[HIGH COURT OF AUSTRALIA.]

COMMONWEALTH LIFE ASSURANCE SOCIETY LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

SMITH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1937, *Aug.* 9, 10, 13, 16.

MELBOURNE, 1938, *Feb.* 14.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Malicious Prosecution—Essentials of action—Innocence of plaintiff—Evidence—Admissibility—Damages—Termination of criminal proceedings—Refusal by Attorney-General to file indictment—Nolle prosequi.

The plaintiff brought an action for malicious prosecution arising out of a charge of conspiracy against him, in respect of which charge the Attorney-General for New South Wales, after the plaintiff had been committed for trial, had refused to file an indictment.

Held that the guilt or innocence of the plaintiff was not an issue going to his cause of action in malicious prosecution.

Davis v. *Gell*, (1924) 35 C.L.R. 275, in which the proceedings were determined by the entry of a *nolle prosequi*, distinguished.

Held, further, that the issue of guilt or innocence had no real relevance to damages.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

In an action for malicious prosecution brought in September 1933, in the Supreme Court of New South Wales, by Sydney Smith against the Commonwealth Life Assurance Society Ltd., the plaintiff in his

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declaration alleged that the defendant falsely and maliciously and without reasonable or probable cause prosecuted the plaintiff upon a charge of conspiracy with three other persons to cheat and defraud divers shareholders and policy holders of the Commonwealth Life Assurance (Amalgamated) Association and caused him to be arrested, taken before a magistrate and imprisoned until he obtained bail. The plaintiff further alleged in his declaration that he was committed for trial and thereafter and before any trial the Attorney-General for New South Wales declined to proceed further against the plaintiff in respect of the charge and entered a *nolle prosequi* in respect thereof whereby the prosecution was determined. The plaintiff claimed as damages the sum of £10,000.

The defendant pleaded (*a*) that it was not guilty, and (*b*) that the prosecution was not determined as alleged.

The circumstances out of which the prosecution arose are set forth in the judgments delivered in *Commonwealth Life Assurance Society Ltd.* v. *Brain* (1).

On 31st October 1934, after a trial which lasted thirty-one days, the jury returned a verdict for the plaintiff in the sum of £5,000. This verdict was set aside by the Full Court of the Supreme Court and a new trial was ordered.

At the second trial of the action the plaintiff insisted that he was entitled to lead evidence to establish affirmatively that he was innocent of the conspiracy with which he had been charged, and, for that purpose, to prove many matters, such as what he had been informed or believed and what circumstances or alleged circumstances actuated his conduct. The defendant objected and maintained that the question of the actual guilt or innocence of the plaintiff formed no part of the issues before the jury. The trial judge, on the authority of the judgments in *Davis* v. *Gell* (2), admitted the evidence.

After a hearing which occupied seventeen days, the jury, at the second trial, returned a verdict in favour of the plaintiff and awarded him the sum of £5,000 as damages.

A motion by the defendant for a new trial was dismissed by the Full Court of the Supreme Court.

(1) (1935) 53 C.L.R. 343.

(2) (1924) 35 C.L.R. 275.

From that decision the defendant appealed to the High Court on the grounds: (*a*) that the trial judge misdirected the jury; (*b*) that certain inadmissible evidence was wrongly admitted and certain admissible evidence was wrongly rejected by the trial judge; and (*c*) that the damages awarded were excessive.

Other material facts appear in the judgments hereunder.

Dovey K.C. (with him *Badham*), for the appellant. In an action for malicious prosecution the innocence of the plaintiff is not an issue for determination by the jury (*Balbhaddar Singh* v. *Badri Sah* (1)). The decision in *Davis* v. *Gell* (2) to the contrary is no longer good law. All the evidence tendered by the respondent on that issue was inadmissible and ought to have been rejected. That evidence was intended to prejudice and must have prejudiced the appellant in the minds of the jury; it was not admissible on any issue properly before the jury. The question of innocence or guilt was not litigated in *Abrath* v. *North Eastern Railway Co.* (3). The appellant had a genuine honest belief in the probable guilt of the respondent (*Pollock* on *Torts*, 13th ed. (1929), p. 322; *Clerk and Lindsell* on *Torts*, 8th ed. (1929), pp. 587, 588; *Salmond* on *Torts*, 8th ed. (1934), pp. 648, 649, 655). Evidence consisting of correspondence, statements and depositions relating to the impropriety of the respondent and other relevant persons, and tendered by the appellant on the issues of reasonable and probable cause and malice, was wrongly rejected by the trial judge (*Walker* v. *South Eastern Railway Co.* (4); *Weston* v. *Beeman* (5); *Roscoe's Evidence in Civil Actions*, 19th ed. (1922), p. 762). On those issues the appellant was entitled to put before the jury all the material in its possession and used by it in and about the prosecution. In all the circumstances the *quantum* of damages awarded to the respondent was inordinately excessive.

Shand (with him *Jenkyn*), for the respondent. In an action for malicious prosecution the innocence of the plaintiff is an issue which must be determined by the jury. If the plaintiff was acquitted in the proceedings complained of the matter is determined between the parties by estoppel (*Davis* v. *Gell* (2)). If those proceedings

(1) (1926) The Times Weekly Edition, p. 260.
(2) (1924) 35 C.L.R. 275.
(3) (1883) 11 Q.B.D. 440.
(4) (1870) L.R. 5 C.P. 640, at p. 644.
(5) (1857) 27 L.J. Ex. 57, at p. 60.

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did not result in the acquittal of the plaintiff it must appear that he was innocent in order to show either that the prosecution was groundless or that no successful prosecution could ever be brought against the plaintiff in respect of the charge made (*Waterer* v. *Freeman* (1); *Parker* v. *Langly* (2); *Jones* v. *Gwynn* (3); *Jones* v. *Givin* (4); *Farmer* v. *Darling* (5); *Fisher* v. *Bristow* (6); *Sutton* v. *Johnstone* (7); *Carnan* v. *Truman* (8); *Heslop* v. *Chapman* (9); *Weston* v. *Beeman* (10); *Steward* v. *Gromett* (11); *Johnson* v. *Emerson* (12); *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (13); *Abrath* v. *North Eastern Railway Co.* (14); *Bank of New South Wales* v. *Piper* (15); *Cox* v. *English, Scottish and Australian Bank Ltd.* (16); *Crowley* v. *Glissan* [*No.* 2] (17); *Gaya Prasad* v. *Bhagat Singh* (18); *Bullen and Leake, Precedents of Pleadings*, 3rd ed. (1868), p. 304).

[DIXON J. referred to *Varawa* v. *Howard Smith & Co. Ltd.* (19).

[EVATT J. referred to *Stone* v. *Walter* (20).]

A guilty plaintiff has succeeded in an action for malicious prosecution (*Williams* v. *Banks* (21)). Guilt is an issue on the ground of reasonable and probable cause to show real cause (*Davis* v. *Gell* (22); *Heslop* v. *Chapman* (23); *Farmer* v. *Darling* (5); *Johnson* v. *Emerson* (24); *Bank of New South Wales* v. *Piper* (15)). A defendant cannot rely on the depositions of witnesses in his favour, but must call witnesses (*Jackson* v. *Bull and Alison* (25)). Evidence of innocence is admissible on the question of damages upon the footing that it may be presumed that a person who is innocent of the offence charged suffers more greatly than a person who is guilty

(1) (1617) Hob. 266; 80 E.R. 412.
(2) (1714) 10 Mod. 209; 88 E.R. 697.
(3) (1714) 10 Mod. 214; 88 E.R. 699.
(4) (1714) Gilb. 185; 93 E.R. 300.
(5) (1766) 4 Burr. 1971; 98 E.R. 27.
(6) (1779) 1 Doug. 215; 99 E.R. 140.
(7) (1786) 1 T.R. 493, at pp. 518, 544; 99 E.R. 1215, at pp. 1229, 1243; (1787) 1 E.R. 427.
(8) (1788) 1 Bro. Parl. Cas. 101; 1 E.R. 444.
(9) (1853) 23 L.J. Q.B. 49, at p. 52.
(10) (1857) 27 L.J. Ex., at p. 59.
(11) (1859) 7 C.B. N.S. 191, at pp. 193, 198; 141 E.R. 788, at pp. 789, 791.
(12) (1871) L.R. 6 Ex. 329, at pp. 344, 360, 361, 372, 373, 381, 382.
(13) (1876) L.R. 4 Ind. App. 23, at p. 38; 2 App. Cas. 186, at p. 201.
(14) (1883) 11 Q.B.D., at p. 445.
(15) (1897) A.C. 383.
(16) (1905) A.C. 168, at p. 170.
(17) (1905) 2 C.L.R. 744.
(18) (1908) L.R. 35 Ind. App., at p. 195.
(19) (1911) 13 C.L.R. 35, at p. 82.
(20) (1610) Moo. K.B. 813; 72 E.R. 923.
(21) (1859) 1 F. & F. 557; 175 E.R. 851.
(22) (1924) 35 C.L.R., at pp. 288, 292.
(23) (1853) 23 L.J. Q.B. 49.
(24) (1871) L.R. 6 Ex., at pp. 360, 373.
(25) (1838) 2 Mood. & R. 176; 174 E.R. 254.

(*Kohan* v. *Stanbridge* (1); *Davis* v. *Gell* (2)). The decision in *Balbhaddar Singh* v. *Badri Sah* (3) is to the extent only that the lower court wrongly directed itself that the plaintiff had to prove beyond reasonable doubt his innocence. The statement in that case which suggests that the innocence of the plaintiff is not an issue is mere *obiter dictum*; it was not part of the *ratio decidendi* of the case (*Attorney-General* v. *Windsor* (*Dean and Canons of*) (4); *Slack* v. *Leeds Industrial Co-operative Society Ltd.* (5); *Leeds Industrial Co-operative Society Ltd.* v. *Slack* (6); *Harries* v. *Crawfurd* (7)). There has not been any miscarriage of justice so far as the appellant is concerned sufficient to justify the granting of a new trial. The damages awarded by the jury are not, in all the circumstances, excessive.

Dovey K.C., in reply. The matters put in issue in an action for malicious prosecution by a plea of not guilty are stated in *Bullen and Leake, Precedents of Pleadings*, 3rd ed. (1868), p. 750; see also *Watkins* v. *Lee* (8). The elements necessary to be proved in an action for malicious prosecution are set forth in *Jenk's Digest of English Civil Law*, 2nd. ed. (1921), vol. I., pp. 489, 491. All that reasonable and probable cause means is: good reason for an action which would commend itself to a reasonable man.

Cur. adv. vult.

1938, Feb. 14.

The following written judgments were delivered:—

RICH, DIXON, EVATT AND MCTIERNAN JJ. Upon the second trial of the action out of which this appeal arises the plaintiff obtained a verdict for £5,000 damages. The defendant company moved for a new trial upon a great number of grounds, but the Supreme Court refused the application. From that decision the defendant now appeals to this court.

(1) (1916) 16 S.R. (N.S.W.) 576; 33 W.N. (N.S.W.) 167.
(2) (1924) 35 C.L.R., at pp. 279, 281-285, 287, 292, 297.
(3) (1926) The Times Weekly Edition, p. 260.
(4) (1860) 8 H.L.C. 369, at pp. 391, 392; 11 E.R. 472, at p. 481.
(5) (1923) 1 Ch. 431, at pp. 449, 450.
(6) (1924) A.C. 851, at p. 864.
(7) (1919) A.C. 717.
(8) (1839) 5 M. & W. 270; 151 E.R. 115.

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The action was for malicious prosecution. An information had been laid against the plaintiff and three others for conspiracy to defraud. They were committed for trial by the magistrate, but the Attorney-General decided that no indictment should be filed. The circumstances out of which the prosecutions arose are very fully stated in the course of the judgments delivered in this court in *Commonwealth Life Assurance Society Ltd.* v. *Brain* (1), where a verdict was allowed to stand awarding damages for malicious prosecution to another of the four persons prosecuted for conspiracy.

At the trial of the action under consideration in this appeal the plaintiff insisted that he was entitled to lead evidence to establish affirmatively that he was innocent of the conspiracy with which he had been charged and for that purpose to prove many matters, such as what he had been informed or believed and what circumstances or alleged circumstances actuated his conduct, all of which would have been inadmissible if the issue of his guilt or innocence were out of the case. The defendant objected, and maintained that the question of the actual guilt or innocence of the plaintiff formed no part of the issues before the jury. The trial judge, on the authority of the judgments given in this court in *Davis* v. *Gell* (2), admitted the evidence. There can, we think, be no doubt that, if this course was erroneous, then, having regard to the nature of the evidence so admitted, the defendant is entitled to a new trial. The contention that no substantial wrong or miscarriage would be occasioned by the error appears to us to be quite untenable.

The first question for consideration, therefore, is whether the plaintiff's guilt or innocence of the charge was in issue. The affirmative of this question is supported on the part of the plaintiff on the ground that his innocence is an element essential to his cause of action and also a matter going to damages. These are, of course, separate reasons for throwing open before the jury in the civil proceeding the question with which the criminal proceeding was concerned. We shall deal first with the question whether the plaintiff's guilt or innocence is an issue going to the cause of action.

In the text-books which treat of the action commonly called malicious prosecution there is not to be found, we believe, any statement to

(1) (1935) 53 C.L.R. 343.

(2) (1924) 35 C.L.R. 275.

the effect that it is incumbent upon the plaintiff in any circumstances to prove his innocence of the charges preferred against him, or any statement to the effect that it is open to a defendant to defeat the action by proof of the plaintiff's actual guilt. But in the often-quoted passage from the *ex tempore* judgment of *Bowen* L.J. in *Abrath* v. *North Eastern Railway Co.* (1), in which the elements or conditions constituting the cause of action in malicious prosecution are described, the first condition is stated thus : " 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." In *Davis* v. *Gell* (2), a direction had been given to the jury that they should assume the plaintiff to be innocent. There had been no verdict of acquittal and the criminal proceedings had been brought to an end, or perhaps more accurately to a standstill, by the entry of a *nolle prosequi* during the trial. On appeal to the Supreme Court of Victoria, the defendant contended that so far from this direction being correct, the burden of proving his actual innocence lay upon the plaintiff ; and the defendant relied upon the words of *Bowen* L.J. The Full Court felt that they must adopt that and similar expressions of opinion to the same effect to be found in several cases to which they referred. On the particular facts of the case, however, the Full Court considered that the plaintiff was entitled to retain his verdict. An appeal to this court by the defendant was heard by *Isaacs*, *Gavan Duffy* and *Starke* JJ., who unanimously ordered a new trial on the ground that the direction to the jury was erroneous. After an elaborate examination of the decided cases by *Isaacs* J. and by *Starke* J. those learned judges arrived at conclusions which appear to us to be substantially the same and in which, as we understand his judgment, *Gavan Duffy* J. concurred. Their Honours considered that in every action of malicious prosecution the plaintiff must show that the charge was " unfounded," and that meant that he must show his innocence. But if he had been tried and acquitted, this would establish his innocence for the purpose of an action for malicious prosecution. It would also show that the criminal proceedings had terminated and thus satisfy another requirement

(1) (1883) 11 Q.B.D., at p. 455. (2) (1924) V.L.R. 315 ; 35 C.L.R. 275.

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indispensable to the maintenance of the civil action. That requirement might be satisfied by other forms of termination short of acquittal, but they would not establish innocence, at all events conclusively. *Starke* J. stated the position as follows :—" He may show, for instance, that the proceedings terminated in his favour by a *nolle prosequi*, or by the *ignoramus* of a grand jury, or by the refusal of a justice to commit for trial, or by some want of jurisdiction in the court, or some technical defect in the indictment or information, and so forth. Proof of these facts would show that the proceedings terminated in favour of the plaintiff, but they do not establish the innocence of the plaintiff, and the burden is upon him in the first instance to make out his case. It is unnecessary, and indeed undesirable, in this case, to discuss what (if any) presumptions in favour of innocence, or other evidence would satisfy the burden " (1).

In expressing the view that the dismissal by a magistrate of an information for an indictable offence or the ignoring of a bill of indictment by a grand jury was insufficient to exclude or conclude the question of the plaintiff's guilt or innocence of the charge, the court went beyond the particular case which, as we have already said, was one where after the plaintiff had been put on his trial a *nolle prosequi* was entered on behalf of the Crown. Now the question whether a *nolle prosequi* is a sufficient termination of the criminal proceedings to enable the accused to maintain an action of malicious prosecution, assuming that he can establish the other elements in the cause of action, is one which has never been settled by English authority. A *nolle prosequi* does no more than bring the trial to an end. The accused may again be indicted or fresh process may be awarded in the same indictment and the prisoner again put on his trial. In *Goddard* v. *Smith* (2), of which there is a number of reports, " the court held that the evidence did not maintain the declaration because a *nolle prosequi* does not, as an acquittal does, discharge the crime, but only puts the defendant without day ; but they held, that if Goddard had pleaded not guilty, and the Attorney-General had con-

(1) (1924) 35 C.L.R., at p. 297.
(2) (1704) 1 Salk. 21 ; 2 Salk. 456 and 767 (record) ; 3 Salk. 245 ; 91 E.R. 20, 394, 632, 803 ; 6 Mod. 261 ; 87 E.R. 1008 ; 11 Mod. 56 ; 88 E.R. 882 ; Holt 497 ; 90 E.R. 1173.

fessed the plea, that would have maintained the declaration" (*Leach's* note (1)). From that time there has been some uncertainty as to the sufficiency of a *nolle prosequi*. Professor *Winfield*, in his *Text Book of the Law of Tort* (1937), at pp. 647, 648, deals with the whole matter thus :—" But if proceedings did end in his favour, it is of no moment how they did so, whether by a verdict of acquittal, or by discontinuance of the prosecution by leave of the Court, or by quashing of the indictment for a defect in it, or because the proceedings were *coram non judice*, or by nonsuit. The effect of a *nolle prosequi* (staying by the Attorney-General of proceedings on an indictment) is open to question. An old case indicates that it is not a sufficient ending of the prosecution because it still leaves the accused liable to be indicted afresh on the same charge. But this seems inconsistent with the broad interpretation put upon ' favourable termination of the prosecution ' which signifies, not that the accused has been acquitted, but that he has not been convicted." In a note he adds that in America the balance of the decisions is to the effect that *nolle prosequi* is a sufficient ending of the prosecution and refers to *Gilchrist* v. *Gardner* (2), where the same decision has been given in New South Wales.

The development by an action on the case in the nature of conspiracy of the remedy for malicious prosecution was perhaps somewhat late and relatively slow. The elements of the cause of action did not become definite and certain before the nineteenth century and it is evident that there has survived to the present time a difficulty in the application of principles, otherwise settled, to the special case of proceedings brought to an end by *nolle prosequi*. The view adopted in *Davis* v. *Gell* (3) covered that difficulty and solved it by leaving the question of innocence or guilt open for inquiry in the civil proceedings. But the opinion expressed by the members of the court that proceedings which ended in favour of the accused by a refusal of the magistrates to commit fell under the same rule was unnecessary to the decision, and, in view of the unreported case in the Privy Council, *Balbhaddar Singh* v. *Badri Sah* (No. 66 of 1924), it cannot now be followed. We have been furnished

(1) 11 Mod. 56 ; 88 E.R. 882.
(2) (1891) 12 L.R. (N.S.W.) 184 ; 8 W.N. (N.S.W.) 21.
(3) (1924) 35 C.L.R. 275.

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with a full copy of the reasons of the Privy Council in that case, which were given by Lord *Dunedin*, and also copies of the printed cases filed by the respective parties. There is an abbreviated report in the *Times* newspaper of 17th March 1926 which we mentioned in *Brain's Case* (1). The facts material to the point under discussion were that a warrant having been issued for the apprehension of the appellants upon a charge of murder they voluntarily appeared before a magistrate, who discharged them on the ground that there was no sufficient evidence against them. Afterwards, doubts having arisen as to the correctness of this, they were again summoned and taken before a district judge, who again discharged them. They had been apprehended as the result of a story told by one of the respondents who was brought by the other respondent to the police station for the purpose. The story was that they had committed the alleged murder with the assistance of the informant and others. The appellants alleged that the story was a concoction, in which the informant had been tutored by the other respondent. The suit for malicious prosecution was heard by a subordinate judge, who found for the plaintiffs, that is, the appellants in the Privy Council. Lord *Dunedin's* judgment then sets out what followed, and states the view of their Lordships upon the question involved. He says :—" The learned subordinate judge delivered an exceedingly careful judgment, and came to the conclusion that the plaintiffs, now appellants, had made out their case. On appeal to the Court of the Judicial Commissioner of Oudh, the Judicial Commissioners reversed that judgment. Unfortunately, however, they took a completely wrong view of the law of the case. In their judgment they put the matter thus :—' In an action for malicious prosecution the plaintiff has to prove :—(1) That he was prosecuted by the defendant. (2) That he was innocent of the charge upon which he was tried. (3) That the prosecution was instituted against him without any reasonable and probable cause. (4) That it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect.' Proposition (2), as stated, is quite erroneous. It should be ' That the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating.' This phraseology

(1) (1935) 53 C.L.R., at pp. 350, 379.

may be found in the judgment of *Montague Smith* J. in *Basébé* v. *Matthews* (1). But the practice was in accordance with these words long before that case. Under the old forms of pleading a declaration, if the law were really as the judges in this case defined it, would in all cases where there had not been an actual acquittal have been bad if there were not added the statement that the plaintiff was innocent of the crime charged. The reports may be searched in vain for any declaration so found bad, though there were many cases where prosecutions had terminated without acquittal. There was controversy as to what terminated proceedings, as, e.g., whether a *nolle prosequi* of the Attorney-General was a termination. But at any rate it was quite settled that a prosecution comes to an end when a magistrate declines to commit (*Delegal* v. *Highley* (2) ; *Weston* v. *Beeman* (3) ; *Huntley* v. *Simson* (4)). Accordingly in *Bullen and Leake's Precedents*, 8th ed. (1924), p. 434, the regular form is given for an action for malicious prosecution when the plaintiff has been arrested and brought before a magistrate. After narrating the arrest and the charge, it continues : ' The said justice having heard the said charge dismissed the same and discharged the plaintiff out of custody, whereupon the said proceedings terminated.' In the present case it was sufficient for the appellants to prove, as they have done, that the criminal proceedings threatened on account of the disclosure contained in the confessions of Raghunath and Teja ended so far as they were concerned when the sessions judge finally refused to commit them for trial. That opened the way for the proof of the next proposition that the respondents had instigated the proceedings maliciously and without probable cause. The result of the view of the law taken by the judges was that the evidence was gone into with a view of saying whether the appellants had proved their innocence, and finally the learned judges held that ' the plaintiffs have failed to prove their innocence of the crime '."

It is to be noticed that Lord *Dunedin* adverts to the case of a *nolle prosequi* as possibly unsettled, but treats that of discharge by a magistrate as quite covered by authority. The ignoring of a bill

(1) (1867) L.R. 2 C.P. 684, at p. 688.
(2) (1837) 3 Bing. N.C. 950 ; 132 E.R. 677.
(3) (1857) 27 L.J. Ex. 57.
(4) (1857) 2 H. & N. 600 ; 157 E.R. 247.

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of indictment was covered by authority at a very early date, and it is quite clear that it is a termination of the prosecution in favour of the accused. It is a termination on the merits, and we can see no reason why for the purposes of malicious prosecution it should operate less in favour of the accused than acquittal by a petit jury. It is true that after a bill had been ignored by a grand jury, another indictment might be preferred against the accused; he could not plead *autrefois acquit*. But the reason why an acquittal or conviction should conclude for purposes of malicious prosecution the issue of guilt or innocence is not and could not be found in the principles governing the pleas of *autrefois convict* or *acquit*, which are but applications of the general doctrine of estoppel by judicial decision. The Crown, not the prosecutor, is the party to a criminal inquest (*Petrie* v. *Nuttall* (1)), and for that reason the acquittal could not give rise to an issue of estoppel in a subsequent action of malicious prosecution. *Starke* J., in *Davis* v. *Gell* (2), did mention as a possibility the view that the parties to the action of malicious prosecution were, in substance, the parties to the criminal proceedings, and said that it might be that the conclusion that acquittal was necessary to establish innocence could be supported on this ground. But we do not think that such a view is consistent with the principles governing estoppel by judicial decision, and his Honour mentioned it only to put it on one side in favour of the ground upon which he said the conclusion might be more properly rested. The reason he proceeded to give for treating an acquittal alone as enough to exclude the issue of guilt is the broad ground of the peculiar and exceptional character of the action for malicious prosecution and considerations of public policy; a policy which could not allow a criminal prosecution so terminating to be tried over again upon its merits. But, in substance, dismissal by a magistrate or the refusal by a grand jury to find a true bill ought not to receive less respect as a decision given in due course of law that the accused is not guilty, which in criminal proceedings never means more than that from the evidence that is the proper conclusion. The reason of the rule that the criminal proceedings must have terminated in the plaintiff's favour has been

(1) (1856) 11 Ex. 569; 156 E.R. 957.

(2) (1924) 35 C.L.R. 275.

found in three different considerations. Each of these explanations can be found repeatedly stated in the decided cases.

Sometimes it is put upon the ground that otherwise the propriety of a conviction for crime might be drawn in question collaterally. Thus, in *Basébé* v. *Matthews* (1) *Byles* J. says :—" I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action of malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits."

Sometimes it is said that it is an example of a general rule which prevents imputations in one proceeding against the justice of another proceeding already pending or of a judicial determination still standing. This is the ground given by *Willes* J. in *Gilding* v. *Eyre* (2) :—" It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination, or other final event of the suit in the regular course of it. That is the reason given in the cases which established the doctrine, that, in actions for a malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because want of probable cause cannot otherwise be properly alleged." According to this view the termination of the proceedings is a condition without which an absence of reasonable and probable cause cannot be supposed. But it includes also a principle the policy of which constitutes the first reason, the principle that as long as a conviction stands no one against whom it is producible shall be permitted to aver against it (See per *Collins* M.R., *Bynoe* v. *Bank of England* (3)).

The third reason given is that from which the conclusion in *Davis* v. *Gell* (4) was deduced. It is stated in *Johnson* v. *Emerson* (5) by *Cleasby* B. in formulating, as *Bowen* L.J. did afterwards, the elements in the cause of action in malicious prosecution. He says, in stating what things must concur to render the prosecutor liable to an action : " First, if the proceeding be really without foundation, and this

(1) (1867) L.R. 2 C.P., at p. 687.
(2) (1861) 10 C.B. N.S. 592, at p. 604 ; 142 E.R. 584, at p. 589.
(3) (1902) 1 K.B. 467, at p. 470.
(4) (1924) 35 C.L.R. 275.
(5) (1871) L.R. 6 Ex. 329, at p. 344.

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must be evidenced by the proceedings having finally terminated in favour of the plaintiff, whether the proceedings be in bankruptcy or by indictment."

These three explanations of the requirement are, of course, by no means inconsistent; indeed it may be said that they are not completely distinct from any other. But they are reasons for or explanations of a settled rule. They do not affect the nature and application of the rule itself and they are not principles having an independent and further operation in imposing some additional condition as a necessary element in the cause of action for malicious prosecution.

Before the decision in *Davis* v. *Gell* (1) no one appears to have supposed that, where the prosecution broke down before the magistrate or the grand jury, the accused has a less favourable position as plaintiff in a subsequent action of malicious prosecution than if he had been put upon his trial and acquitted. Lord *Dunedin* speaks of the absence from the precedent in the eighth edition (1924) of *Bullen and Leake, Precedents of Pleadings,* of any allegation of innocence though the termination of the prosecution was the refusal of the magistrate to commit. He might have added a reference to the count in *Huntley* v. *Simson* (2), to *Venafra* v. *Johnson* (3), where there was a committal but no indictment preferred, to the precedents in *Chitty's Pleadings*, 7th ed. (1844), vol. II., pp. 441 et seq., and that in *Bullen and Leake, Precedents of Pleadings*, 2nd ed. (1863), p. 307; 3rd ed. (1868), p. 355. In none of these is it alleged that the prosecution ended in a verdict of acquittal, and in none of them is the plaintiff's innocence of the charge alleged.

The older forms of pleadings in use before the reforms made by the *Regulæ Generales* of Hilary Term 4 Will. IV. alleged as matter of inducement that the plaintiff was a good honest just and faithful subject of the kingdom and as such hath always behaved and conducted himself and hath not ever been guilty or until the time of the committing the several grievances by the defendant in the declaration afterwards mentioned been suspected of having been guilty of felony or of any other such crime. But, according to *Joseph Chitty*,

(1) (1924) 35 C.L.R. 275.
(2) (1857) 2 H. & N. 600; 157 E.R. 247.
(3) (1833) 10 Bing. 301; 131 E.R. 920.

ibid., note *r*, this inducement was not traversable, and the declaration was sufficient although it was omitted.

Weight too should be given to the silence of the text-writers. From *Buller's Nisi Prius*, 4th ed. (1785), which perhaps contains one of the earliest attempts to collect the law upon the action upon the case in the nature of conspiracy, through *Joseph Chitty's Criminal Law* (1816), vol. I., pp. 835 et seq., where there is a full account of malicious prosecution, the notes to *Williams Saunders*, vol. I., p. 229, 5th ed. (1845) by *Patteson* J. and *E. V. Williams* J., up to the most recent works, Professor *Stallybrass'* edition of *Salmond on Torts*, 8th ed. (1934), pp. 649 et seq., and Professor *Winfield's Text Book of the Law of Tort* (1937), pp. 643 et seq., and his two previous works on *The History of Conspiracy and Abuse of Legal Procedure* (1921), pp. 118 et seq., and *The Present Law of Abuse of Legal Procedure*, pp. 174 et seq., no trace of such a requirement can be found. None of these writers appears to have supposed that the question of guilt or innocence was ever at issue in an action of malicious prosecution.

In *Herbert Stephen's Malicious Prosecution* (1884), at p. 107, he refers in a note to the language employed by *Bowen* L.J. in *Abrath's Case* (1), and says that he knows of no other authority for the proposition that guilt or innocence is in issue. In the article by Mr. *Arthian Davies* in *Halsbury's Laws of England*, 2nd ed., vol. 22, pp. 10 et seq., the learned author refers in a note to the statement of *Bowen* L.J. and the cases incorporating it and places against it other authorities to the contrary. As *Isaacs* J. explains in *Davis* v. *Gell* (2), *Bowen* L.J. did not mean that innocence must be proved and acquittal also. He meant that a decision in favour of the accused must be proved, which decision thus established innocence. When he said (3) that the plaintiff must prove first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made, he used words which cover discharge by a magistrate, the ignoring of a bill of indictment and a judgment of acquittal after a verdict of not guilty. He appears to us to have meant no more than is meant by the statement of *Byles* J. in *Basébé* v. *Matthews* (4) which we have quoted. What *Bowen* L.J. said has,

(1) (1883) 11 Q.B.D. 440.
(2) (1924) 35 C.L.R., at p. 293.
(3) (1883) 11 Q.B.D., at p. 455.
(4) (1867) L.R. 2 C.P. 684.

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however, been understood in the Court of Appeal of Saskatchewan as meaning that the issue of guilt is always open (*Meier* v. *Elder* (1)). After citing the passage and the cases in which it has been repeated with approval, *Turgeon* J.A., delivering the judgment of the court, says: "It results from all the authorities to which I have referred that the question of the plaintiff's innocence or guilt is still open upon the trial of the action of malicious prosecution, notwithstanding his acquittal in the criminal proceedings." This, in our opinion, is an error. It does not represent any general view held in Canada. For in *Jewhurst* v. *United Cigar Stores Ltd.* (2), *Meredith* C.J.O. gives the usual list of things for the jury's determination in malicious prosecution, making no mention of guilt and says that these *only* are what the jury must determine. Unless the termination of the criminal proceedings has been by *nolle prosequi*, a case which is covered by the decision of *Davis* v. *Gell* (3), the cause of action in malicious prosecution does not depend upon the actual innocence of the plaintiff. The plaintiff must prove that the prosecution terminated in his favour. He must prove that there was no reasonable and probable cause for the prosecution. But he need not prove that in truth he was innocent of the charge, and it is not open to the defendant to attempt to prove as an answer to the action that in truth he was guilty, notwithstanding the termination of the criminal proceedings in his favour. In proving the existence of reasonable and probable cause, the defendant is confined to information of which he was aware at the time of the prosecution. He cannot justify a prosecution that failed by showing that facts of which he did not know made it reasonable (*Delegal* v. *Highley* (4); *Turner* v. *Ambler* (5)). In the course of proving facts on which he based the prosecution, the defendant may sometimes succeed in raising a doubt of the plaintiff's innocence. When this happens an absence of reasonable and probable cause is hardly likely to be found. But it would be surprising if a defendant could go into the guilt or innocence of the plaintiff as a separate issue, though on the issue of reasonable and probable cause he is not permitted to prove facts

(1) (1931) 1 D.L.R., at p. 554.
(2) (1919) 49 D.L.R. 649, at p. 654.
(3) (1924) 35 C.L.R. 275.
(4) (1837) 3 Bing. N.C. 950; 132 E.R. 677.
(5) (1847) 10 Q.B. 252; 116 E.R. 98.

which he did not know at the time of the prosecution even when the facts amount to the highest degree of objective cause for the prosecution, namely, proof of the real guilt of the accused.

Except in the case of a *nolle prosequi* covered by the decision in *Davis* v. *Gell* (1), we are of opinion that the guilt or innocence of the plaintiff is not an issue going to the cause of action in malicious prosecution.

The present case is not one where the proceedings were terminated by the entry of a *nolle prosequi*. They ended by the refusal of the Attorney-General to file an indictment. Under the law of New South Wales there is no grand jury, and the Attorney-General discharges a duty analogous to or replacing that which, under the common law, was performed by a grand jury. See sec. 5 of 9 Geo. IV. c. 83; *Crimes Act* 1900, sec. 572, and *Justices Act* 1902-1931 (N.S.W.), secs. 39, 41 (6) and 42, and *R.* v. *McKaye* (2), to which *Rich* J. has referred us. When an accused person is committed for trial, it is for the Attorney-General to consider whether the accused should be put on his trial and for what precise offence, and this he does by filing or refusing to file an indictment. This is an entirely different function from that of entering a *nolle prosequi* upon an indictment after it has been filed, which does no more than *non. pros.* the indictment. The decision in *Davis* v. *Gell* (1) was upon the effect of a termination by the latter process and both on principle and upon the authority of the decision of the Privy Council in *Balbhaddar Singh* v. *Badri Sah* (3) it cannot be extended further.

The question remains whether proof of the actual innocence of the plaintiff is admissible to enhance the damages. The question should, perhaps, be stated more widely. For, if innocence enhances damages, guilt must mitigate them. The argument that to increase or diminish damages the guilt or innocence of the plaintiff may be tried afresh in an action of malicious prosecution rests in part on the traditional description of the heads into which damage for that tort falls, and in part on the view that the mental sufferings of an innocent man are greater and he has a better claim to visit the

(1) (1924) 35 C.L.R. 275.
(2) (1885) 6 L.R. (N.S.W.) 123, at p. 127.
(3) (1926) The Times Weekly Edition, p. 260.

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defendant with vindictive or exemplary damages for his misconduct in maliciously prosecuting him on insufficient materials. For the purpose of determining whether an action will lie for maliciously putting the law in motion, and of distinguishing in that respect one legal process from another, the kind of damage which must appear before an action can be maintained is divided into damage to a man's fame as where the matter of which he is accused is scandalous, damage to his person as where his liberty is restrained or his life, limb or liberty endangered, and damage to his property as where he is put to expense in defending himself. The manner in which this distribution of the heads of possible damage has been used may be seen from *Savile* v. *Roberts* (1), *Byne* v. *Moore* (2), *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (3) and *Wiffen* v. *Bailey* (4).

So far as the two heads of damage which relate respectively to reputation and personal freedom and safety are concerned, the only point of the classification appears to lie in determining whether the proceeding complained of is of such a character that an action ought to lie against a person who institutes the proceeding maliciously and without reasonable cause. Thus, on the one hand, proceedings though criminal in form will not give rise to the action if they involve no reflection on reputation or threat to personal liberty, and, on the other hand, civil proceedings will do so if, as in the case of *ca. re.*, they involve a restraint of liberty. The policy of the law appears to us to be opposed altogether to reopening in civil proceedings the question of innocence or guilt. Even if the question of real guilt or innocence had a prima facie relevance to damages, we should think that it ought to be excluded upon the same grounds of policy as have kept that question out of the elements constituting the cause of action. In other words, for the purpose of malicious prosecution, the law should consistently treat the question as disposed of in the criminal proceedings, the propriety of the conclusion of which ought not to be canvassed. For instance, a defendant ought not to be permitted to prove in mitigation of damages that a plaintiff who has obtained a favourable determination of the criminal proceedings was in truth guilty. But, having regard to the nature of

(1) (1698) 1 Ld. Raym. 374; 91 E.R. 1147.
(2) (1813) 5 Taunt. 187; 128 E.R. 658.
(3) (1883) 11 Q.B.D. 674.
(4) (1915) 1 K.B. 600.

the cause of action and remembering that the damages must be attributable to the combination of factors by which it is constituted, we think that in point of reason the issue of guilt or innocence has no real relevance to damages.

For the reasons already given, the basis of the action puts out of consideration any question of actual guilt. The failure of the proceedings brought by the defendant, the absence of any reasonable cause and malice are the grounds. If exemplary damages are to be given, it is within the area covered by these matters that the defendant's misconduct must be found. The uncertain psychological considerations urged in favour of giving a larger *solatium* to a plaintiff whose mind rightly feels the injustice of the proceedings appear to us to desert the objective standards of actual and probable loss or damage to which the common law adheres. In any case the soundness of those considerations may be doubted : *conscia mens recti famae mendacia risit.*

The material and ascertainable loss suffered by the plaintiff cannot be affected by the question, and the incalculable consequences flowing from the impairment of respect, esteem and reputation, must be covered by an assessment which attributes them to the prosecution and the circumstances attending it. In other words, the damage does not depend upon a comparison between what the plaintiff did suffer and what he ought to have suffered but on an estimate of the actual and potential consequences of the defendant's act in instituting and maintaining the proceedings.

For these reasons we think that the question of the plaintiff's actual guilt or innocence ought to have been laid out of account altogether and that the evidence received under that head was inadmissible.

In the Supreme Court a new trial was refused for reasons based largely on a complete acceptance of *Davis* v. *Gell* (1) as a binding authority covering the case of a refusal by the Crown law officers to file an indictment after a committal by magistrates.

As to the other grounds which were dealt with expressly in the judgment of the Supreme Court delivered by *Jordan* C.J., it is necessary to add only two observations. The first is that we are

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

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unable to agree that the letter or opinion of Mr. Windeyer was properly admitted in evidence. We think that the reasons given by his Honour for upholding its admission still leave its materiality to the question of Senator McLachlan's knowledge and appreciation of the facts too remote to give it real relevancy to the issue of malice or of absence of reasonable and probable cause.

The second observation is that, in the view we have taken, the question does not arise whether the damages are so excessive as to justify a new trial. The amount awarded was very large and we desire to say nothing which would affect the question should it again arise.

In our opinion the appeal should be allowed with costs.

The order of the Supreme Court should be set aside and a new trial ordered.

STARKE J. This was an action for malicious prosecution brought by the respondent against the appellant in the Supreme Court of New South Wales.

The respondent in his declaration alleged that the appellant falsely and maliciously and without reasonable or probable cause prosecuted the respondent upon a charge of conspiracy to cheat and defraud divers shareholders and policy holders of a life assurance association and caused him to be arrested, taken before a magistrate and imprisoned until he obtained bail.

The declaration further alleged that he was committed for trial and that thereafter the Attorney-General for New South Wales declined to proceed with the charge and entered a *nolle prosequi* in respect thereof whereby the prosecution was determined.

The action was tried before a judge and jury and the respondent obtained a verdict for £5,000 damages. The appellant moved before the Supreme Court of New South Wales *in banc* that the verdict be set aside and that a verdict be entered in its favour or for a new trial. The motion was denied and an appeal is now brought to this court.

The grounds upon which the appeal was founded were misdirection by the trial judge, misreception and rejection of evidence, and excessive damages. The misdirection relied upon consists of an instruction

to the jury that in order to succeed in his action the respondent must prove his innocence of the charge of conspiracy. The direction is based upon a decision of this court in *Davis* v. *Gell* (1), which is now challenged upon the authority of a decision of the Judicial Committee of the Privy Council in *Balbhaddar Singh* v. *Badri Sah* (2), referred to in *Commonwealth Life Assurance Society Ltd.* v. *Brain* (3). An official transcript of the proceedings in *Balbhaddar's Case* (2) has been obtained by the appellant in this appeal and has been supplied to this court. It is surprising that a direction prima facie favourable to the appellant, the defendant in this action, should constitute the basis of a motion for a new trial, but it is said that the direction led to the admission of a large body of evidence irrelevant to the issues for trial and distracted the attention of the jury from the real question to be tried. But I postpone for the moment the consideration of the evidence and confine myself to the accuracy of the direction.

It is now clear that the plaintiff in an action for malicious prosecution must allege and prove :—1. Malice in the prosecutor. 2. Want of probable cause for instituting the proceedings. 3. The termination of the proceedings in the plaintiff's favour if they are capable of such a termination. 4. Damage to the plaintiff.

The declaration, which is in a form in use for more than a hundred years, alleges that the defendant " falsely " prosecuted the plaintiff. Is it an immaterial averment that the defendant " falsely " prosecuted the plaintiff ? It is no answer to this question to assert that " the omission is made up for by other allegations," for that only shows that the allegation in some form or other is essential (Cf. *Saxon* v. *Castle* (4)). Nor is it enough to say that in an action for defamation the averment that the words complained of were " falsely and maliciously " published is immaterial (See *Belt* v. *Lawes* (5)), for the action for malicious prosecution involves other considerations. But it may not be out of place to cite observations of learned judges and text-books. *Isaacs* A.C.J. in *Davis* v. *Gell* (6)

(1) (1924) 35 C.L.R. 275.
(2) (1926) The Times Weekly Edition, p. 260.
(3) (1935) 53 C.L.R. 343.
(4) (1837) 6 A. & E. 652, at p. 659 ; 112 E.R. 251, at p. 254.
(5) (1882) 51 L.J. Q.B. 359.
(6) (1924) 35 C.L.R., at p. 282.

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sets forth a number of observations on the part of learned judges but the following appear to me to be the most explicit.

In *Waterer* v. *Freeman* (1), which was an action for abuse of process, the following observations are found :—" But now two cautions are to be observed to maintain actions in these cases. The first, that the new action must not be brought before the first be determined, because 'till then it cannot appear that the first was unjust, which is the reason given by the judges and that is the reason that a writ of conspiracy lies not till the plaintiff be lawfully acquitted." Again, according to the report of *Jones* v. *Gwynn* (2), *Parker* C.J. said that the action cannot be supported unless the indictment was groundless : the grounds of this action are on the plaintiff's side innocence and on the defendant's malice (*Jones* v. *Givin* (3)). Again, in 1857, in *Weston* v. *Beeman* (4) *Watson* B. is reported to have said :—" All these cases presuppose that the plaintiff is innocent of the crime charged. Otherwise, of course he could not sue. . . . To prove that he was innocent is to prove nothing. It must be proved that the prosecution was proceeded with by the defendants without reasonable cause on their part." *Pollock* C.B. observed that the real innocence of the party accused cannot be the criterion for it is only in the case of his being innocent that he can sue (5). In 1871, in *Johnson* v. *Emerson* (6), in an action for maliciously procuring an adjudication in bankruptcy, *Cleasby* B. said :—" I apprehend that, if three things concur, the person prosecuting the proceedings is liable to an action. First, if the proceeding be really without foundation ; and this must be evidenced by the proceedings having finally terminated in favour of the plaintiff, whether the proceeding be in bankruptcy or by indictment " (7). *Martin* B. said :—" It is part of the liberty of the law that any man may prefer an indictment against another for an alleged crime, but when the indictment is disposed of in favour of the accused, he may maintain an action of tort for damages provided he can establish that the charge was false and malicious, and without reasonable or probable cause . . . it was incumbent upon the plaintiff to give evidence that

(1) (1617) Hob. at p. 267 ; 80 E.R., at p. 413.
(2) (1714) 10 Mod. 214 ; 88 E.R. 699.
(3) (1714) Gilb. 185 ; 93 E.R. 300.
(4) (1857) 27 L.J. Ex., at p. 59.
(5) (1857) 27 L.J. Ex., at p. 60.
(6) (1871) L.R. 6 Ex. 329.
(7) (1871) L.R. 6 Ex., at p. 344.

the proceeding of the defendant was false and malicious. I think these words mean that the proceeding was not merely groundless and without foundation in law, but that it was so to the knowledge of the defendant, or, what is the same thing . . . that a reasonable and sensible man . . . would have formed the conclusion that the proceeding was groundless. They also mean that it was malicious " (1). Again, the Judicial Committee in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2) observed that the prosecution of legal proceedings which are instigated by malice and are " at the same time groundless is a wrong to the person who suffers damage in consequence of them." And in *Cox* v. *English, Scottish and Australian Bank* (3) the Judicial Committee repeated with approval the well-known passage of *Bowen* L.J. in *Abrath* v. *North Eastern Railway Co.* (4) : " 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 . . . and, lastly, that the proceedings of which he complains were initiated in a malicious spirit."

Lastly, I would add citations from text-books. In *Chitty* on *Pleading*, 7th ed. (1844), vol. II, p. 441, it is said :—" To support an action for criminal prosecution four circumstances must concur : 1st, *Falsehood* in the original charge, and which must have terminated in favour of the plaintiff. 2ndly, *The want of probable cause* for instituting such proceedings. 3rdly, *Malice* in the prosecutor which must be proved. 4thly, *Damage* to the accused party, which may be either to his person by *imprisonment*—to his *reputation* by scandal —or to his *property* by expense." Again, in *Street* on *The Foundations of Legal Liability* (1906), vol. I, p. 329, it is said : " First, it must appear that the accused was innocent and that the proceedings against him are at an end, having been terminated in his favour." It appears to me therefore that the allegation of the falsity of the charge is not an immaterial averment. How the allegation is to be established is another matter. It was in general essential in an action

(1) (1871) L.R. 6 Ex., at pp. 372, 373.
(2) (1876) L.R. 4 Ind. App., at p. 38 ; 2 App. Cas., at p. 201.
(3) (1905) A.C. 168.
(4) (1883) 11 Q.B.D., at p. 455.

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for conspiracy founded upon the writ of conspiracy that the plaintiff had been acquitted of that with which he had been falsely charged, presumably to make good *falso* in the writ and in the *Ordinacio de Conspiratoribus*, 31 Edw. I., which defines conspirators (*Winfield, History of Conspiracy and Abuse of Legal Procedure* (1921), p. 83; *Jones* v. *Givin* (1)). But in an action on the case for malicious prosecution acquittal is not necessary : it is enough if the proceeding terminated in favour of the plaintiff if it was capable of so terminating. An acquittal, however, is conclusive of the falsity and groundlessness of the charge and on the other hand a conviction is equally conclusive that it was not false or groundless. It would not be consistent with principle or with public policy to try over again the innocence or the guilt of a person after he had been acquitted or convicted by the constitutional tribunal (*Castrique* v. *Behrens* (2)). But in cases in which a magistrate has refused to commit a person for trial or a grand jury has ignored a bill or the Attorney-General has entered a *nolle prosequi* the question whether the charge is false or not has never been determined. The proceeding has terminated but the plaintiff might in an action for malicious prosecution recover damages and yet be prosecuted again and perhaps convicted of the offence originally charged (Cf. *Fisher* v. *Bristow* (3)). Moreover this possibility is not completely answered by the proposition that the burden of proving want of reasonable and probable cause is upon the plaintiff. If it be true that the immunity thus arising is " personal and not absolute " and must be judged not by the event but by the party's means of knowledge and belief at the time he launches the prosecution, then the possibility of a guilty person still succeeding in an action for malicious prosecution is not wholly demolished (Cf. *Brain's Case* (4) ; *Bank of New South Wales* v. *Piper* (5)). How then is the falsity of the charge in such cases to be established if it be an essential element of the cause of action, as I think it is ? *Davis* v. *Gell* (6) attempted to work out, I believe for the first time, the solution of this question. It resolved that the

(1) (1714) Gilb., at pp. 214-220; 93 E.R., at pp. 308, 310.
(2) (1861) 3 E. & E. 709, at pp. 721, 722; 121 E.R. 608, at p. 613.
(3) (1779) 1 Doug. 215; 99 E.R. 140.
(4) (1935) 53 C.L.R. 343.
(5) (1897) A.C. 383.
(6) (1924) 35 C.L.R. 275.

termination of the proceedings in the manner indicated did not establish the falsity of the charge and that there was misdirection in instructing the jury that they were not trying the question of the plaintiff's innocence or guilt and that they should assume for the purposes of the action that he was innocent. In other words, if the question of the falsity of the charge were a material allegation in an action for malicious prosecution, then the burden was upon the plaintiff to establish the falsity in accordance with his allegation. It is on this point I think that the decision of the Judicial Committee in *Balbhaddar's Case* (1) becomes decisive, though I confess that the reasoning has not wholly satisfied me that *Davis* v. *Gell* (2) was wrongly decided by the court. The substance of the decision in *Balbhaddar's Case* (1) is set forth in *Brain's Case* (3). I observe from the official transcript that not only had a magistrate refused to commit the plaintiffs for trial but also a district judge who had issued a summons to the plaintiffs to appear before him. And I also observe that the action was for malicious prosecution of the plaintiff on the allegation that the defendant had maliciously and falsely and without any reasonable or probable cause accused the plaintiffs of having murdered one Sheo Bakhsh Singh.

The issues settled for trial were: 1. Did the defendant No. 2 make a false report to the police station that he and the plaintiffs and one Teja had murdered Sheo Bakhsh Singh? 2. If the report was false does it come within the meaning of prosecution? 3. If the first and second issues be found in favour of the plaintiffs then was the prosecution malicious and without reasonable and probable cause? 4. Did the defendant No. 2 prosecute at the instigation of and in collusion with defendant No. 1 as alleged in par. 5 of the plaint? 5. To what damage, if any, are the plaintiffs entitled and from which of the defendants? All these issues were found in favour of the plaintiffs. On appeal to the court of the Judicial Commissioner of Oudh that court stated the propositions set out in *Brain's Case* (4), which, according to the Judicial Committee, was "a completely wrong view of the law." But was the first issue settled for trial also completely wrong? On the decision of that

(1) (1926) The Times Weekly Edition, p. 260.
(2) (1924) 35 C.L.R. 275.
(3) (1935) 53 C.L.R., at pp. 350, 351.
(4) (1935) 53 C.L.R. 343.

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issue depended the allegation that the defendants falsely accused the plaintiffs of murder. As already indicated, I should not think that an immaterial or irrelevant allegation or issue. And the Judicial Committee has not expressly so decided. But I think the decision necessarily affirms the proposition that the termination of the proceedings in favour of the plaintiffs by a refusal to commit for trial conclusively establishes the falsity or groundlessness of the charge. Viscount *Dunedin* said :—" It was sufficient for the appellants to prove, as they have done, that the criminal proceedings threatened on account of the disclosure contained in the confessions . . . ended so far as they were concerned when the sessions judge finally refused to commit them for trial. That opened the way for the proof of the next proposition that the respondents had instigated the proceedings maliciously and without probable cause." It would thus appear, as in the case of acquittal and conviction, that it is not consistent with principle or with public policy that the decisions of magistrates, grand juries or the Attorney-General should be tried over again upon the merits and be " blowed off by a side wind." *Davis* v. *Gell* (1) in this court, so far as it is inconsistent with this view, cannot therefore be supported. But in cases such as *Steward* v. *Gromett* (2) it would still be necessary, I apprehend, to establish the falsity or groundlessness of the proceedings and perhaps also in cases of malicious proceedings which have been compromised (Cf. *Burdick* on *Torts*, 2nd ed., p. 250).

It follows from what has been said that the direction of the learned judge, following as he did *Davis* v. *Gell* (1), was erroneous. But I cannot think that the misdirection resulted in any prejudice to the defendant, the appellant here. It was favourable to him and prejudicial to the plaintiff, the respondent here, and moreover he established his innocence to the satisfaction of the jury.

I pass now to the objection based upon the misreception of evidence. It was contended that all the evidence tendered and admitted on the issue of innocence was inadmissible. It now appears to be unnecessary so far as that issue was concerned. And as the termination of the proceedings is the material and necessary method of establishing that the prosecution was false and unjust, then it

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

(2) (1859) 7 C.B.N.S. 191 ; 141 E.R. 788.

was also irrelevant. But it was also sought to justify the admission of the evidence on the issue of damages. " The institution of criminal proceedings by one individual against another amounts to a publication of the charge that he is guilty of the crime for which he is prosecuted." It is " a mode of publication which, above all others, is dangerous to the reputation of the person who is charged with crime. It tends to fix upon him the stigma of dishonour much more effectively than the spoken word or printed libel " (*Street, Foundations of Legal Liability* (1906), vol. I, p. 326). It is a form of damage sufficient to support an action for malicious prosecution (*Savile* v. *Roberts* (1)). But nevertheless it is not permissible for a plaintiff to give evidence of general good character in aggravation of damages unless counter proof has been given. And still less is it permissible, in view of *Balbhaddar's Case* (2), for the plaintiff to falsify the charge other than by proving its termination any more than it is permissible for the defendant to justify it (*Taylor* on *Evidence*, 10th ed. (1906), p. 362 ; *Stuart* v. *Lovell* (3)).

It was contended that all this evidence tended to distract the attention of the jury from the real issues to be tried and to inflame and aggravate the amount of damage. It is possible that some evidence of the plaintiff's innocence would not have occasioned so substantial a miscarriage as to warrant a new trial. But the evidence tendered and admitted on this trial was surprising and accounts largely, I should think, for the heavy damages awarded.

The prosecution of the plaintiff was launched in 1932 but the plaintiff was allowed to go back to 1928 and produce considerable evidence of the unsatisfactory management and position of the defendant company from that time onwards. It was admitted not in proof of the facts but to establish the state of the plaintiff's mind prior to and at the date of the prosecution. Apart from *Balbhaddar's Case* (2) the evidence was too remote and should have been rejected and *Balbhaddar's Case* establishes its irrelevance. Another class of evidence which has been objected to is in connexion with a telegram purporting to be from Page to Stack but which

(1) (1698) 1 Ld. Raym. 374 ; 91 E.R. 1147.

(2) (1926) The Times Weekly Edition, p. 260.

(3) (1817) 2 Stark. 93, at pp. 94, 95 ; 171 E.R. 583, at p. 584.

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COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. SMITH.

Starke J.

was never sent. It was dealt with in *Brain's Case* (1). In my opinion that evidence was inadmissible but this court held otherwise. But a further development of this class of evidence is an opinion given upon the matter by one of His Majesty's counsel to Messrs. Cohen, Sharpe and Stack. It was not admitted as proof of the facts stated in it but as a statement put before the appellant or its chairman of directors. As evidence, the opinion is not much worse than that allowed in *Brain's Case* (1) in connection with the telegram, but it aggravates the whole affair. The Full Court justified the reception of this opinion on the following ground :—" In cases of malicious prosecution it is always legitimate for the plaintiff to prove, if he can, on the issue of reasonable and probable cause that the person responsible for the prosecution acted upon information without making due inquiry as to its authenticity notwithstanding that the circumstances called for such inquiry . . . it was legitimate for the plaintiff to show that whatever action the chairman of the directors took to promote the prosecution he took it with knowledge that it was being contested that Inch's statements about the telegram were not to be relied upon and that he had declined to investigate those contentions." But it is one thing to investigate facts and quite another to investigate the opinions and inferences of counsel in relation to matters put before him by third parties. In my opinion the evidence was wholly inadmissible. Other objections were taken to the rejection of evidence but these objections were of a minor character and unimportant as compared with the objections already dealt with.

The last objection relates to damages. The jury have awarded £5,000. It is contended that they are excessive and, in my opinion, they are. The judgment which I gave in *Brain's Case* (1) sufficiently indicates the reasons for my conclusion and I shall not repeat them. Here the damages are £5,000 or £2,000 more than in *Brain's Case*. And this to a man who, the evidence suggests, was a busybody who put himself forward as the protector of the shareholders of the appellant company, but who was acting really against the interest of the shareholders and attempting to force the hands of the appellant's directors to dispose of its business to the Associated Dominions

(1) (1935) 53 C.L.R. 343.

Assurance Society Ltd., which any capable and prudent man must have known was unable out of its own funds to finance the acquisition of the appellant's business.

The trial was so conducted that the position of the appellant was seriously prejudiced and led to a real miscarriage of justice. The only remedy is a new trial, deplorable as the result must be to the litigants.

Appeal allowed with costs. Order of the Supreme Court set aside. New trial ordered. Costs of former trials to abide the event of new trial. Costs of new trial application in Supreme Court to be paid by the plaintiff.

Solicitors for the appellant, *Pigott, Stinson, Macgregor & Palmer.*
Solicitors for the respondent, *C. Don Service & Co.*

J. B.