and persisted in a course from which he received every discouragement. It was next suggested that the fourth question should not have been asked because it enabled the jury to decide a question of reasonableness which was strictly for the Court. It appears from the cases that such a question has long been quite usual. Although reasonable belief in guilt is an important fact, it is not the same by any means as reasonable and probable cause for prosecution. The propriety of asking the question in any case must depend upon the circumstances, and, although it may be better to leave to the jury as little as possible upon the questions of reasonableness of conduct and belief in connection with reasonable and probable cause, I cannot see in this case why the Judge should not adopt such a question as a means of avoiding an elaborate set of interrogatories. No doubt he might have given a general direction giving the jury his ruling as to reasonable and probable cause on all the numerous hypothetical combinations of fact which might be held on the evidence. But in the difficulties which these three alternatives present it was eminently a matter for the trial Judge to decide which he would adopt. It was then said on behalf of the appellant that the Supreme Court had not adopted a proper criterion of reasonable and probable cause. Each of their Honors gave a separate judgment, and although some exception may be taken to some of the expressions used, I am far from satisfied that there was any misapprehension upon this subject. Indeed, *Macfarlan* J. contented himself with the statement that a reasonable man could not come to the conclusion that the defendant had not made a mistake. In this I agree. In such circumstances I am unable to see how there could be reasonable and probable cause. A point was made that the Magistrate had committed for trial and this was either strong

H. C. OF A. 1932. SHARP v. BIGGS. Rich J.

presumptive or even conclusive evidence of the existence of reasonable and probable cause. The relevance of the Magistrate's opinion is, perhaps, questionable in any event, but in this case the depositions show that the prosecutor gave evidence which the jury in the present action may well have thought unfounded. The point has been overruled in Canada (*Hall* v. *Geiger* (1)). It was not suggested that the jury were misdirected in any particular, and the point dealt with in the judgment of the Full Court as to the admission of evidence was not pressed before us.

The appeal should be dismissed.

DIXON J. This appeal is from an order of the Full Court of the Supreme Court of Victoria dismissing an appeal against a verdict and judgment in favour of the plaintiff by which he recovered £500 damages against the defendant for prosecuting him upon a charge of perjury maliciously and without reasonable and probable cause. The issue with which the appeal is concerned is that of the absence of reasonable and probable cause for instituting the prosecution. Findings were obtained from the jury, and the matters to be considered are whether these findings can be supported and whether they justify the conclusion of the learned Judges of the Supreme Court that there was an absence of such cause. These matters depend upon an understanding of the circumstances attending a lengthy but commonplace dispute, and the variant accounts of some of them which the evidence contains. The evidence in respect of which the prosecution took place related to the period of time for which the defendant appellant had in the earlier part of 1928 occupied part of the premises of the plaintiff respondent. It was given on the trial of an action between the parties in the County Court on 22nd April 1931. The action arose out of a transaction which began in 1927. In August 1927, the plaintiff respondent desired to obtain a lease of a shop in Smith Street, Collingwood, of which the defendant appellant was occupier. The shop contained some fixtures and fittings which, although he did not need them, the plaintiff agreed to buy from the defendant for the sum of £200 upon condition that the defendant procured from the landlord a lease to

(1) (1930) 3 D.L.R. 854.

the plaintiff for the required term commencing on 16th January 1928. The plaintiff paid down £100, and arranged to take possession of the shop from the defendant on that date and to pay him the remaining £100. The shop included a basement and six upper rooms, which were reached from within by a stairway and gallery. Behind the shop stood a cottage with access to another street. The plaintiff arranged for an auction sale on 16th January 1928 of the fixtures and fittings and for the execution afterwards of some alterations. He had some conversations with the defendant which, although the details are in dispute, undoubtedly made it clear to the defendant that he wished him to remove his stock from the shop. The defendant continued to occupy or use the cottage, and he placed some of his stock in the upstairs rooms of the shop and some in the basement. The plaintiff considered that he had cause to complain of the defendant's failure to clear the shop itself and to vacate the building, and some differences appear to have arisen between them almost at once. On 6th February 1928, the plaintiff notified the defendant in writing that as and from that date the rent chargeable for the partial use of the premises would be £1 per day. On 25th February 1928, in the course of a letter to the defendant about other things, the defendant wrote "I have disposed of the bulk of the goods from upstairs that we placed in the back shanty. Shall start on the room under shop Tuesday or Wednesday, so may exceed my time by a couple of days." According to the defendant he had completed the removal of the goods upstairs about 22nd or 23rd February 1928, and after that date visited the upper rooms on one occasion only. The letter refers to the basement as the room under the shop. In a letter of 20th May 1928, he told the plaintiff that he would keep the cottage two or three months longer at 10s. a week (a sum which the defendant says he named in respect of the cottage) because the goods were hard to dispose of. On 6th October 1928, he handed over the key of the cottage and vacated the premises entirely. In February 1929, the plaintiff's solicitor wrote to the defendant demanding the difference between £242 rent at £1 per day from 6th February 1928 to 6th October 1928 and £100 owing to the defendant for the fixtures and fittings. At the same time the plaintiff himself wrote saying that he had waited as long

H. C. OF A. 1932. SHARP v. BIGGS. Dixon J.

as possible for the defendant to call and that he had now placed all matters of business between them in the hands of his solicitor to whom he referred him. The defendant's first reply was unobjectionable in its form of expression, although it said that the claim arose from the plaintiff's desire for an extension of time for meeting his indebtedness, and added that it made the defendant look upon him with suspicion. But after an answer from the plaintiff expressing some resentment, the defendant sent him and his solicitors a series of abusive letters which contain many indications of an unusual temperament. At length, in December 1930, the now defendant began an action against the now plaintiff in the County Court to recover the balance of the price of the fixtures, £100, together with interest. In this action the now plaintiff counterclaimed £152 15s., made up of (1) £103 for use and occupation from 6th February to 20th May 1928 of the upstairs rooms, of the basement, and of the yard and cottage at £1 per day; (2) £15 for use and occupation of the cottage from 20th May 1928 to 6th October 1928, and (3) £34 15s. for storage of goods in the basement from 20th May 1928 to 20th January 1931.

Upon the trial of the County Court action, which took place on 27th April 1931, the now defendant's claim as plaintiff in that action to recover £100 was not contested, but on the counterclaim the now plaintiff as defendant in that action recovered £29 for use and occupation upon the basis that the upstairs rooms were occupied from 6th February to 20th May 1928. In support of his counterclaim the now plaintiff gave evidence and called two of his employees as witnesses. The effect of the evidence which the plaintiff admits giving was that the now defendant had used the upstairs rooms for his stock, that he and his assistant had gone up and down stairs to them and had carried goods down, and that the use of the rooms had gone on for three or four months, the now plaintiff giving 20th May 1928 as the end of the occupation. How much further the evidence went is in dispute. The now plaintiff says that he specified 20th May 1928 because of the defendant's letter of that date, but whether he made it clear in his evidence in the County Court how he arrived at it does not appear, or, at any rate, is left quite uncertain.

From the judgment given in the County Court for the now plaintiff upon his counterclaim, the now defendant appealed, but against his solicitor's advice. The notice of appeal, which was dated 6th May 1931, included the ground that since the hearing of the action the falsity of the evidence of the defendant and his witnesses upon matters material to the judgment and the findings of the learned Judge had been revealed. Shortly after the hearing the now defendant, who appears to have been very litigious, told his solicitor's clerk that he contemplated issuing informations for perjury against the plaintiff and his two employees. The clerk says he suggested that the transaction was three years ago and a mistake might have been made; to which the defendant replied to the effect that three months was too long to forget altogether. According to the evidence of the solicitor, the defendant told him that he could prove that he was not at or using the place after some date in February 1928, and informed him what proofs he relied upon. He heard what he had to say and told him that, if he considered he had a case, he ought to go to the police and lay all the facts before them and let them take steps in regard to it. The defendant did resort in some way to the police, but precisely what took place does not appear. On 28th April 1931, however, he went personally before a Magistrate and laid informations for perjury against the plaintiff and his two employees. The charge contained in the informations was that the accused knowingly and falsely swore that "you (meaning informant) were in occupation of six rooms above the shop at 232 Smith Street Collingwood and that he saw you and your assistant taking goods from those rooms three or four times a day up to May 20th 1928. They may have missed a day or two occasionally in that time." The Magistrate issued summonses but the defendant did not serve them for some weeks, according to him because he was unable to find the private address of one of the accused who was, however, still in the plaintiff's employ. The defendant was asked his motive for instituting these prosecutions, and he said:—"Well, a week or two before that I had a Court case and the man gave some false evidence in the case, and I said then 'The next time that a man gives false evidence against me he will go up for it.' Of course, unluckily or luckily, Mr. Biggs happened to be the next man."

H. C. OF A. 1932. SHARP v. BIGGS. Dixon J.

Upon the hearing before the Magistrate of the charge against the plaintiff, the defendant gave evidence that the plaintiff had in the County Court sworn substantially what was set out in the information. The solicitor's clerk was also called, but he said that he did not remember the plaintiff's swearing that he had seen the defendant and his assistant removing goods three or four times a day. His version of what the plaintiff had sworn was that the defendant was in occupation of six upstairs rooms from 6th February until 20th May 1928; that he had from time to time seen the defendant and the boy removing goods from the upstairs rooms to the basement; that he had seen them taking goods away at intervals; that a day or two might have passed when he did not see them.

Upon the question of the falsity of the plaintiff's evidence, the defendant deposed that by 22nd or 23rd February 1928 he had entirely removed his goods from the upstairs rooms; that the statement in his letter of 25th February 1928 that he might exceed his time by a couple of days referred to a period expiring on 6th March 1928 allowed by the plaintiff for the removal of the goods from the upper rooms; that his assistant had done nothing for him on those premises after 20th March when his employment was terminated, a date which the defendant fixed by reference to the movements of himself and his family, which he established by other evidence; that he did not afterwards go upstairs except on one occasion at or near the end of April; that during a day or two about the last week in April he took some goods from the basement to the cottage and must have gone through the shop. His assistant also gave evidence, and said that all the goods were moved out of the upstairs rooms before he left the defendant's employment on 20th March 1928. Upon this evidence the Magistrate committed the plaintiff for trial. The Attorney-General, however, declined to file a presentment. His refusal was announced about 8th July 1931. The defendant discussed the question whether he would apply for a grand jury, *scil.*, under sec. 388 of the *Crimes Act* 1928, but the plaintiff promptly issued the writ in this action for malicious prosecution. After the plaintiff's committal for trial, the informations against his two employees had been withdrawn upon their undertaking not to sue for malicious prosecution. Indeed, when the

summonses were served upon them, the defendant had written to one of them that in order to protect himself, he was compelled to issue the summons calling upon him to prove his statements, and he says that he told the Magistrate that when he issued a summons against one he thought he must issue summonses against the three witnesses. On 6th October 1931 the appeal from the judgment of the County Court was abandoned.

Upon the trial of the action, which was heard from 12th to 17th November 1931, the plaintiff gave evidence that what he swore in the County Court was that the defendant was in occupancy of the upstairs rooms from 6th February 1928 to about 20th May 1928, and that he had seen the defendant and the boy going up and down stairs to and from those upstairs rooms ; that sometimes they would have goods in a basket and at other times they would have no goods, but he denied saying that he had seen them three or four times a day. He said that he fixed that date by inference from the letter of 20th May 1928 ; that he might have told the County Court that he was only speaking from memory, but he did not remember ; that he had sworn that he saw the defendant and his assistant going up and down those stairs from time to time until about 20th May 1928 ; that he had intended to convey to the County Court that the defendant was going up and the boy was going up at some period during that time ; that he saw them on several different occasions, that those occasions extended with regard to the defendant up to about 20th May 1928, and that he still believed this to be correct. The defendant persisted that what the plaintiff had sworn was that he had seen him and his assistant coming downstairs with a basket between them carrying goods from upstairs and putting them either into the basement or into the cottage two or three times a day and that they might have missed a day or two to 20th May 1928. The law clerk gave evidence that he now recollected, what he could not remember before the Magistrate, namely, that the plaintiff had sworn that he saw them three or four times a day, but his notes of evidence did not include such a statement by the plaintiff. It does not appear that either of the parties obtained a copy of the notes of the learned County Court Judge.

H. C. OF A. 1932. SHARP v. BIGGS. Dixon J.

Upon the question of the correctness of the evidence given by the plaintiff in the County Court, the defendant now said that his assistant had left his employ on 22nd or 23rd February 1928, and that he had made a mistake before the Magistrate in giving 20th March, a mistake which arose through the boy's having again done some work for him on 17th March in the yard of the cottage. In answer to the question " When did you complete taking the whole of the goods from upstairs ? " he said " About 22nd or 23rd February 1928, before 1st March." In this revised statement of the date of the end of the boy's employment, he was supported by the evidence of the boy himself, who also had previously given 20th March as the date.

With so many circumstances more or less in dispute affecting, or possibly affecting, reasonable and probable cause, it is not surprising that the learned trial Judge did not take a general verdict but put questions to the jury. The questions which he put and the jury's answers are as follows :—" (1) Has the plaintiff proved he was innocent of the charge made against him ? Yes. (2) Did the defendant or his assistant carry goods downstairs from the upstairs rooms during the months of March, April or May 1928 ? No. (3) At the time the defendant laid the information against the plaintiff, did he honestly believe that the plaintiff had committed perjury in the County Court action ? Yes. (4) Was the defendant's belief that the plaintiff had committed perjury based on reasonable grounds ? No. (5) When the defendant laid the information, was he actuated by malice ? Yes." The learned trial Judge expressed his concurrence in these findings, except the third, namely, that the defendant honestly believed the plaintiff had committed perjury, and, upon the basis of the fourth answer, he found a want of reasonable and probable cause.

For the defendant appellant, it is contended that in view of the other findings, particularly the second, the fourth answer cannot be supported, or, at any rate, cannot be understood in a sense which would warrant the conclusion that there was an absence of reasonable and probable cause. It is said that, because upon a matter within the defendant's own knowledge the plaintiff admittedly gave direct evidence which, according to the second answer, was contrary

to fact, the belief of the defendant that the plaintiff in doing so had committed perjury was based upon grounds which could not be otherwise than reasonable. In considering this contention, the effect of the finding that the defendant honestly believed in his guilt must not be misapprehended. This finding is not necessarily, or even probably, founded upon the supposition that the defendant formed a deliberate judgment of the plaintiff's guilt, much less that he considered how far his guilt might be inferred from the variance between the actual date when the transportation of goods downstairs ended and the date to which the plaintiff deposed. The unusual temperament of the defendant, his propensity to litigation, and his contentious disposition, cannot be neglected. The jury may well have thought it was as difficult to suppose that his opinion of the moral obliquity of an adversary was insincere, as that dispassionate consideration played any part in its formation. Honest belief in the guilt of the accused may in many sets of circumstances be inconsistent with malice. But, in the present case, there was ample ground for the inference which the jury drew that a desire to bring an offender to justice was not the cause of the prosecution, however genuine and intense may have been the defendant's belief that the plaintiff and his witnesses were perjurers. It is not unlikely that the defendant did believe that the plaintiff had sworn that during the months of March, April and May 1928, the defendant and his man three times a day carried goods downstairs. The defendant may well have confused what he said with the evidence given by another witness. If the plaintiff had so sworn, it would have been less easy to suppose that he had fallen into an error of recollection. But there is no reason to think that the jury accepted this account of the testimony given by the plaintiff before the County Court.

Further, in considering the supposed inconsistency between the second and fourth answers, the first answer cannot be disregarded, which must involve that the plaintiff honestly believed in the truth of the evidence which the jury considered he had given. In determining whether the jury's findings are consistent, we ought not to assume that where two views of the facts are clearly open upon the evidence, they adopted that which would tend against the correctness of one or more of their findings, although it may support another or

H. C. OF A. 1932. SHARP v. BIGGS. Dixon J.

others. Accordingly, we are not entitled to treat the second answer as implying the acceptance by the jury of any evidence not involved in the exact finding it expresses. It does not appear from the transcript who proposed the second question, but it is so framed that the answer which in the event was given means no more than that neither the defendant nor his assistant at any time in the month of March, or the month of April, or the month of May, carried goods downstairs from the upstairs rooms. The Judge's charge in relation to this question commends to the jury the conclusion, upon the probabilities of the matter, that the defendant's goods had been taken from the upper rooms before the end of March 1928. But conceding these facts to have been found, there remains the question: What foundation do they afford for a belief that the plaintiff had committed perjury? The jury must for this purpose be taken to have accepted the plaintiff's version of what evidence he gave in the County Court. The facts which he deposed to in that evidence admittedly took place, but during a period of time ending not later than 1st March and not earlier than 23rd February 1928. His error lay in extending the period until 20th May 1928. But during that period the defendant had brought goods from the basement although not from upstairs. At one stage the defendant considered that he had taken them through the shop, but at another stage he thought otherwise. He had been on one occasion at least up to the rooms above. In fixing the date for the clearance of the goods, he relied to some extent upon his letter of 23rd February 1928 and to some extent upon the date when he discharged his assistant. But at the time of the prosecution, he fixed the date as 20th March 1928. He knew, or ought to have known, that the date given by the plaintiff was adopted from his own letter of 20th May 1928 and that, apart from any assistance to be derived from it, the plaintiff must rely upon his memory of the length of a period in which some of his goods were left in one of three parts of the plaintiff's premises, parts where he had left goods for different lengths of time from 16th January 1928. He knew that the two employees, who had a more intimate acquaintance with the matter, had assigned a duration of three months. Finally, the events had occurred three years before the evidence was given.

These circumstances do, in my opinion, warrant the finding that the defendant's belief that the plaintiff in deposing to an incorrect time for the removal of the defendant's goods from the upper rooms had committed wilful and corrupt perjury was not based upon reasonable grounds. No doubt the jury were bound to weigh with these circumstances the possibility of the defendant's reasonably thinking that the plaintiff was inspired by a desire to defeat his claim for £100. But, in doing so, they were entitled also to consider a note by the defendant on the plaintiff's letter of 6th February 1928 perversely adopting this interpretation of that notification at a time when it was quite evident that its purpose was to speed his own departure.

In that part of his charge to the jury in which the learned Judge dealt specifically with the fourth question, he did, I think, make it clear that the matter to be considered was whether, having regard to the lapse of time and the probability of error in the plaintiff's recollection, the defendant had reasonable grounds for believing that the plaintiff was not merely mistaken but had committed perjury. But he laid some emphasis upon the defendant's own mistakes of fact, a matter which to my mind was not of importance, and he did not enter into a detailed exposition of the considerations of fact which might affect the answer. His Honor had, however, already drawn attention to the different accounts of what the plaintiff had sworn in the County Court, and to many of the circumstances affecting the question of the plaintiff's innocence in fact, and to the matters by reference to which the date when the occupancy of the upper rooms ceased might be fixed. He had also stated some material considerations in dealing with the existence of the defendant's belief. No objection was taken to the direction in relation to the fourth question. The grounds of appeal to the Supreme Court are wide enough to cover an objection to its sufficiency, but it is not specifically referred to, and the reasons of the Judges in the Full Court in no way dealt with it. Again in the appeal to this Court it was not distinctly and specifically raised. The objection is to the adequacy of the treatment in the charge of facts and evidence, and does not relate to any misdirection in law. No doubt, it would have been more satisfactory if the learned Judge had entered upon

H. C. OF A. 1932. SHARP v. BIGGS. Dixon J.

a fuller discussion with the jury, but I do not think that even if at the proper time a further direction had been requested and refused, the deficiencies of the charge are so great as to require or justify a new trial of the issue. In any event, I do not think the defendant can at this stage obtain the benefit of the objection.

The ultimate inference, whether or not the facts of the case amount to a want of reasonable and probable cause, is for the Court, but it is for the jury to determine what are the facts of the case.

Reasonable and probable cause does not exist if the prosecutor does not at least believe that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted. Such cause may be absent although this belief exists if the materials of which the prosecutor is aware are not calculated to arouse it in the mind of a man of ordinary prudence and judgment. In some circumstances, the question whether the materials before the prosecutor sufficed for the purpose may be determined by considering what, if any, further steps a reasonable man would have taken to inform himself upon the subject before laying a charge. Where the facts are much in dispute, as in the present case, the difficulty must be great of explaining to a jury in advance what, of the possible combinations of circumstances which they may find, would in the Judge's opinion amount to reasonable and probable cause and what to an absence of it. "A Judge may leave the jury to find a general verdict, explaining to the jury what the disputed facts are, telling them that if they find the disputed facts in favour of one side or the other, his opinion as to reasonable and probable cause will differ accordingly, telling them what, in each alternative, his view will be, and enabling them to apply that statement with reference to the issue as to malice; that is a way which in a very simple kind of case may be adopted. But I think it necessary only to state as much as I have stated about it, to see that a very clear head and a very clear tongue will be required to conduct a complicated case to a general verdict in that way. Accordingly, Judges have been in the habit of adopting a different course whenever there are circumstances of complication" (per *Bowen* L.J. in *Abrath* v. *North Eastern Railway Co.* (1)). That course is to leave specific

(1) (1883) 11 Q.B.D., at p. 458.

questions to the jury. But these questions should be framed in such a way as not to transfer to the jury the determination of the ultimate issue which it is the province of the Court to decide. This necessity sometimes calls for a nice and difficult discrimination. In *Douglas* v. *Corbett* (1) *Coleridge* J. remarked that in cases of this nature "the conduct of the trial is always full of practical difficulty." The separation of the duty of the Judge and the functions of the jury, he said, was a rule which in theory is perfect; "but I believe no Judge has sat long without finding himself embarrassed in its application to the special cases before him" (2). The embarrassment is well illustrated by the charge of *Cave* J. in *Abrath's Case* (3). He asked the jury "Did the defendants take reasonable care to inform themselves of the true state of the case?" and directed them that a negative answer meant an absence of reasonable and probable cause. *Brett* M.R. said of it (4): "A summing-up in an action for malicious prosecution I have never read which I more admired." Yet in *Brown* v. *Hawkes* (5) *Cave* J. himself said: "I entertained some doubt whether it was right to put the question even in *Abrath* v. *North Eastern Railway Co.*, where I put it *ex majori cautela*, and it seems to me that, if such a question is to be put in every case, the result will be to transfer the decision of the question of what is reasonable and probable cause from the Judge to the jury, except when the Judge holds that there is an absence of such cause." And where there is no controversy as to what was the material upon which the accuser acted and none of it has been shown to be false, such a question ought not to be put because it does no more than commit to the jury a matter which ought to be decided by the Court (*Bradshaw* v. *Waterlow & Sons Ltd.* (6); *Taylor* v. *President &c. of the Shire of Eltham* (7)). Indeed, even where information relied upon by the prosecutor has turned out to be false, a negative answer to this question can seldom be decisive of the absence of reasonable and probable cause. But in some circumstances, the final conclusion upon this issue may be determined by

(1) (1856) 6 E. & B., at p. 514; 119 E.R., at p. 956.
(2) (1856) 6 E. & B., at pp. 514, 515; 119 E.R., at p. 956.
(3) (1883) 11 Q.B.D. 79, 440.
(4) (1883) 11 Q.B.D., at p. 449.
(5) (1891) 2 Q.B., at p. 721.
(6) (1915) 3 K.B. 527.
(7) (1922) V.L.R. 1; 43 A.L.T. 122.

H. C. OF A. 1932. SHARP v. BIGGS. Dixon J.

the existence, or non-existence, of reasonable grounds for a prosecutor's belief in the accused's guilt. In *Douglas* v. *Corbett* (1) the defendant had prosecuted the plaintiff upon a charge of sheep stealing. The defendant believed that a sheep in the plaintiff's possession was one of a number which had been stolen from him. The plaintiff claimed to have bought the sheep before the date of the defendant's loss. Upon the issue of reasonable and probable cause, *Bramwell* B. left to the jury the single question whether the defendant had reasonable ground for that belief, and, upon the jury answering that he had, decided that there was not an absence of reasonable and probable cause. Upon a rule for a new trial, *Coleridge* J. said (2):—"Here there are many facts not really in controversy; one of those, the Judge thought, was that the defendant really believed that the sheep, alleged to be stolen, was one of those he had lost. By itself that would not necessarily amount to reasonable and probable cause; he might believe this; but, if he came to that conclusion rashly and inconsiderately, he was not warranted in acting on his belief. But, if he had reasonable and probable cause for his belief, that belief may be sufficient, under some circumstances, to make out reasonable and probable cause. I by no means mean that a reasonable belief that goods were stolen is in itself reasonable and probable cause for a charge of felony against a person in possession of the goods; but the other facts may be such that this is the sole circumstance wanting to complete the reasonable and probable cause." *Crompton* J. said (3):—"Very often, it is extremely difficult, in such cases, to say which are the facts to be left to the jury. Here the Judge thought that many of the facts were not in dispute; but he doubted upon one; and as to that he took the opinion of the jury, who said there was reasonable ground for the defendant's belief that the sheep was his. That, alone, would not have been reasonable and probable cause for a charge of felony: in very many cases such reasonable belief might exist without any ground for such a charge; but we must look to the other circumstances." *Erle* J. dissented upon the ground that the answer to the question did not dispose of the issue of the existence of reasonable and probable cause.

(1) (1856) 6 E. & B. 511; 119 E.R. 955.

(2) (1856) 6 E. & B., at p. 515; 119 E.R., at p. 957.

(3) (1856) 6 E. & B., at p. 517; 119 E.R., at p. 957.

In *Hicks* v. *Faulkner* (1) the action for malicious prosecution arose out of a charge of perjury in swearing that the plaintiff delivered to the defendant a key. Upon motion for a new trial after verdict for the defendant, *Hawkins* J., in the course of his judgment, said (2):—"No doubt as an abstract proposition the plaintiff might have spoken the truth, and still the defendant for reasonable cause might have believed him to be guilty. So, on the other hand, the defendant might have spoken the truth as to the key, and yet have had no reason to suppose the plaintiff's oath to the contrary was other than the result of innocent forgetfulness." He proceeded (3) to define reasonable and probable cause, and said:—"There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused. The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, and the reasonableness of such last mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause."

In the present case upon the issue of reasonable and probable cause, disputed questions of fact were: What part of the evidence charged in the information had the accused actually given? to what extent did such evidence so given correspond with fact? in so far as it did not correspond with fact, did the defendant honestly believe it was wilfully and corruptly false? and, what facts did the defendant know and what ought he to have known affecting the reasonableness of that belief?

Perhaps, if these questions had been answered in detail, no more would have been required to enable the Judge to make the ultimate

(1) (1878) 8 Q.B.D. 167. (2) (1878) 8 Q.B.D., at p. 169.
(3) (1878) 8 Q.B.D., at p. 171.

H. C. OF A. 1932. SHARP v. BIGGS. Dixon J.

inference. The discussion in this Court has made it clear that it is unfortunate at least that separate questions were not directed to some of these matters. Indeed, if an express finding had been made that the plaintiff's evidence in the County Court did not include the statement charged in the information that the plaintiff had seen the defendant taking goods from the upper rooms three or four times a day up to 20th May 1928—a finding which may be thought to be involved in the jury's actual answers—the question would have arisen whether, inasmuch as that statement might require a separate assignment of perjury, reasonable and probable cause for the prosecution could exist. See *Reed* v. *Taylor* (1); *Ellis* v. *Abrahams* (2); *R.* v. *Prosser* (3); *Palmer* v. *Birmingham Manufacturing Co.* (4). Compare *Boaler* v. *Holder* (5); and compare *Delisser* v. *Towne* (6).

But the matter for our consideration is not whether the question ought to have been put, or whether some other questions, or some general direction, were more desirable, but whether, that having been the question put and answered, it enables the Court in all the circumstances of the particular case to perform its functions and pronounce upon the issue of reasonable and probable cause, or whether on account of its insufficiency, or its transferring some part of the Court's functions to the jury, it makes it necessary to direct a new trial.

In my opinion the finding, having regard to the general circumstances of the case, does leave the Court in a position to exercise for itself the function which the law commits to it. I think upon this finding there was an absence of reasonable cause.

The appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed. The facts have been stated with great particularity by other members of the Court. Upon these facts I think that the finding of *Wasley* A.J., that there was an absence of reasonable and probable cause for the prosecution, was correct. The finding of the learned Judge was unanimously affirmed by the Full Court. The only question

(1) (1812) 4 Taunt. 616; 128 E.R. 472.
(2) (1846) 8 Q.B. 709; 115 E.R. 1039.
(3) (*Circa* 1770), cited in 1 T.R., at p. 533; 99 E.R., at p. 1237.
(4) (1902) 18 T.L.R. 552.
(5) (1887) 3 T.L.R. 546; 51 J.P. 277.
(6) (1841) 1 Q.B. 333, at p. 339 and note (*b*); 113 E.R. 1159, at p. 1162.

argued in this appeal was whether there was an absence of reasonable and probable cause for the prosecution.

The answer which the jury gave to the second question does not in any way modify or affect the conclusive nature of the answer to the first question. The second answer does not suggest that if the respondent deposed to the occurrence of the events in the second question he was guilty of perjury. Indeed, there was some doubt whether the respondent gave such evidence; but, assuming that doubt to be resolved against him, the first answer entirely exculpates him and shows that the jury's view was that the plaintiff did not swear falsely or recklessly, but merely made a mistake. The nature of the controversy between the parties rendered it very desirable to have that issue of fact, contained in the second question, settled by the jury. Although an affirmative answer to the second question would have tended to the respondent's advantage on the question of the absence of reasonable and probable cause, yet the negative answer does not render it necessary to conclude, as was argued on behalf of the appellant, that there was not an absence of reasonable and probable cause for the prosecution. I agree in the view expressed by *Mann* J., and its application to the present case. His Honor said: "There may be many statements which, if untruly made, are only consistent with wilful perjury, but it is also clear to everyone, I think, that there are innumerable controversies in which two parties honestly believe they are saying what is true and each thinks the other party is saying what is untrue—in which it would be dangerous in the extreme to suggest that the moment you arrive at that state of things each is entitled, with impunity, to launch a prosecution for perjury against the other." This present case is one of such controversies. Assuming that the respondent did swear that the particular events which the jury, by its answer to the second question negatived, did occur in those months, I do not think that it should have been concluded that reasonable and probable cause for the prosecution existed. The test applied by *Macfarlan* J. in his judgment in the Supreme Court was, in my opinion, correct. His Honor said: "In my opinion it has been established that a reasonable man could not come to the conclusion that the plaintiff had not made a mistake."

H. C. OF A. 1932. SHARP v. BIGGS. McTiernan J.

It is true of the third question, as of the second, that the affirmative answer to it is not as advantageous to the appellant as a negative answer would have been to the respondent. But the manner in which the case was fought rendered it very desirable to have the issue of fact, mentioned in that question, decided by the jury. Again the answer to this question did not preclude the learned Judge from deciding in favour of the respondent on the question of law, whether there was an absence of reasonable and probable cause for the prosecution. The peculiar traits of the appellant, which are disclosed by the evidence, would suggest that though he may have had a sincere belief that the respondent committed perjury, his belief may not have been based on reasonable grounds. It is quite proper to obtain the assistance of the jury in determining the question of fact contained in the fourth question. The answer to that question established part of the premises for the decision of the learned Judge of the question of law, whether there was an absence of reasonable and probable cause. In submitting this question of fact, the learned Judge did not, in effect, submit to the jury the question of law, as to reasonable and probable cause, which is within his own province. The inquiry whether the defendant's belief—honest though it may have been—was based on reasonable grounds, is, in my opinion, quite different from the question whether there was an absence of reasonable and probable cause for prosecuting the plaintiff for perjury. The inquiry elicited a fact which, in the circumstances of this case, it was material for the learned Judge to know in order to arrive at a conclusion on the question as to reasonable and probable cause. The fact so elicited was part of the evidence upon which the learned Judge decided that the onus which rested on the respondent of proving that there was an absence of reasonable and probable cause for the prosecution was discharged.

I should add that, in my opinion, there was evidence to support the answer which the jury gave to each question.

Appeal dismissed with costs.

Solicitor for the appellant, *P. J. Ridgeway.*

Solicitors for the respondent, *Septimus A. Ralph & Son.*

H. D. W.