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possession he did so with notice of the outstanding beneficial interests and it is not disputed that, if the testator had been seised in fee, the defendant's possession and any title to the fee which he might subsequently have acquired would have been subject to these outstanding beneficial interests. *Scott* v. *Scott* (1) was accepted without question as authority for that proposition. In those circumstances the defendant would not, of course, have acquired his legal title from the testator or his executors; he would have acquired it adversely to them, but having acquired title with notice of the outstanding beneficial interests he would, in equity, be bound by them. But, assuming the testator to have had a lesser interest—but yet one both devisable and assignable—why should the same principle not apply? If it was devisable then his executors were lawfully entitled, at least, as against all but the true owner, to enter into possession and execute the trusts of the will. But if they were forestalled by a person who entered with notice of the outstanding beneficial interests the principle enunciated in *Scott* v. *Scott* (1) would have become as fully applicable as if the testator had been seised in fee. This, in effect, is the substance of the appellants' case, and upon this independent ground I am disposed to think that, even if the defendant had been able to make out a legal title by prescription he would, in the circumstances of this case, have been bound to hold the land subject to the equitable interests created by the testator's will.

One further matter which should be mentioned is the somewhat peculiar situation which arises from the acceptance by the defendant in 1937 of the office of joint trustee of the testator's estate. The defendant in accepting this office must be taken to have acknowledged that the land in question formed part of the trust estate. The testator had purported to devise this land by his will and the office accepted by the defendant imposed upon him the duty of executing those trusts so far as they still remained to be executed. This consideration was sufficient, at least, to cast upon the defendant the onus of establishing in the suit that such lands did not, at that time, form any part of the trust estate and this he clearly failed to do.

For these reasons the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *M. D. Roach.*
Solicitors for the respondents, *H. O. Marshall Lupton & Scott.*

R. A. H.

(1) (1854) 4 H.L.C. 1065 [10 E.R. 779].

Appl *Yarran* v *Czerkasow* [1982] WAR 239

Cons *Webster* v *Lampard* (1993) 67 ALJR 886

Appl *Webster* v *Lampard* (1993) 177 CLR 598

Appl *JL Holdings* v *Queensland* (1998) 85 FCR 1

Refd to *Coffey* v *DSS* (1998) 54 ALD 43

Foll *Nye* v *NSW* (2002) 134 ACrimR 245

[HIGH COURT OF AUSTRALIA.]

TROBRIDGE . . . . . APPELLANT;
PLAINTIFF,

AND

HARDY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 16;

SYDNEY, *Dec.* 7.

Fullagar, Kitto and Taylor JJ.

Police (W.A.)—Action against police constable—Acts done in carrying the provisions of the Police Act 1892-1953 *into effect—Person "suspected of offending against" Act—Statutory protection without "direct proof of malice"—Police Act* 1892-1953 *(W.A.), ss.* 50, 138—*Interpretation Act* 1918-1948 *(W.A.), s.* 47, *par.* H, *Second Schedule.*

H., a police constable, arrested T. and caused him to be charged with an offence under circumstances which the trial judge subsequently held showed that there was no reasonable or probable cause for making the arrest or laying the charge. In an action brought by T. for damages for assault, malicious arrest and wrongful imprisonment, H. pleaded that his taking T. into custody and causing the charge to be tried were "acts done . . , in carrying the provisions of the *Police Act* 1892-1953 into effect" within the meaning of par. H of the Second Schedule of the *Interpretation Act* 1918-1948 (W.A.) and that consequently no such action lay unless T. produced "direct proof of corruption or malice."

Held, that par. H was inapplicable to the circumstances of the case: by *Fullagar* and *Kitto* JJ., because the acts of H. were not done with an honest intention of enforcing, vindicating or giving effect to the law and were therefore not "done in carrying the *Police Act* into effect"; by *Taylor* J. because T. was not a person "suspected of offending against" any provision of the *Police Act*.

Held, further, that T. had produced "direct proof of malice" within the meaning of par. H.

Meaning of "malice" and "direct proof of malice" in par. H of the Second Schedule of the *Interpretation Act* 1918-1948 (W.A.), discussed.

Consideration by *Fullagar* J. of the nature of the statutory authority conferred by s. 50 of the *Police Act* 1892-1953 to arrest without warrant on failure of a person to give his name and address on request.

Decision of the Supreme Court of Western Australia (*Virtue* J.), reversed.

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APPEAL from the Supreme Court of Western Australia.

By writ issued out of the Supreme Court of Western Australia Arthur Lincoln Trobridge sought to recover damages from Frederick John Hardy, a police constable, for assault, malicious arrest and wrongful imprisonment. The defendant pleaded that his actions in arresting the plaintiff and subsequently causing a charge to be laid against him were "acts done . . . in carrying the provisions of the *Police Act* 1892-1953 into effect" and that consequently no such action lay unless there be "direct proof of corruption or malice". This defence was based on par. H of the Second Schedule to the *Interpretation Act* 1918-1948 (W.A.) as incorporated into the *Police Act* 1892-1953 (W.A.) by s. 138 thereof.

The learned trial judge (*Virtue* J.) held on the construction of par. H. that the requirement of direct proof of malice could not be satisfied by evidence which fell short of establishing, not only that the defendant was activated by some motive constituting malice, but also precisely what the malicious motive was. He was not prepared to make a finding that the defendant did the acts complained of from any identifiable malicious motive. For that reason he gave judgment for the defendant.

From this decision the plaintiff appealed to the High Court.

The facts of the case as found by *Virtue* J. are fully set out in the judgments of the Court hereunder.

C. B. Gibson (with him *A. C. Gibson*), for the appellant. The trial judge found on the facts that no offence had been committed by the appellant and that there were no reasonable grounds for the respondent suspecting that he had committed any offence. This finding amounted to a finding of malice. Knowledge in the respondent that the appellant was innocent is clear evidence of malice: *Fitzjohn* v. *Mackinder* (1). "Direct proof of malice" requires only that it be shown that the respondent was activated by a motive other than the carrying of the provisions of the *Police Act* into effect. This can be established as a matter of inference and was established in this case by showing that before the arrest and before the imprisonment the respondent had no reasonable grounds for believing that the appellant had committed any offence: *Hicks* v. *Faulkner* (2). If he held any belief as to the appellant's guilt it was the result of his gross ignorance of the law from which malice may be inferred: *Brooks* v. *Warwick* (3). The defence

(1) (1861) 9 C.B. (N.S.) 505, at pp. 528, 531, 532 [142 E.R. 199, at pp. 208, 209].

(2) (1881) 8 Q.B.D. 167, at pp. 174, 175.

(3) (1818) 2 Stark. 389 [171 E.R. 682].

based on par. H of the Second Schedule of the *Interpretation Act* 1918-1948 has no application once it is shown as it was here that the respondent was not as a fact carrying the provisions of the *Police Act* into effect.

K. W. Hatfield (with him *I. W. P. McCall*), for the respondent. The appellant has no right of action against the respondent because of the protection conferred on the respondent by par. H. The respondent was a policeman in the employ of the Government authorized to carry out the provisions of the *Police Act* and was in fact carrying the provisions of such Act into effect against a person whom he bona fide suspected of offending against s. 50 of the *Police Act*. The respondent genuinely believed that the appellant had, by handing him a card with his name and address on it, offended against s. 50, and the fact that it was subsequently held that the handing of the card was sufficient compliance does not affect the respondent's position if he at the time bona fide believed that the appellant had been guilty of non-compliance with the section. There is no direct evidence to refute the statement of the respondent that he genuinely believed the appellant to be guilty of non-compliance. If a person in the position of the respondent is acting under his assumed, supposed or presumed powers then he is deemed to be carrying into effect the provisions of the *Police Act* and the fact that it is ultimately found that he is acting in excess of or contrary to his powers does not disentitle him to the protection of the Act. [He referred to *Hamilton* v. *Halesworth* (1); *Theobald* v. *Crichmore* (2); *Parton* v. *Williams* (3); *Beechey* v. *Sides* (4); *Cook* v. *Leonard* (5); *Siebert* v. *Miller* (6); *Ellis* v. *Brownrigg* (7); *Kyloh* v. *Wilsen* (8); *Hermann* v. *Seneschal* (9); *Chamberlain* v. *King* (10).] Where a defendant is found purporting to exercise what is actually his statutory authority the burden rests on the person claiming damages against him to prove that he was not actuated by an honest desire to do his duty and was acting not in the intended but in the pretended execution of his function: *G. Scammell & Nephew Ltd.* v. *Hurley* (11); *Hamilton* v. *Halesworth* (12). The protection of par. H can only be withdrawn from

(1) (1937) 58 C.L.R. 369, particularly at p. 380.
(2) (1818) 1 B. & Ald. 227 [106 E.R. 83].
(3) (1820) 3 B. & Ald. 330 [106 E.R. 684].
(4) (1829) 9 B. & C. 806 [109 E.R. 300].
(5) (1827) 6 B. & C. 351 [108 E.R. 481].
(6) (1896) 12 W.N. (N.S.W.) 87.
(7) (1863) 2 S.C.R. (N.S.W.) 177.
(8) (1923) S.A.S.R. 501.
(9) (1862) 13 C.B. (N.S.) 392 [143 E.R. 156].
(10) (1871) L.R. 6 C.P. 474.
(11) (1929) 1 K.B. 419.
(12) (1937) 58 C.L.R. 369.

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the respondent if there is "direct proof of malice". It is not necessary to consider the question of "direct" or "indirect" malice because the trial judge made no finding of malice at all against the respondent. "Malice" as used in the *Interpretation Act* is not to be considered in the sense of spite or hatred but *malus animus* which means that the party has acted by improper and indirect motives. In other words, he is not actuated by an intention to perform his duty but he is actuated by a desire to do harm to the appellant: *Salmond* on *Torts*, 11th ed. (1953), pp. 745, 746; *Brown* v. *Hawkes* (1). Much of the argument at the trial centred round the meaning of the words "direct malice". It is submitted that inquiry is not necessary because there was no finding of malice against the respondent either direct or indirect, though it was found that his conduct was aggressive, rude, abusive and unnecessarily unpleasant and went far beyond what was called for in the circumstances. The words "direct proof of malice" appear to have no precedent in the English statutes although a number include the words "proof of malice". It is submitted that the addition of the word "direct" before the word "proof" means a greater onus on the part of any person attempting to take action against a police constable. Direct proof of malice means proof by evidence direct as distinct from proof presumed from failure to discharge the onus that the contrary obtains. In other words it is for a plaintiff in such a case to show by direct evidence that a defendant acted maliciously and such plaintiff cannot discharge the onus by asking a court to infer malice from conduct. To hold otherwise would be to give no effect whatever to the addition of the word "direct". The proper meaning of the words "direct proof of malice" is that a plaintiff must prove malice affirmatively by some positive evidence and not negatively by asking the court to presume malice from the evidence.

C. B. Gibson, in reply.

Cur. adv. vult.

Dec. 7. The following written judgments were delivered:—

FULLAGAR J. This is an appeal from a judgment of the Supreme Court of Western Australia in an action in which the appellant was plaintiff and the respondent was defendant. The plaintiff is a taxi-cab proprietor, and the defendant is a constable of police. The case arose out of the arrest and imprisonment of the plaintiff, who was subsequently charged before a magistrate with refusing

(1) (1891) 2 Q.B. 718.

to give his name and address to the defendant. On this charge he was acquitted. At the trial, which took place before *Virtue* J., there was a conflict of evidence between the plaintiff and the defendant. *Virtue* J. accepted the evidence of the plaintiff, which was corroborated in material respects by two independent witnesses, Davies and Skeffington. The effect of the evidence for the plaintiff may be summarized as follows.

About 9.15 p.m. on 24th July 1954 the plaintiff was driving his taxi-cab along William Street, Perth, at a slow speed. Being hailed from the kerb by two intending passengers, he stopped his car, and backed it towards the kerb, in order that the intending passengers might enter. As he opened the rear door, the defendant, who was in plain clothes, approached. He was accompanied by another constable, also in plain clothes, who seems to have played a comparatively silent and inactive part in the drama which followed. Thinking that the defendant wished to hire the taxi-cab, the plaintiff said: "Excuse me, I am afraid these people hired the taxi first." The defendant said: "Never mind about you! Police here! What the hell are you doing here? You have no bloody right to be here." The plaintiff asked whether he was to be allowed to take his passengers or not, and was told that he would not be allowed to do so. The defendant then demanded his name and address. The plaintiff asked him what he was to be charged with, and the defendant replied: "Plying for hire". The plaintiff then said: "In that case you won't mind if I take the names and addresses of these people, who wished to hire me and were responsible for my stopping." He also handed the defendant his card and (according to Davies) said: "That has got my name and address, and I will tell you anything else you want to know when I have taken these people's names and addresses." It is important to note that the defendant admitted in cross-examination that he accepted the plaintiff's explanation that he had been hailed from the kerb. He could hardly have done otherwise, because the intending passengers were there, and there was no shadow of reason for doubting the plaintiff's word. The card contained the name and address of the plaintiff, the situation of his taxi-stand, and his business and private telephone numbers. As he was taking down the name and address of the first man, the defendant grabbed him by the shoulder and said: "How much longer are you going to be? The police are not going to wait all night for you." The plaintiff said: "I won't be a moment". Whereupon the defendant "thumped him again severely on the shoulder", and said:—"You are under arrest." Being asked the reason for the arrest, he said:

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"For refusing to give your name and address." The plaintiff said that he still wished to take the names and addresses of the persons who had hailed him, and who had seen him give his card to the defendant and had heard what he said. The defendant replied: "If you hesitate one moment, I will handcuff you." He was then arrested and taken to the police station. The bystanders protested and wished to go to the police station in the cab, but this the defendant refused to allow them to do. He waved the plaintiff's card in the air, and said: "This doesn't mean a thing to me, nor what you people saw or heard! We're not interested in bloody witnesses!" On arrival at the police station he was searched with considerable violence. Although he had ample money for bail on his person, he was then taken by the defendant and another constable to a cell. He was told to remove his shoes and socks, and was struck a severe blow on the neck. He was also told to remove his tie. When this had been done, he was placed in the cell. There were three other men in the cell, and he stood in his bare feet on a cement floor for the best part of two hours. He was then taken out of the cell, and, after his finger-prints had been taken, he was allowed to leave, a sum of five pounds being retained, out of the money which had been in his possession, for bail. The plaintiff was subsequently charged before a magistrate with refusing to give his name and address, and, as has been mentioned, he was acquitted. On the facts as found by *Virtue* J., the charge was impudent, and the acquittal inevitable.

Nothing in the argument before us turned on the pleadings in the action, but the pleadings call for some comment. The plaintiff did not sue, as he might also have done, for malicious prosecution, but for trespass to the person and false imprisonment. It was unnecessary for him to allege in his statement of claim, as in fact he did, that the defendant was "acting in his office as a member of the police force". The mere interference with the plaintiff's person and liberty constituted prima facie a grave infringement of the most elementary and important of all common law rights. It was for the defendant to justify, if he could, by reference to his office or otherwise. Actually one of the plaintiff's main contentions both at the trial and before this Court was that the defendant was *not* really acting in the execution of his office. Nor was it necessary to allege in the first place either absence of reasonable and probable cause or malice. With regard to the defence, it is to be noted that it does not allege either that there was in fact a refusal or neglect to give name and address or even that the defendant believed (whether with or without reasonable

grounds) that there had been such a refusal or neglect. Nor does it, as it might have done under the statute on which this case ultimately turns, plead the general issue, which would have left everything open. It does, however, allege facts which, if proved, would bring the case within that statute and require proof by the plaintiff of malice.

I do not think that the defendant's counsel relied very seriously on the statutory authority to arrest without warrant which is given to constables of police by s. 50 of the *Police Act* 1892-1953, but it is desirable to refer to that section. It provides: "Any officer or constable of the police force may demand from and require of any individual with whose person he shall be unacquainted his name and address and may apprehend without warrant any such person who shall neglect or refuse to give his name and address or either of them when required so to do as aforesaid."

In an article in the *Law Quarterly Review* (1) Dr. *Glanville Williams* refers to the weakness of the legal position of the police in England in the matter of obtaining the name and address of a person who is believed to have committed an offence: see, e.g. *Jones* v. *Owen* (2) and *Hatton* v. *Treeby* (3) and cf. *Elder* v. *Evans* (4) where *Hay* J. refers to Dr. *Williams*' article. At common law a constable's authority to arrest without warrant is confined to the case where there is reasonable suspicion that a felony has been committed: see *Christie* v. *Leachinsky* (5) (per Lord *du Parcq*). The statutory modifications of the common law rule are numerous and miscellaneous, and, in the opinion of Dr. *Williams*, generally unsatisfactory. I do not think, however, that he would approve of such a provision as that which is contained in the Western Australian statute. Section 50, if read literally, authorizes a constable to approach any person anywhere, though he has done no wrong and is suspected of no wrong, and demand his name and address: then, if the name and address are not given, that person may be arrested and held in custody. There are, however, two things to be said about s. 50. On the one hand, it in terms authorizes arrest without warrant only where there is actual refusal or neglect to give name or address, and it is perfectly clear in this case (as *Virtue* J. held) that there was no refusal or neglect to give either. It may be that the section could be held to extend to cases where there is an honest belief based on reasonable grounds that there has been such a refusal or neglect (e.g. where the constable reasonably but mistakenly believes that a false name or address has been

(1) (1950) 66 L.Q.R. 465.
(2) (1823) 2 Dow. & Ry. 600.
(3) (1897) 2 Q.B. 452.
(4) (1951) N.Z.L.R. 801.
(5) (1947) A.C. 573, esp. at pp. 496, 497.

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given), but here there were no reasonable grounds for any such belief. (I do not think the implication could be extended beyond cases where there was reasonable ground for the belief). On the other hand, the drastic power conferred by s. 50 must, I would think, be taken to be conferred only for the purposes of the Act in which it occurs. If the power is used wantonly or otherwise than for the purpose of bringing an offender or suspected offender to book, there is an abuse of power which may give rise to a cause of action. This is probably what counsel for the defendant had in mind when he told *Virtue* J. that he conceded that s. 50 must be read subject to some implied limitation.

Section 50 being out of the way, it is clear that the acts of which the plaintiff complains were done without legal justification or excuse. The defendant, however, relies on another statutory provision, which is of a different character from s. 50. It does not authorize or justify acts which would otherwise be illegal, but, subject to certain conditions, it deprives a person in the position of the plaintiff of any remedy. It is on this statutory provision that this case really turns. It is contained in par. H of the Second Schedule to the *Interpretation Act* 1918-1948 (W.A.). It is incorporated in the *Police Act* 1892-1953 by virtue of s. 47 of the former Act and s. 138 of the latter Act. It is desirable to set it out in full. It reads :—" No action shall lie against any justice of the peace, officer of police, policeman, constable, peace officer, or any other person in the employ of the government authorized to carry the provisions of this Act, or any of them, into effect or any person acting for, or under such persons, or any of them, on account of any act, matter, or thing done, or to be done, or commanded by them, or any of them, in carrying the provisions of this Act into effect against any parties offending or suspected of offending against the same, unless there is direct proof of corruption or malice, and unless such action is commenced within three months after the cause of action or of complaint shall have arisen : and if any such person shall be sued for any act, matter, or thing which he shall have so done, or shall so do, in carrying the provisions of this Act into effect, he may plead the general issue and give the special matter in evidence : and in case of judgment after verdict or by a judge sitting as a jury, or on demurrer being given for the defendant, or of the plaintiff discontinuing, or becoming nonsuit in any such action, the defendant shall be entitled to and have treble costs." This action was in fact commenced within the period of three months.

The two questions which arise are :—(1) whether the defendant, in doing the things which he did, was " carrying the provisions of

the *Police Act* into effect " within the meaning of the statute, and (2) if he was, whether there was " direct proof of malice ". *Virtue* J., while he clearly regarded the conduct of the defendant as deplorable and expressed himself strongly on the subject, assumed, I think, that the case did fall within the section, and decided that there was no direct proof of malice. His Honour added that he came to this conclusion with extreme reluctance, and found it a " profoundly disturbing thought " that a person in the position of the plaintiff should be without redress.

With regard to what is meant by " malice " in the statute, I think that his Honour correctly held that it was used in the sense, familiar in cases of malicious prosecution, of personal spleen or ill-will, or some motive other than that of bringing a wrongdoer to justice. I would regard that as clear enough. But the meaning of the expression " direct proof of malice " is, I think, a matter of serious doubt and difficulty. On this question I have had the advantage of reading the judgment prepared by my brother *Kitto*, and I think that the distinction which he draws has a good deal to recommend it. I would, however, be disposed myself to take a very broad view of the words used. It may be proper in the case of some protective provisions of this nature to construe them liberally in favour of the persons whom it is intended to protect, but, in view of the iniquitous provision for treble costs, I think it would be in accordance with sound principle to construe this particular provision very strictly against that person. Be this as it may, however, the expression in question is neither a technical expression nor an expression with any recognized popular meaning. I would regard it as fanciful to say that it had reference to the technical distinction between direct evidence and hearsay evidence, and I find it almost equally difficult to say that it has reference to the technical distinction between direct evidence and circumstantial evidence. If it is regarded as having reference to the latter distinction, a plaintiff could only succeed if the defendant himself went into the witness box and swore that he had acted maliciously. For, as *Wills* on *Evidence*, (2nd ed.) (1907), pp. 63, 64, says, " In one class of cases circumstantial evidence must from the nature of the case be given. They are those where the state of mind of a particular person is in issue . . . In these cases no one save the party charged can, strictly speaking, give direct evidence of his mental state ; and, when he denies the charge, it has to be proved by inference from his conduct." Even such evidence as was given in *Haddrick* v. *Heslop* (1) and *Stevens* v. *Midland Counties Railway Co.* (2), in each of which cases the defendant had made statements

(1) (1848) 12 Q.B. 267 [116 E.R. 869]. (2) (1854) 10 Ex. 352 [156 E.R. 480].

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out of court from which malice might be inferred, is clearly not "direct" evidence of malice. It is clear that the legislature intended to make things difficult for a plaintiff, but it is hardly possible to suppose that it meant to deprive him of a remedy unless the defendant himself chose to give evidence in court that he was actuated by malice. Having regard to all these considerations, I think myself that the expression in question should not be treated as meaning anything more than "actual proof of malice" or "proof of actual malice".

The statute, however, is a very curious one. It seems not unlikely that it represents a confusion between the respective positions at common law of justices and of constables. I have not been able to find any model or precedent for it, or any authority giving any guidance as to what is meant by "direct proof of malice". On the other hand, there is an abundance of authority on the meaning of such expressions as "in carrying into effect the provisions of this Act". On the whole, although I am of opinion that the evidence accepted by *Virtue* J. clearly established malice, I think it preferable to decide this case on the ground on which *Kitto* J. was also prepared to decide it—that is to say, that the case does not come within the terms of the statute at all. I am clearly of opinion that the defendant's acts fall outside the scope of what is protected by the provision in question. I agree substantially, as will be seen, with *Kitto* J.'s analysis of the motives by which the defendant was actuated.

The statute does not apply except in respect of acts done in carrying the *Police Act* into effect against persons offending or suspected of offending against the same. Expressions of this kind have been used in many statutory provisions designed to protect officials against the possible consequences of acts not actually authorized by law but done in a conscientious attempt to perform a public duty, and there is, as I have said, a great mass of authority on the meaning of such expressions. A number of the cases were considered by this Court in *Hamilton* v. *Halesworth* (1) and by *Dixon* J. (as he then was) in *Little* v. *The Commonwealth* (2).

The current of authority has fluctuated somewhat in one respect. It has never been doubted that an act is not done "in pursuance of an Act" or "in carrying an Act into effect" unless it is done in the bona fide belief that it is authorized by the Act and in a bona fide attempt to give effect to the Act. But opinions have differed as to whether it is necessary that the belief should be based on reasonable grounds. The course of authority is traced by *Dixon* J.

(1) (1937) 58 C.L.R. 369.

(2) (1947) 75 C.L.R. 94.

in *Little* v. *The Commonwealth* (1). It seems now to be settled that, while there must be some factual basis for the belief, and while the actual facts known to a defendant may often be relevant to the question of the existence of a real belief, it is not necessary that the belief should be based on reasonable grounds. *Dixon* J. summed up his view of the cases as follows:—"I think that the words 'any arrest or detention in pursuance of this section' occurring in s. 13 (3) of the *National Security Act* 1939-1940 cover an arrest or detention by a constable who with some facts to go upon honestly thinks that what he has found or suspects is an offence against the Act committed or about to be committed by the person whom he arrests or detains notwithstanding that the arrest and detention are not actually justified and that his error or mistake is in whole or in part one of law" (2).

But, although a belief that his act is authorized by law may, even if it is not based on reasonable grounds, bring a constable or other official within a protective statute such as that now under consideration, it is essential not only that such a belief should be honestly entertained, but that the purpose of the act done should be to vindicate and give effect to the law. The statement of the general position by *Erle* C.J. in *Hermann* v. *Seneschal* (3) has often been referred to in later cases, and has never, I think, been doubted. That learned judge said:—"I think the governing question for the jury was, whether the defendant really believed that the facts existed which would bring the case within the statute . . . , and honestly intended to put the law in force; and that, if the jury found that the defendant did so really believe, and did so honestly intend, then the defendant was entitled to a verdict" (4). In *Theobald* v. *Crichmore* (5), Lord *Ellenborough* C.J. said:—"The object" (sc. of the protective statute) "was clearly to protect persons acting illegally, but in supposed pursuance, and with a *bonâ fide* intention of discharging their duty under the Act of Parliament" (6). This passage was quoted by *Starke* J. in *Hamilton* v. *Halesworth* (7). A defendant is not "acting in pursuance" of a statute, or "carrying into effect" a statute, if there is an absence of such a bona fide intention—if he is "acting wantonly and in abuse of his power" (per *Lush* J. in *Selmes* v. *Judge* (8)—if the acts complained of "are not done in intended execution of a statute,

(1) (1947) 75 C.L.R., at pp. 108-113.
(2) (1947) 75 C.L.R., at p. 113.
(3) (1862) 13 C.B. (N.S.) 392 [143 E.R. 156].
(4) (1862) 13 C.B. (N.S.), at pp. 402, 403 [143 E.R., at p. 160].
(5) (1818) 1 B. & Ald. 227 [106 E.R. 83].
(6) (1818) 1 B. & Ald., at p. 229 [106 E.R., at p. 84].
(7) (1937) 58 C.L.R., at p. 374.
(8) (1871) L.R. 6 Q.B. 724, at p. 728.

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but only in pretended execution thereof" (per *Scrutton* L.J. in *G. Scammell & Nephew Ltd.* v. *Hurley* (1)).

The only possible inference, in my opinion, from the facts of this case, as found by *Virtue* J., is that the acts of which the plaintiff complains were done by the defendant not with the intention of carrying into effect the provisions of the *Police Act* but with the intention of punishing the plaintiff for some fancied slight or affront, or to gratify the instincts of a man who "knows no use for power Except to show his might". I can see no other possible explanation of the defendant's conduct.

It is not necessary to inquire what it was that offended the defendant and led to his acting as he did, because, whatever it was, it could not justify what he did. But I do not think that the cause of his hostility is far to seek. *Virtue* J. found that the conduct of the plaintiff throughout was courteous, correct, and entirely unprovocative. But without doubting this, I think it highly probable that the very fact that the plaintiff's behaviour was dignified and showed a degree of proper independence was what got him into trouble. Being entirely innocent of any offence, I think he would naturally resent the rude and aggressive approach of the defendant, who would find in the very dignity of his victim an indication of that resentment. Then there is a sentence in the plaintiff's evidence which may well be thought revealing. He says that, when he asked the witnesses for their names and addresses, he "apologised to them for the incident". It seems very probable to me that something in what the plaintiff said, or in the way he said it, offended the defendant, who may have been further irritated by a certain slowness of the plaintiff, who is an elderly man, in writing down the name and address of the first witness. I feel fairly sure that such matters—or something of that kind—led to the defendant's resolving to "teach the plaintiff a lesson".

It may be assumed that in the beginning the defendant did suspect the plaintiff of committing the trivial offence of "plying for hire". Suspecting this, he was justified in asking the plaintiff for his name and address. But he admits himself that he accepted the plaintiff's statement that he had stopped because he had been hailed by intending passengers. In other words, he was satisfied that the plaintiff had not been plying for hire. From that moment he had no justification whatever for requiring the plaintiff's name and address at all. He was nevertheless given the plaintiff's name and address. By giving his card and saying that (as the fact was) it

(1) (1929) 1 K.B. 419, at p. 427.

contained his name and address, the plaintiff in fact complied fully with the requirements of s. 50 of the *Police Act*. It is perhaps just conceivable that an extremely stupid person might think that s. 50 required a direct oral statement of name and address to be made to the inquiring constable, though I doubt the possibility of this. But in truth it is of no consequence whether the defendant entertained any such notion or not. For it is impossible to credit him with a sincere affirmative belief that the plaintiff had refused or neglected to give his name and address. It is obvious that the plaintiff had not so refused or neglected. On the contrary, he was perfectly willing, and said that he was perfectly willing, to answer any questions that might be put to him, but he wished to take the names and addresses of two persons who could be witnesses for him on any charge that might be laid against him. This was a matter of urgency, because people generally are reluctant to give evidence in a court of law, and, if he missed getting their names and addresses then and there, it was quite probable that he would never hear of them again. His desire to get these names and addresses, and to get them immediately, was most natural and most reasonable, and obviously ought to have been facilitated rather than hindered by the defendant and the other constable. While he was writing down one name and address, he was informed that the police were not going to wait all night for him, struck a blow on the shoulder, and told that he was under arrest for "*refusing* (*sic*) to give his name and address". When he asked to be allowed to complete taking the names and addresses, the defendant said: "If you hesitate one moment, I'll handcuff you." He was then seized by the arm, taken to his cab and driven to the police station. *Virtue* J., who saw him, mentions that the plaintiff is an elderly man. He had shown no sign of violence or of attempting to run away. The "thump" on the shoulder, and the threat to handcuff him, were outrages. Their immediate importance is that they are among the circumstances which indicate very clearly that by this time the defendant was actuated by anything but a desire to vindicate the law. The desire to prevent the taking of the names and addresses of Davies and Skeffington is also very significant. When the plaintiff was marched away, they asked if they might go with him, as they were witnesses of all that had happened. The defendant's refusal was conveyed by the words: "We're not interested in bloody witnesses." A man who was anxious merely to do his duty would have been very interested in witnesses, whether bloody or not.

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If, on arrival at the police station, the plaintiff had been immediately released, he would, in my opinion, have had a cause of action for substantial damages in respect of his arrest—a cause of action to which the statute would have afforded no defence. But what happened at the station was a gross aggravation of what had gone before. That the defendant was actuated by strong personal animosity, and that his whole object was to punish and humiliate the plaintiff, appears to me to be placed beyond all shadow of doubt by the treatment of the plaintiff at the station. His name and address are known. He has given them to the defendant, who has by this time read the card. There is not the slightest reason for supposing that he will flee or hide. There is no suggestion that he has committed any substantive offence. Yet he is searched with some violence, his money and part of his clothing are taken from him, and he is actually imprisoned in circumstances of grave discomfort and humiliation for a period of two hours. A thoroughly disgraceful episode then terminates with the taking of the plaintiff's fingerprints before his release. This itself was an outrage, but it seems to be one for which the defendant was not directly responsible, and the officer actually taking the fingerprints may well have been unaware of the circumstances of the case.

No attempt whatever was made to explain or excuse the treatment to which the plaintiff was subjected. The defendant simply relied on the statute. But it seems to me to be idle to say that the acts of the defendant were done for " carrying into effect the provisions of the *Police Act* ". Through all the numerous cases in which such expressions have been considered runs the clear conception of a man intending and trying to do his duty but labouring under some misapprehension of fact or of law. Nothing, to my mind, could be more remote from such a conception than the conduct of the defendant in this case. No purpose of the *Police Act*, no purpose of the law, could possibly be served, or could possibly be supposed to be served, by what was done. The only conceivable explanation of it lies in a determination on the part of the defendant to inflict punishment on a man who had in some way offended him. He was acting, in the words of *Lush* J., " wantonly and in abuse of his authority ".

Virtue J. assessed special damages suffered by the plaintiff at £27 17s. 0d., and general damages at £500. The case is obviously one for exemplary damages. The amount seems moderate, and it was not challenged. The appeal should be allowed with costs, and there should be judgment for the plaintiff in the action for £527 17s. 0d. with costs.

KITTO J. We have heard from Mr. *Hatfield* a forceful and helpful argument which has placed before us, I am sure, every consideration which we ought to weigh in favour of the respondent. In my opinion, however, the appeal should be upheld.

It is an appeal from a judgment given by *Virtue* J. in the Supreme Court of Western Australia on the trial of an action for assault and malicious arrest and imprisonment. The learned trial judge would have given judgment for the plaintiff, the present appellant, had he not considered that he was precluded from so doing by the provisions of par. H of the Second Schedule to the *Interpretation Act* 1918-1948 (W.A.) as incorporated into the *Police Act* 1892-1953 (W.A.) by s. 138 thereof. So far as material, the provision so made is that no action shall lie against an officer of police (and certain other officers of government authorized to carry the provisions of the *Police Act* into effect) on account of any act, matter or thing done in carrying that Act into effect against any parties offending or suspected of offending against the same, "unless there is direct proof of . . . malice". And it goes on to entitle a successful defendant to recover treble costs. His Honour did not specifically deal with the question whether the conduct of the defendant which was complained of in the action fell within the description of the acts matters and things referred to in par. H. He held, on the construction of the paragraph that the requirement of direct proof of malice could not be satisfied by evidence which fell short of establishing, not only that the defendant was actuated by some motive constituting malice, but also precisely what the malicious motive was. He was not prepared to make a finding that the defendant in this case did the acts complained of from any identifiable malicious motive, and indeed he thought that no such motive was really more likely than that the defendant's conduct was induced by sheer over-officiousness and boorishness. For that reason, and for that reason alone, he felt constrained to give judgment for the defendant.

The phrase "done in carrying the *Police Act* into effect" imports more than a belief in facts which, if they had existed, would have meant that the plaintiff had committed an offence against the *Police Act*. It cannot be applied unless, having such a belief, the defendant honestly intended by doing what he did to put the law in force: *Hermann* v. *Seneschal* (1). For reasons which I shall state it appears to me that the facts found by the trial judge are inconsistent with the existence in the defendant's mind of an honest

(1) (1862) 13 C.B. (N.S.) 392, at pp. 402, 403 [143 E.R. 156, at p. 160].

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intention to enforce the law. On that footing par. H. was inapplicable to the case and the question of direct proof of malice did not need to be decided. It was, however, the question to which his Honour addressed himself and which formed the main subject of discussion before us. We ought, I think, to deal with it.

The word "malice" must here mean what has been variously called express malice, actual malice or malice in fact as contrasted with malice in law which is no more than the unlawful intent which is present whenever an injurious act is done intentionally and without just cause or excuse: *Shearer* v. *Shields* (1). Malice in the latter sense is not a separate matter of proof. In the former sense, however, it forms the subject of a separate issue of fact on which the party alleging it must establish that the conduct of which he complains was actuated solely or predominantly by a wrong or indirect motive. This means, where that conduct could only be justified by reference to an authority possessed by the actor to perform functions for the enforcement of law, that he acted "from an indirect and improper motive, and not in furtherance of justice": *Abrath* v. *North Eastern Railway Co.* (2). That is to say, from some desire other than "to discharge his duty to the public": *Cruise* v. *Burke* (3). What has already been said about the conduct of the defendant in the present case means that malice, in this sense of the word, was proved quite convincingly. But the evidence by which it was proved was circumstantial evidence—cogent enough, but circumstantial. For that reason, it could not fulfil the requirement of "direct proof" if, as we were invited to hold, that expression means proof which does not depend upon the drawing of inferences. But proof of motive is always and necessarily a matter of inference, except where a party whose motive is to be ascertained makes a direct admission on the point after the event and either in or out of court. Even proof of statements made by him before the event, and showing a clear intention to do for an improper reason the acts which thereafter he did, would not be direct proof of malice, for they could provide no more than a ground, when considered with all other relevant circumstances, for drawing an inference that the improper reason persisted at the material time and provided the defendant at that time with his actuating motive. If the legislature had really intended that nothing but proof of an admission by the defendant should suffice as proof of malice, a less happy choice of words than "direct proof" could hardly have been made. In any case, it is not easy to suppose that Parliament

(1) (1914) A.C. 808, at pp. 813, 814, 815.
(2) (1883) 11 Q.B.D. 440, at p. 455.
(3) (1919) 2 I.R. 182, at p. 186.

would really intend to give public officers immunity from civil liability for damage caused by malicious conduct however convincingly the malice might be proved, and to inflict treble costs on a victim so ill-advised as to seek legal redress, except in the odd case in which the guilty officer is sufficiently accommodating to condemn himself. Clearly "direct proof" must be intended to draw some other distinction.

The distinction which *Virtue* J. considered to be relevant was that to which *Cave* J. referred in *Brown* v. *Hawkes* (1) when he said in dealing with a case of malicious prosecution: "malice can be proved, either by shewing what the motive was and that it was wrong, or by shewing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor" (2). The word "direct" does seem to be an entirely appropriate and natural word to use for the purpose of describing the first of these methods of proof. Evidence which points to a particular motive which is a wrong motive goes directly to the issue of malice. It is true that such evidence may only establish immediately certain primary facts from which the step of drawing an inference has to be taken before the conclusion can be reached that the particular form of malice existed; but the route to that conclusion is a direct one, none the less. It is in this very respect that it contrasts with the second method referred to by *Cave* J. That is a method which follows the route—I see no difficulty in calling it the indirect route—of proving that the defendant's conduct is not to be explained by the existence of a right motive. Evidence which tells against the probability that a right motive was the sole or predominant cause of the conduct goes to provide a foundation on which the jury may reason, through the presumption that there must be *some* explanation of what the defendant did, to the conclusion that he must have been actuated by an inadmissible motive of some kind or other. An example may be found in the case of evidence which shows that the defendant in an action of malicious prosecution had no reasonable or probable cause. That is a question for the judge, though in order to answer it he must accept any findings of the jury on relevant questions of disputed fact. The jury's findings on such questions may have importance, not only for the judge on the question he has to decide, but for themselves on the question of malice which it is for them to decide. They may find that facts were known to the prosecutor such that a reasonable man who knew them would not believe in the guilt of the accused. That may seem to them to make it

(1) (1891) 2 Q.B. 718.

(2) (1891) Q.B., at p. 722.

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improbable that the prosecutor in fact believed in the guilt of the accused, although, as they should recognize, there is always the possibility that a belief which appears unreasonable may nevertheless be honestly held, either because the person concerned pursues an unreasonable train of thought or because he is forgetful of or inattentive to factors in the situation, the absence of which would make his belief reasonable. If they think it more probable than not that the prosecutor lacked a belief in the guilt of the accused, they are justified in taking the next step of concluding that the prosecution was not instituted from a genuine desire to serve the ends of justice and is not to be satisfactorily explained save on the supposition that the prosecutor was actuated by an indirect or improper motive. If so, they may legitimately make a finding of malice, even though they may not feel able to say precisely what the malicious motive was. Thus the issue is found, not by the direct persuasion of the primary facts proved, but by the indirect persuasion of the presumption that there must be some rational explanation to account for the acts complained of plus the proved unlikelihood of the defendant's having acted from a proper motive.

To understand par. H as requiring proof of malice by the first of the methods mentioned by *Cave* J. is to treat it as insisting upon a distinction which is not only clear and logical but gives effect to a readily comprehensible policy. The mischief which has been thought to call for such enactments is that public officers who have the responsibility of enforcing the law would otherwise be left exposed to the risk of being held liable as for malicious conduct in cases where the true explanation of their behaviour is, not that they were impelled by any inadmissible motive, but only that they acted injudiciously, imprudently or through some mistake such as forgetfulness of facts which at some time had come to their notice. That, as Lord *Shand* pointed out in *Beaton* v. *Ivory* (1) is a risk which, if it were unrelieved, might deter them "from doing what (is) right and proper and what might even be necessary for the vindication of the law in the circumstances". The problem of a draftsman desiring to meet this situation is to preserve a balance between, on the one hand, effectively protecting officers from the danger that actions which they may take in the genuine discharge of their public responsibilities may be misconstrued as malicious, and, on the other hand, preserving as far as practicable the protection which the common law throws around private individuals in relation to abuses of official power. Although the language chosen by the draftsman of the Western Australian provision is far from

(1) (1887) 14 R. 1057, at p. 1063.

clear, its meaning appears to me to be that the officers to whom it refers are protected from suit in respect of the conduct of the class described, unless malice be proved affirmatively, by evidence "shewing what the motive was and that it was wrong", and not negatively by making other possible causes appear unlikely and so persuading the tribunal of fact that it cannot account for what the officer did except by imputing to him some wrong or indirect motive.

I therefore agree with *Virtue* J. in the construction which he placed upon par. H. It is only in the application of the paragraph in the circumstances of this case that I take a view which differs from that which his Honour felt constrained to adopt. When the evidence which his Honour accepted is considered in detail, it seems to me to point convincingly to a specific motive as accountable for the defendant's conduct. We have the spectacle of a constable, over-officious and boorish, who, in the presence of strangers, impetuously accuses a taxi-driver in terms of crude insult and offensiveness of the minor offence of cruising for hire. Finding that he must abandon the charge because the passengers in the taxi will be ranged against him on the issue of fact, a sense of frustration and an affronted dignity lead him to look for a way of getting even with the innocent cause of his discomfiture. He surlily demands the taxi-driver's name and address. The taxi-driver complies at once by stating his surname orally and handing the constable his card which shows his surname and the initial letter of his first name, the telephone numbers of his taxi-rank and his home, and his home address. If more is needed, the taxi is there, so that its registration number can be taken. In truth, of course, nothing is needed, for the constable knows that he is not in a position to allege the commission of any offence. He takes the card, but does not bother to read it. The taxi-driver proceeds to ask and write down the names of his passengers, lest a charge should be laid against him and he should need the passengers as witnesses; but he informs the constable that as soon as he has taken the names he will tell him anything further he wishes to know. There is nothing further the constable wishes to know; and obviously he does not wish to know even the information already in his possession. But his irritation, the irritation of a conceited man who has given a display of arrogance and been proved wrong before witnesses, mounts to anger. He interrupts the taxi-driver, grabbing him by the shoulder as he tries to write down the names which he needs to preserve, and, before he has finished, arrests him for failing (or refusing) to give his name and address. He

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threatens to handcuff him, though there is not the slightest reason for thinking that so extreme a step is called for, bundles him unceremoniously into a police vehicle, and takes him to a police station. Protests voiced by the stranded passengers and by other members of the public fail to recall him to his sense of decency and duty. Those who protest are treated with rudeness and contempt. At the police station, the constable formally charges the taxi-driver with "refusing" to give his name and address. Even assuming that he might think there has been a failure to give these particulars, it is quite impossible that he should see in the man's words or conduct anything remotely resembling a refusal. But he persists in the charge, continues to ill-treat his victim, compels him to remove his shoes, socks and tie, and has him put into the lock-up where he is detained for two hours in circumstances (as the trial judge said) of considerable indignity, humiliation and discomfort. Eventually the object of this malevolence is brought before a magistrate, and the charge so absurdly laid against him is very properly dismissed.

No one could suppose that in pursuing the course he did the defendant was animated by a desire to vindicate the law. What explanation of his conduct do the proved facts themselves convey? Surmise and conjecture are not permissible, as the learned judge observed; but inference is another matter: see *Luxton* v. *Vines* (1). The circumstances I have briefly recounted appear to me to give rise to a very clear inference indeed that what actuated the defendant was nothing but a vindictive desire for the satisfaction of settling a score with a man who, by his inoffensive resistance to an arrogant abuse of authority, had inflicted a wound upon vanity and self-conceit. In my opinion such a motive so proved is malice proved directly.

I would therefore allow the appeal and hold the plaintiff entitled to judgment.

TAYLOR J. This is an appeal from an order of the Supreme Court of Western Australia (*Virtue* J.) dismissing an action in which the plaintiff, the present appellant, sought to recover damages from the respondent for false imprisonment. The action failed, not for lack of merits, but because, in the opinion of the learned trial judge, the appellant was unable to surmount the difficulties raised by a statutory defence which was available to the respondent as a constable of police of that State.

(1) (1952) 85 C.L.R. 352, at p. 358.

About 9.15 p.m. on 24th July 1954 the appellant, who was a taxi-cab driver in Perth, stopped his cab at the kerbside in William Street for the purpose of picking up four passengers, two men and two women. As he opened the rear door on the near side of the cab the respondent, who was not in uniform, opened the adjoining door. In the belief, apparently, that the respondent was a person who desired to hire the cab the appellant told him that the four persons on the footpath had hired the cab first whereupon the respondent is alleged to have said, " Never mind about you ! Police here ! What the hell are you doing here ? You have no bloody right to be here. There's a taxi rank in Murray Street ". When asked if he might pick up the intending passengers he was told that he could not. At this stage the respondent apparently suspected that the appellant was offending against the traffic laws by " cruising for hire " and after a brief discussion the respondent walked to the driving side of the cab and demanded the appellant's name and address. The appellant asked with what he was to be charged and he was informed " plying for hire ". He then asked if he might take the names and addresses of the persons who had hired him, adding that his name was Trobridge and that he was well and favourably known to the Traffic Department. At the same time he handed to the respondent one of his business cards saying " This is one of my cards ". The card bore the following inscription : " Railway Taxi Rank. Phone BA3508. L. Trobridge. 113 Fourth Avenue, Mt. Lawley. Phone UA 2587 ". After handing his card to the respondent he said, "As soon as I get the names and addresses of these people I will tell you anything further you want to know ". Thereupon, the appellant got out of his cab, walked towards the front of it and asked the four persons standing there if they would give him their names and addresses. This they proceeded to do but the appellant was only in the course of writing down the first name and address when the respondent " grabbed " him by the shoulder and asked how much longer he was going to be, adding " the police are not going to wait all night for you ". The appellant said he would only be a moment or two, but as he turned to resume his writing he was again seized by the shoulder by the respondent who said " You are under arrest ". When asked the reason for this the respondent said " For refusing to give your name and address ". The appellant again requested time to take down the names and addresses of the intending passengers, but the respondent said " If you hesitate one moment I will handcuff you ". Thereupon the respondent took the appellant by the arm and the latter said " If I am being arrested for refusing my name

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and address these people must have seen me hand you my card and heard me say my name is Trobridge ". The respondent, who then had the appellant's card in his hand, is alleged to have said: " This doesn't mean a thing to me nor what you people saw or heard ". Thereafter he took the appellant to a police car which was standing in the street and conveyed him to a police station where at the instance of the respondent he was charged with having refused upon demand to give his name and address to the respondent.

This brief account of the relevant events is taken from the appellant's evidence which was generally acceptable to the learned trial judge. In the light of his findings made upon the evidence it should, however, be supplemented by the following observations, some of which are taken from his Honour's reasons. The respondent's approach to the appellant was " aggressive, rude and abusive and quite contrary to what ordinary law-abiding members of the public are entitled to expect when questioned by police officers regarding minor breaches of the law ", whilst " the plaintiff's conduct was courteous, correct and entirely unprovocative and that despite the provocation he himself received ". Notwithstanding that, after speaking to him at the kerbside, the respondent was satisfied that the appellant had not committed the offence of cruising or plying for hire he forbore to tell the appellant so. In the course of arresting the appellant " the respondent made himself unnecessarily unpleasant and went far beyond what was called for under the circumstances ". He " handled the appellant unnecessarily and threatened to handcuff him though he was an elderly man who did not in any way resist arrest or show any disposition to attempt to escape ". Moreover, if the interests of justice called for the appellant's arrest, or for the preferring of a charge against him, it was of importance that the evidence of the intending passengers should have been available. But the respondent prevented the appellant from obtaining their names and, even, when these same persons informed the constable they " wanted to go as witnesses " for the appellant the respondent refrained from taking their names and dismissed them contemptuously. At a later stage, when, impelled by a sense of justice, they had walked to the police station, they were treated in the same manner. In spite of the fact that the appellant had ample money in his possession to provide bail after being charged he was detained for two hours " in circumstances of considerable indignity, humiliation and discomfort ", until the authorities finally released him on bail which he was easily able to provide out of money in his possession. It should

be added that the respondent was one of the officers who conducted the appellant to a cell where he was required to remove his shoes, socks and tie. Thereafter, for the period mentioned, he remained in the cell with three other prisoners who had been arrested, except for a short period when he was removed for the purpose of having his fingerprints taken.

It is almost unnecessary to say that when the appellant appeared before a magistrate on 4th August 1954 to answer the charge it was dismissed.

In view of the fact that the respondent satisfied himself that the appellant had not been cruising or plying for hire one may wonder why he demanded the appellant's name and address, but, whether or not there was any reason for this, the findings of the learned trial judge disclose an abuse of authority which is about as gross as it is possible to imagine. The respondent's conduct, which, in the opinion of the learned trial judge, so far departed from the standards commonly observed by the police force of the State, evoked a well-merited stricture from him. Strong condemnation of the respondent's conduct was, he thought, necessary not only in the public interest but in the interests of the police force itself. It is perhaps unnecessary to add to what his Honour has already said but I cannot forbear to say that upon the facts as found by him the respondent's conduct constituted a grave and completely unwarranted interference with the appellant's person and liberty.

The appellant's statement of claim alleged that the respondent, acting in his office as a member of the police force, but acting illegally, assaulted the appellant and maliciously and without reasonable or probable cause took him into custody on a false charge then made by him. In answer to this allegation the respondent admitted that he took the appellant into custody on a charge then made by him of refusing to give the respondent, as a police constable, his name and address when required so to do but he denied that he had acted illegally or (*sic*) that the charge was false. I confess that I have some difficulty with this answer. It does not allege either that the appellant had committed the offence with which he was charged or that the respondent had just cause to suspect that he had done so: (see *Police Act* 1892-1953, s. 43); it merely alleges that the respondent did not act illegally and that the charge was not false, whatever that may mean. Apparently at the trial s. 50 of the *Police Act* alone was relied upon as justification but an arrest under that section is justifiable only if, upon demand, an individual neglects or refuses to give his name and address. Upon the facts of this case the provisions of that section

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were of no avail to the respondent for the appellant had not refused to give his name and address. This, however, is of little consequence for, notwithstanding the form of the pleading, the learned trial judge gave consideration to the question whether the arrest was justifiable on any grounds. In the result he concluded " that there was no reasonable or probable cause for making the arrest or laying the charge " and, accordingly, he was of the opinion that the appellant was entitled to succeed in the action unless he was debarred by the second defence which was raised by the respondent.

This defence was based on par. H of the Second Schedule to the *Interpretation Act* 1918-1948 which is in the following terms : " No action shall lie against any justice of the peace, officer of police, policeman, constable, peace officer, or any other person in the employ of the Government authorised to carry the provisions of this Act, or any of them, into effect, or any person acting for, or under such persons, or any of them, on account of any act, matter, or thing done, or to be done, or commanded by them, or any of them, in carrying the provisions of this Act into effect against any parties offending or suspected of offending against the same, unless there is direct proof of corruption or malice, and unless such action is commenced within three months after the cause of action or of complaint shall have arisen ; and if any such person shall be sued for any act, matter, or thing which he shall have so done, or shall so do, in carrying the provisions of this Act into effect, he may plead the general issue and give the special matter in evidence ; and in case of judgment after verdict, or by a Judge sitting as a jury, or on demurrer being given for the defendant, or of the plaintiff discontinuing, or becoming nonsuit in any such action, the defendant shall be entitled to and have treble costs." By s. 47 of the Act it is provided that any of the provisions contained in the second schedule may be incorporated as enactments in any Act by reference to the said schedule and to the letters distinguishing the said sections respectively. The provisions of par. H were, by s. 138 of the *Police Act*, incorporated with and constituted part of that Act to all intents and purposes as if that provision had been introduced and fully set forth in the Act. Under this defence two particular issues arose. The first was whether the appellant was a party " suspected of offending against " any provision of the *Police Act*, whilst the second was whether there was any " direct proof of malice " on the part of the respondent.

The only offence which was alleged against the appellant is that he refused, upon demand, to give his name and address to the respondent but it is clear that he did not commit this offence.

Nor, in the circumstances of the case, did the respondent, in the language of the learned trial judge, have reasonable and probable cause for suspecting that he had. But there seems little doubt that the protection afforded by par. H extends to cases of wrongful arrest if, notwithstanding the absence of just cause or reasonable and probable cause for suspicion, a suspicion is honestly, though wrongly or mistakenly, entertained. The provision is intended to provide protection against liability for acts which would otherwise be actionable and it would serve no purpose if, in cases of arrest, it did not extend beyond claims made by actual offenders and persons suspected on reasonable grounds of having committed offences : (cf. *Graves* v. *Arnold* (1) and *G. Scammell & Nephew Ltd.* v. *Hurley* (2)—per *Scrutton* L.J. (3)).

On this view the question whether the provisions of par. H afford a good answer to a plaintiff's claim really becomes relevant only when the matter complained of is not otherwise legally justifiable and one issue which it must be taken to have raised in this case was whether the respondent suspected that the appellant had committed the offence in question. It may, at once, be said that on this point there is, at the very least, considerable room for doubt. It was not a case of a police officer acting on credible information supplied to him ; the respondent had first-hand information of all the relevant facts. He knew that when he demanded the appellant's name and address the latter had said that his name was Trobridge and that he had handed to the respondent a card which purported to contain the appellant's name and address. Yet the respondent deposed that he believed that the appellant " had refused his name and address ". He did not, however, say that he did not believe the appellant when he said his name was Trobridge, nor did he say that he did not believe that the card tendered to him was not the appellant's. Neither did he say that he believed that the card did not contain a correct or proper statement of the appellant's name and address. In these circumstances it is difficult to understand the assertion of the respondent that he believed that the appellant had, in fact, refused his name and address. It was suggested in the course of argument that the respondent considered, or may have considered, that the appellant was under an obligation to give his name and address orally and that his belief that an offence had been committed was, or may have been, based upon this mistaken view of the law. But if this was so there is no evidence of it ; there is simply the bald assertion that, notwithstanding a full

(1) (1812) 3 Camp. 243 [170 E.R. 1369].

(2) (1929) 1 K.B. 419.

(3) (1929) 1 K.B., at p. 427.

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knowledge of the facts as they really occurred, he believed the offence had been committed. The learned trial judge did not make any express finding concerning the respondent's belief on this point but it is clear that he was of the opinion that no such belief could reasonably have been entertained. This conclusion was put on two grounds. The first was that the appellant complied with the respondent's demand, and the second, that, even if the particulars given were insufficient, there was, in fact, no refusal. According to his Honour he was: "satisfied that even if the particulars were not sufficient the plaintiff never refused his name and address. He told the constable when saying his name was Trobridge and supplying the card that he would supply any further information which the constable required when he had taken the names and addresses of his witnesses. That was a reasonable request. For all he then knew the constable intended to charge him for the traffic offence. The people who had hailed him were unknown to him and might well have disappeared and become unavailable to him if he did not take immediate steps to ascertain their identity and I consider that the defendant acted most unreasonably in endeavouring to hamper him from doing so or in not telling him that he had no intention of laying a charge so that there was no necessity for him to pursue the enquiries". If, as his Honour found, there was, in fact, no *refusal* on the part of the appellant to give his name and address and if, in fact, the respondent was aware of this, it becomes unnecessary to conjecture whether the latter entertained the mistaken view that the appellant was bound to give the information demanded orally. Knowledge on the part of the respondent that the appellant had not so refused is quite inconsistent with any belief or suspicion that the offence in question had been committed. Nevertheless the respondent asserted that he believed the offence had been committed. The respondent's assertion, however, was made at the end of his evidence and after he had deposed to a version of the facts which, if accepted, might, perhaps, have justified such a belief. In effect, the respondent had said "these are the facts and I believed that the offence had been committed". But once the true facts emerge and it is clear that there never was a refusal on the part of the appellant what weight can the respondent's assertion carry? He was in full possession of the facts and nothing had occurred to give rise to any belief or suspicion on his part that the offence had been committed. Indeed the learned trial judge expressly so found. And once the respondent's version of the facts is rejected, and that of the appellant accepted, the assertion of the former is entirely

stripped of weight. Not only does the acceptance of the appellant's version operate to impeach the respondent's credit generally but it leads to the conclusion that, clearly, there was no refusal and that the respondent must have been aware that this was so. In these circumstances the statutory protection upon which he relies is not available to him.

The views already expressed are sufficient to dispose of the appeal but in view of the fact that the point just discussed was not debated at the trial and that attention was focused solely on the question whether the appellant had adduced " direct proof of malice " it is necessary that something should be said on this point also. The expression " direct proof " used in relation to malice raises questions of some difficulty. It is, of course, not difficult to distinguish between " direct evidence " and " circumstantial evidence " when it is used concerning issues of fact which are provable by either means. There is no difficulty in appreciating how the commission of many crimes may be proved by direct evidence, that is to say, by the evidence of witnesses who have observed the commission of those crimes, or by circumstantial evidence, that is to say, by direct evidence of collateral facts from which inferences may be drawn concerning the existence of a fact or facts primarily in issue. But it is virtually impossible to prove some issues of fact by direct evidence. If A be charged with assaulting B with intent to murder him, or with intent to rob, the question of A's intent in either case is a question of fact. But the mental processes of one person are not capable of being proved by the direct evidence of others in the sense in which that term is generally understood. (See *Phipson* on *Evidence*, 9th ed. (1952), p. 2, and *Taylor* on *Evidence*, 12th ed. (1931), p. 63.) The issue of fact must, therefore, be proved in the first instance by way of inference from proved facts. The same observation may be made concerning proof of malice, that is to say proof that a defendant was actuated by some improper motive or motives. It is, of course, quite impossible for a plaintiff to prove such an issue except by inference from collateral facts and this alone is sufficient warrant for saying that the statutory provision does not debar a plaintiff unless malice be proved by direct evidence in the sense in which I have used that term. The examination of the provision should, therefore, commence by assuming that " direct proof of malice " does not exclude proof by evidence of facts which give rise to the inference that the defendant was actuated by malice for this is the only way in which that issue may be established. This being so what is meant by the expression " direct proof of malice " ? The learned trial judge was fully aware of the difficulties

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created by the expression and finally expressed the view that the provision would operate as a bar unless a plaintiff could prove what, in fact, the improper motive of the defendant was; it would not be sufficient, he thought, to prove circumstances leading to the inference that there must have been an improper motive unless the motive was also identifiable. But once it is recognized that "direct proof" cannot mean "direct evidence", and that the former expression does not exclude proof by evidence of facts from which the inference of malice may be drawn, I can see no reason for the distinction made by his Honour. As pointed out in the passage quoted by him from the judgment of *Cave* J. in *Brown* v. *Hawkes* (1), "Malice can be proved, either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor" (2). In endeavouring to construe the provisions of par. H it should be borne in mind that it was first enacted in Western Australia in 1853 and it was introduced in sufficiently wide terms to cover a multitude of activities. It was designed for incorporation in any Act passed by the Parliament of the State and it was contemplated that it might be adopted for the protection of government officials and others in the exercise of a wide variety of statutory powers. Quite obviously it was the intention of the legislature to afford protection to governmental officers in respect of wrongful acts, that is to say, the exercise or purported exercise of statutory powers on insufficient grounds or "without just cause or excuse". There can, however, be no reason for attributing to the legislature an intention to afford protection in respect of wrongful acts which have been prompted by some motive other than the legitimate interests which the exercise of any particular statutory power is intended to serve. But divergent meanings have, over a long period, been assigned to the word "malice" and the absence of just cause might, itself, be taken as evidence of it. As *Bayley* J. said in *Bromage* v. *Prosser* (3): "Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse" (4). See also *M'Pherson* v. *Daniels* (5) and *Reg.* v. *Munslow* (6). Since, however, it was the aim of the provision to afford protection in respect of acts done without such cause or excuse it was necessary to distinguish between malice in this sense

(1) (1891) 2 Q.B. 718.
(2) (1891) 2 Q.B., at p. 722.
(3) (1825) 4 B. & C. 247 [107 E.R. 1051].
(4) (1825) 4 B. & C., at p. 255 [107 E.R., at p. 1054].
(5) (1829) 10 B. & C. 263 [109 E.R. 448].
(6) (1895) 1 Q.B. 758.

and what has been described as actual or express malice. Hence the use of the expression "unless there is direct proof of . . . malice" to indicate that the protection afforded by the section extends to cases where malice may be said to be implied from the absence of just cause and excuse; but the use of the expression does not, in my view, exclude a plaintiff who is able by evidence of collateral facts to prove the existence, in fact, of an extraneous motive whether the motive be identifiable or not.

Perhaps another way of approaching the problem is to emphasize the expression in par. H "on account of any act, matter or thing done in carrying the provisions of this Act into effect". As already pointed out the use of this phrase does not restrict the protection afforded by the paragraph to liability for acts otherwise legally justifiable; it is a well recognized expression (cf. *McLaughlin* v. *Fosbery* (1) and cases there cited) and it comprehends, in some circumstances, acts for which no statutory justification can be found. But where an act, unlawful in itself, has been performed and it appears that it has been actuated by express malice it can scarcely be said that it was an act done in the exercise of a statutory power. Nor, indeed, can it be said to have been done in the *intended* exercise of a statutory power. If there is evidence of express malice in the sense in which I have used that term then, in the language of *Scrutton* L.J. in *G. Scammell & Nephew Ltd.* v. *Hurley* (2) such acts "are not done in intended execution of a statute, but only in pretended execution thereof" (3). This consideration fortifies the view which I have formed that the section is not intended to provide protection where express malice is proved.

In the present case there was abundant evidence to establish the existence of malice. Not only was there no evidence of any just cause or excuse for the appellant's arrest but the respondent did not, upon the proved facts of the case, suspect that the appellant had committed an offence. Moreover, the respondent's conduct in the course of the arrest was outrageous. He did not even bother to look at the card which had been handed to him and his handling of the appellant and his threat to handcuff him all point the one way. Again, the respondent knew at the police station, when the appellant gave his name for the purpose of being charged, that the card which had been handed to him contained particulars of the appellant's name and address for, at that stage, he had taken the trouble to read it and yet he did nothing to rectify the position even then. On the contrary he assisted in escorting the appellant to

(1) (1904) 1 C.L.R. 546.
(2) (1929) 1 K.B. 419.
(3) (1929) 1 K.B., at p. 427.