[HIGH COURT OF AUSTRALIA.]

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

AND

BRAIN . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1934-1935.

SYDNEY, 1934, *Dec.* 3-8.

MELBOURNE, 1935, *May* 17.

Starke, Dixon, Evatt and McTiernan JJ.

Malicious Prosecution—Prosecution commenced by police—Information supplied by secretary of company—Prosecution conducted by company's counsel at expense of company—Reasonable and probable cause for prosecution—Damages.

In an action for malicious prosecution the defendant may be liable although neither he nor any servant of his was the actual prosecutor if he counselled and persuaded the prosecutor to institute the proceedings or procured him to do so by false information or other dishonest means.

Reasonable and probable cause for a prosecution cannot exist if the prosecutor does not believe either in the guilt of the accused or in such a probability of guilt as to make a prosecution warrantable. If there is evidence that the prosecutor did not so believe, the question of his belief must be left to the jury.

In an action against a company for malicious prosecution it appeared that, though the charge of conspiracy to defraud, which was the foundation of the claim in the action, was laid by an officer of police, the information which led to the making of the charge was supplied to the police by the secretary of the company, and the prosecution was conducted by counsel and solicitors employed by the company, which agreed to pay all costs, charges and expenses of the prosecution. The plaintiff was committed for trial, but the Attorney-General declined to file an indictment. At the trial of the action the Judge submitted to the jury specific questions, two of which, with their answers, were as follows:—(1) "Was the prosecution of the plaintiff instigated by the defendant

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

company? Yes." (2) "If so, did the defendant company genuinely and honestly believe that the prosecution was justified? No." In answer to other questions the jury found that the plaintiff was not guilty of the offence with which he had been charged and that the defendant was actuated by malice in instigating the prosecution, and they awarded damages, £3,000.

Held that the questions were proper to be submitted to the jury; the finding that the defendant did not believe the prosecution to be justified was incompatible with reasonable and probable cause for the prosecution, and, there being evidence to support the jury's findings, the plaintiff was entitled to succeed.

Held, also, by *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that the damages awarded by the jury were not excessive.

Decision of the Supreme Court of New South Wales (Full Court): *Brain* v. *Commonwealth Life Assurance Society Ltd.*, (1934) 35 S.R. (N.S.W.) 36; 52 W.N. (N.S.W.) 7, affirmed.

APPEAL from the Supreme Court of New South Wales.

The respondent, Leslie Roy Mattinson Brain, brought an action in the Supreme Court of New South Wales against the appellant, the Commonwealth Life Assurance Society Ltd., for malicious prosecution, the charge being that Brain and three others conspired to cheat and defraud divers shareholders and policy holders of the Commonwealth Life (Amalgamated) Assurances Ltd. of divers large sums of money. The appellant was a company incorporated in New South Wales, which had ceased to conduct active operations but held a large part of the share capital of the Commonwealth Life (Amalgamated) Assurances Ltd.

The charge of conspiracy was laid by Detective-Sergeant Lawrence. The persons charged were the respondent, Brain, who had formerly been a director of the appellant company, and also on the staff of the Amalgamated company, Sydney Smith, W. T. Page, who was the managing director of Associated Dominions Assurance Society Ltd., and Corkhill, the general secretary of that company. The alleged object of the conspiracy was to bring about a change in the control of the appellant company so as to force the Amalgamated company to dispose of its business to the Associated Dominions Assurance Society Ltd. Brain was committed for trial, but the Attorney-General declined to file an indictment.

The action was heard by a Judge and a jury of four, and a verdict of £3,000 was returned in favour of the plaintiff. The defendant

then applied to the Full Court of the Supreme Court of New South Wales by motion for an order setting aside the verdict, or entering a nonsuit or verdict for the defendant, or for a new trial. The Full Court dismissed the motion: *Brain* v. *Commonwealth Life Assurance Society Ltd.* (1).

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

Further facts appear in the judgments hereunder.

Robert Menzies K.C. and *Dovey*, for the appellant. The jury were insufficiently instructed as to the difference between malice and reasonable and probable cause, and their verdict should not be allowed to stand. The question of reasonable and probable cause was expounded in such a way as to make the jury treat it as only another way of putting the question of malice. The jury never directed their minds to the question of the defendant's belief that the prosecution was justified. They only considered the question of malice. The result is that the jury's answer to the question whether the defendant believed the prosecution to be justified ought to be treated as an answer on the question of malice. If that is so, then no finding has been made on the question of reasonable and probable cause at all. Neither the trial Judge nor the Full Court made one. It is open to the High Court to consider the question of reasonable and probable cause itself. On the undisputed facts the trial Judge should have found there was reasonable and probable cause, and, if there are matters in dispute, the jury's finding has never been obtained. The defendant did not instigate the prosecution. The police exercised an independent judgment in prosecuting and did not exercise merely an administrative function. Information can be supplied to the police, with the desire that it should be acted upon, without the informer becoming the prosecutor. The supplying of counsel and solicitor does not make the matter a private prosecution. These were supplied at the request of the Crown Law Department. The respondent and the others charged with conspiracy were proposing to become the owners of the appellant company by getting finance to obtain the business and then using the funds of the company, which would otherwise have been available to the shareholders.

(1) (1934) 35 S.R. (N.S.W.) 36; 52 W.N. (N.S.W.) 7.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

to recoup their outlay. In all the circumstances that was an illegal undertaking. It is for the plaintiff to satisfy the jury that the defendant did not have reasonable and probable cause to prosecute. The defendant does not have to establish that there was a conspiracy. There was material which would warrant the defendant in the conclusion that the plaintiff was probably guilty of the offence charged against him. If the prosecutor reasonably believes that on the information he possesses the other man is probably guilty, that is sufficient. The scheme in which the respondent was involved was one to be achieved by unlawful means, first, by the preparation and putting forward of a false balance-sheet by the proposed purchasing company, and secondly, by the circular issued on 22nd November, which contained misrepresentations of fact. The evidence suggesting that Inch had concocted a telegram attempting to implicate Stack in the conspiracy should not have been admitted. There is no evidence that such a document was used or sought to be used by Inch to implicate Stack or Brain. The evidence should not have been admitted at all, and, if admitted, it was relevant only to the question of malice. The amount of damages was excessive.

Shand (with him *Pike*), for the respondent. There was no misdirection of the jury, and if the matter was not expressed as clearly as it might have been, the conduct of the trial precludes the appellant from taking that objection. No objection was taken to the summing up. Assuming that there was evidence of conspiracy to commit a criminal act, there is nothing to connect Brain with the criminal purpose. Moreover, there is no sufficient evidence upon which a reasonable man could come to the conclusion that there was a criminal design at all. No objection was taken to the summing up at the trial and it is now too late to take the objection (*Seaton* v. *Burnand* (1); *Nevill* v. *Fine Art and General Insurance Co.* (2); *Mutual Life Insurance Co. of New York* v. *Moss* (3); *Wilson* v. *United Counties Bank Ltd.* (4)). It may not be counsel's duty to suggest what questions should be put, but, if the Judge does put questions, then it is the duty of counsel to object if he is not satisfied

(1) (1900) A.C. 135, at p. 143.
(2) (1897) A.C. 68, at pp. 75, 76.
(3) (1906) 4 C.L.R. 312.
(4) (1920) A.C. 102.

with the questions. The Judge did draw the distinction between malice and lack of reasonable and probable cause. The questions of motive and lack of bona fide belief were considered in *Johnson* v. *Emerson* (1) and *Broad* v. *Ham* (2). In deciding whether there was malice or absence of reasonable and probable cause the ascertained facts may be tested by the attitude of a reasonable man to them (*Haddrick* v. *Heslop* (3)), but the prosecutor's actual belief is material (*Willans* v. *Taylor* (4) ; *Cotton* v. *James* (5) ; *Venafra* v. *Johnson* (6) ; *Machattie* v. *Lee* (7) ; *Mansergh* v. *M'Kersie* (8) ; *Hicks* v. *Faulkner* (9) ; *Lister* v. *Perryman* (10) ; *Abrath* v. *North Eastern Railway Co.* (11) ; *Davis* v. *Gell* (12) ; *Sharp* v. *Biggs* (13) ; *Moriarty* v. *London, Chatham and Dover Railway Co.* (14)). If there is no belief in the guilt of the plaintiff, that is evidence of want of reasonable and probable cause ; and non-belief can be deduced from motive or conduct. The question of reasonable and probable cause should not be left to the jury unless there is something to show that the defendant honestly believes in the plaintiff's guilt (*Bradshaw* v. *Waterlow & Sons Ltd.* (15)). When the jury had found here that the defendant did not believe in the guilt of the plaintiff, the Judge should say, as a matter of law, that the defendant had not reasonable cause. The ultimate test is the state of the prosecutor's mind (*Corea* v. *Peiris* (16) ; *Cox* v. *English, Scottish and Australian Bank* (17)).

[DIXON J. referred to *Shrosbery* v. *Osmaston* (18).]

The defendant cannot now say that owing to the form which the summing up took the jury were not sufficiently aware of what they had to ascertain (*Wilson* v. *United Counties Bank Ltd.* (19) ; *Macdougall* v. *Knight* (20)). If the Judge directs the jury on the

(1) (1871) L.R. 6 Ex. 329, at p. 352.
(2) (1839) 5 Bing. N.C. 722, at p. 724 ; 132 E.R. 1278, at p. 1279.
(3) (1848) 12 Q.B. 267, at p. 274 ; 116 E.R. 869, at p. 871.
(4) (1829) 6 Bing. 183 ; 2 B. & Ad. 845 ; 130 E.R. 1250.
(5) (1830) 1 B. & Ad. 128 ; 109 E.R. 735.
(6) (1833) 10 Bing. 301 ; 131 E.R. 920.
(7) (1861) 10 L.R. (N.S.W.) (L.) 182 ; 6 W.N. (N.S.W.) 13.
(8) (1870) 1 A.J.R. 114.
(9) (1878) 8 Q.B.D. 167.
(10) (1870) L.R. 4 H.L. 521.
(11) (1883) 11 Q.B.D. 440 ; (1886) 11 App. Cas. 247.
(12) (1924) 35 C.L.R. 275.
(13) (1932) 48 C.L.R. 81.
(14) (1870) L.R. 5 Q.B. 314.
(15) (1915) 3 K.B. 527.
(16) (1909) A.C. 549.
(17) (1905) A.C. 168.
(18) (1877) 37 L.T. 792.
(19) (1920) A.C. 102.
(20) (1889) 14 App. Cas. 194, at p. 199.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

facts incorrectly, but tells them that the facts are for them, that is not a matter on which an appeal will lie (*Ryan* v. *Oceanic Steam Navigation Co.* (1)). If there is evidence upon which Inch as agent for the company can be shown to have invented evidence against the alleged conspirators, an inference can be drawn that the defendant, through Inch as agent, did not believe in its own case (*Moriarty* v. *London, Chatham and Dover Railway Co.* (2)). If the evidence is capable of showing that to Inch's knowledge the informants were not trustworthy, the jury can infer that the defendant did not believe the information given or ought not to have believed it, and acted unreasonably in believing it. And if there is evidence from which the jury could deduce that Inch and the police were engaged in a conspiracy against an innocent person, the jury are entitled to disbelieve the whole of the evidence given by the police. There was no evidence on which a reasonable man could conclude that there was a conspiracy to commit a crime. And even assuming that there was a conspiracy, there was not sufficient evidence to lead a reasonable man to conclude that Brain was assisting in such a scheme. Inch had authority to conduct the proceedings on behalf of the defendant company. The employment of solicitors and counsel and the payment of witnesses was sufficient evidence, not only of the carrying on, but also of the initiation of the proceedings (*Roscoe's Evidence in Civil Actions*, 19th ed. (1922), vol. II., p. 761). This prosecution was commenced by the defendant (*Davis* v. *Gell* (3)). If the defendant in fact believes in the innocence of the plaintiff, he cannot have reasonable and probable cause, and the same applies if the agent of the defendant believes the plaintiff to be innocent. The questions left to the jury were proper and sufficient (*Black* v. *MacKenzie* (4); *Harcourt* v. *Aiken* (5); *Stewart* v. *Equitable Life Assurance Society of the United States* (6); *Hicks* v. *Faulkner* (7); *Cox* v. *English, Scottish and Australian Bank* (8); *Crowley* v. *Glissan* (9)).

(1) (1914) 3 K.B. 731, at pp. 751, 759.
(2) (1870) L.R. 5 Q.B. 314.
(3) (1924) 35 C.L.R. 275.
(4) (1917) N.Z.L.R. 729, at p. 730.
(5) (1902) 22 N.Z.L.R. 389.
(6) (1890) 8 N.Z.L.R. 647.
(7) (1878) 8 Q.B.D. 167.
(8) (1905) A.C. 168.
(9) (1905) 2 C.L.R. 402.

Dovey, in reply, referred to *Wilson* v. *Mitchell* (1); *Bradshaw* v. *Waterlow & Sons Ltd.* (2); *Sharp* v. *Biggs* (3).

Cur. adv. vult.

The following written judgments were delivered :—

STARKE J. The respondent, Brain, sued the appellant society in the Supreme Court of New South Wales for that the appellant falsely and maliciously and without any reasonable or probable cause prosecuted the respondent upon a charge of having conspired with others to cheat and defraud divers shareholders and policy holders of the Commonwealth Life (Amalgamated) Assurances Ltd. of divers large sums of money. The action was tried before *Halse Rogers* J. and a jury, and the trial lasted no less than twelve days. The learned Judge put specific questions to the jury, and those questions and the answers given, so far as they are now material, were as follows :—

Question 1 : Has the plaintiff satisfied you that he is not guilty of conspiracy with Smith, Page and Corkhill or with any or either of them to defraud the shareholders and policy holders as so charged in the prosecution ? Answer : Yes.

Question 2 : Was the prosecution of the plaintiff instigated by the defendant company ? Answer : Yes.

Question 3 : If so, did the defendant company genuinely and honestly believe that the prosecution was justified ? Answer : No.

Question 4 : If the defendant company instigated the prosecution was it actuated by malice in so doing ? Answer : Yes.

Question 5 : If questions 2 and 4 are answered in the affirmative what damages do you find ? Answer : £3,000.

A verdict was thereupon entered for the respondent for the sum of £3,000. A motion was then made to the Supreme Court of New South Wales sitting in Banco for an order that the verdict be set aside, or a nonsuit or a verdict entered for the appellant, or that a new trial be ordered. The motion was dismissed. An appeal from that decision is now brought to this Court.

(1) (1915) 17 W.A.L.R. 169. (2) (1915) 3 K.B. 527, at p. 535.
(3) (1932) 48 C.L.R., at pp. 89, 90.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Starke J.

The evidence given at the trial was voluminous, but its main features have been summarized in the judgment of the learned Chief Justice of the Supreme Court, and recapitulation on my part would serve no useful purpose. But the appeal raises some questions upon which I propose to state, as shortly as possible, the legal position as it appears to me.

The first question put to the jury was founded, no doubt, upon the decision of this Court in *Davis* v. *Gell* (1). There is an Indian case, *Balbhaddar Singh* v. *Badri Sah* (2), which may require consideration on some future occasion, though happily that occasion is not now, for the jury's answer to the first question, which is warranted by the evidence, relieves us of that duty in this case. The Indian case is, however, little if at all known in Australia, and an outline of the facts and the decision may be useful. It was an appeal from the Judicial Commissioners of Oudh to the Privy Council, which I noticed in *The Times Weekly Edition*, dated 25th March 1926, at p. 260, but which, so far as I know, is not reported in the *Indian Appeals* or in any other series of reports. The suit was one for damages for malicious accusation of murder, and seems analogous to, if not identical with, the action for malicious prosecution known to the English law. (See *Pollock* on *Torts*, 13th ed. (1929), p. 660; *India Civil Wrongs Bill*, sec. 42). The crucial averment was that the respondent, Badri Sah, had tutored certain persons to say that the appellants were implicated in a murder, and that these persons made a statement to the police accordingly. The statement was laid before a magistrate by the police, who, after examining some other witnesses, issued a warrant for the arrest of the appellants. The appellants were not arrested, but appeared voluntarily before the magistrate and were discharged. Subsequently the civil suit was raised for damages for malicious accusation of murder, or shortly, malicious prosecution. On appeal from a subordinate Judge, the Judicial Commissioners of Oudh held that " the plaintiffs " —the appellants before the Judicial Committee—" have failed to prove their innocence of the crime." On appeal to the Privy Council, Viscount *Dunedin*, in delivering the judgment of their Lordships, said :—" Unfortunately, however, they " (the Judicial Commissioners

(1) (1924) 35 C.L.R. 275. (2) (1926) *The Times Weekly Edition*, p. 260.

of Oudh) "took a completely wrong view of the law. 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, was 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.'" In any country where, as in India, added Viscount *Dunedin*, prosecution was not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally led to prosecution was just the same thing. *Pandit Gaya Parshad Tewari* v. *Sardar Bhagat Singh* (1), cited in *Davis* v. *Gell* (2), puts this latter proposition somewhat more clearly. But in the present case the first question was rightly put to the jury in view of the decision of this Court in *Davis* v. *Gell*.

The second question was challenged, and the answer, it was contended, was contrary to the evidence. Detective-Sergeant Lawrence actually laid the charge of conspiracy against the appellant, and he stoutly maintained that, in laying the information, he was not moved or influenced in any way by the appellant or its officers. But it is not enough to say that the prosecution was instituted and conducted by the police. "The mere setting of the law in motion is not the criterion"; the conduct of the appellant "before and after the charge must also be taken into consideration." A person giving information to the police is by no means necessarily a prosecutor. "The question in all cases of this kind must be—Who was the prosecutor? and the answer must depend on the whole circumstances of the case" (*Davis* v. *Gell* (2), citing *Pandit Gaya Parshad Tewari* v. *Sardar Bhagat Singh* (1)). In my opinion, there was evidence in the present case fit to be submitted to the jury that the appellant was a prosecutor. I shall not go in detail through that evidence,

(1) (1908) 30 All. 525; 24 T.L.R. 884. (2) (1924) 35 C.L.R. 275, at p. 283.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Starke J.

but there are two facts which appear to me sufficient in themselves for the consideration of the jury. One is that permission was given to counsel named by or on behalf of the appellant to conduct the prosecution on the express condition that neither the police officer who was informant nor the Commissioner of Police nor the Crown was to be liable for any costs, charges or expenses whatever; in this way and on these terms the prosecution was conducted. Further, the chairman of the appellant company, addressing a meeting of shareholders in May 1933, said that "the recent prosecutions" (which included the prosecution of the respondent) have "earned us the approbation of the insurance companies of New South Wales. If Governments had done what they should have done, we should not have had the need to do what we did. In the other States I have had nothing but commendation for having placed our solicitors at the disposal of the police." Other facts might be referred to, but these are enough.

The third question raises once again the somewhat embarrassing subject of reasonable and probable cause. The question whether there is an absence of reasonable and probable cause is for the Judge and not for the jury, and if the facts on which that depends are not in dispute, there is nothing for him to ask the jury and he should decide the matter himself. If there are facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, those facts must be left specifically to the jury, and when they have been determined by the jury the Judge must decide as to the absence of reasonable and probable cause (*Brown* v. *Hawkes* (1); *Lister* v. *Perryman* (2); *Cox* v. *English, Scottish and Australian Bank* (3)). "It is evident," said *Jordan* C.J. in the present case, "that the learned trial Judge did not think that there was any evidence, or any that was not all one way and undisputed, as to the presence or absence of any of those ingredients of reasonable and probable cause which would be a matter for the jury, with the exception of the question whether the person or persons responsible for the prosecution believed the plaintiff to be guilty" (4). It has long since been held that the defence of reasonable and probable cause

(1) (1891) 2 Q.B. 718.
(2) (1870) L.R. 4 H.L. 521.
(3) (1905) A.C. 168.
(4) (1934) 35 S.R. (N.S.W.), at pp. 45, 46.

to an action for malicious prosecution is, in the words of Sir *Frederick Pollock*, "personal and not absolute." But upon the ascertainment of the facts known to and believed by the prosecutor I should have thought that the conclusion whether there was reasonable and probable cause was for the Judge, without leaving to the jury the question whether the prosecutor believed in the guilt of the accused, or genuinely and honestly believed that the prosecution was justified. Such an inquiry must, in effect, transfer the decision of what is reasonable and probable cause from the Judge to the jury. The belief of the prosecutor in the guilt of the accused, or that the prosecution is justified, will in most cases become a disputed question of fact, and therefore for the jury. In my opinion, however, the cases do not bear out the view I should have supposed was involved in the rule of law stated by Lord *Esher* M.R. in *Brown* v. *Hawkes* (1). Thus, in 1847 *Denman* L.C.J., in delivering the judgment of the Court of Queen's Bench in the case of *Turner* v. *Ambler* (2), said:—"The prevailing law of reasonable and probable cause is, that the jury are to ascertain certain facts, and the Judge is to decide whether those facts amount to such cause. But among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them; *and also the defendant's belief that the facts amounted to the offence which he charged*, because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding." *Haddrick* v. *Heslop* (3), *Broad* v. *Ham* (4), and *Shrosbery* v. *Osmaston* (5) are to the same effect. The question in the present case was therefore rightly put to the jury, and the evidence is such that the finding of the jury cannot be disturbed.

The fourth question was not challenged, and it was more or less conceded that the answer given by the jury to that question could not be disturbed.

(1) (1891) 2 Q.B. 718.
(2) (1847) 10 Q.B. 252, at p. 260; 116 E.R. 98, at p. 101.
(3) (1848) 12 Q.B. 267; 116 E.R. 869.
(4) (1839) 5 Bing. N.C. 722; 132 E.R. 1278.
(5) (1877) 37 L.T. 792.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Starke J.

The remaining question relates to damages, which, it is contended, are excessive. The measure of damages, in an action for malicious prosecution, is incapable of any precise limitation. But, as *Hamilton* L.J. said in *Greenlands Ltd.* v. *Wilmhurst and the London Association for the Protection of Trade* (1), "there must be some reasonable relation between the wrong done and the solatium applied." The relevant facts here are as follows:—About the year 1926 two companies, known respectively as the Commonwealth Life Assurance Society Ltd., and the Citizens and Graziers' Life Assurance Co. Ltd., sold and transferred their assets and business, and their undertakings —with an exception immaterial to matters now in hand—to the Commonwealth Life (Amalgamated) Assurances Ltd. The Commonwealth Life Assurance Society Ltd. held 103,000 out of 155,778 shares in the Amalgamated company, and therefore controlled it. In 1932 a proposal was made by the Associated Dominions Assurance Society Ltd., of which one Page was the managing director, to purchase the business of the Commonwealth Life (Amalgamated) Assurances Ltd. According to Page, the proposal was made upon the suggestion of one Sydney Smith, conveyed to Page by one Partridge. The proposal was declined, and not without good reason. The Associated Dominions Assurance Society Ltd. was quite unable to finance any such transaction out of its own funds. It proposed, as I gather the facts, to raise the cash required from some bank or other financial institution, and secure the sum so raised by assets it obtained from the Amalgamated company. Partridge, who assisted in the proposal, was a man with whom no reputable business man desired to be associated, and Smith was a man whose life, according to himself, was devoted to the purpose of "bettering the shareholders and policy holders in the Amalgamated company." He was not a shareholder or policy holder, but he took an interest in members of the Bank Officers' Association, some of whom, apparently, were shareholders in the Commonwealth Life Assurance Society Ltd., and his father held 100 shares, paid up to 18s., in that company. He knew nothing of the financial position of the Associated Dominions Assurance Society. Smith was by no means satisfied when the proposal of the latter society was declined. In November of 1932

(1) (1913) 3 K.B. 507, at pp. 532, 533.

he issued a confidential circular to shareholders of the Commonwealth Life Assurance Society Ltd. intimating that an alteration in the administration of the society's affairs was imperative in order that the shareholders' interests might be safeguarded. He requested the shareholders to sign a requisition for an extraordinary general meeting and to forward proxy forms in his favour. Brain, the respondent on this appeal, supported this circular in another letter to the shareholders. He had been in the service of the Amalgamated company, but his service was terminated in May of 1929. He had also been appointed a director of the appellant society, but resigned in November of 1932 because he was dissatisfied with the appointment of J. S. Inch to the board of the Amalgamated company. The board of the appellant society took a serious view of the action of Smith and Brain, and in December of 1932 resolved: "That Messrs. James S. Inch, A. T. Taversi, and E. H. Higgs be appointed a committee to take whatever action . . . they may think necessary to protect the interests of shareholders and policy holders." Inch was a director and the general manager of the Amalgamated company, and he was also a director and general secretary of the appellant company. Inch appears to have been the active member of the committee appointed in December of 1932. The evidence suggests that he was a man dictatorial in manner and wanting in balance and cool judgment. He was not called as a witness in the action brought by Brain.

The opposing interests were now in array—Brain, Smith, and possibly Page and Partridge, on the one side, and the appellant, represented in action mainly by Inch, on the other. Smith, Brain and their associates were, in the view of Inch and his companies, attempting "to get control" of the appellant company, and, by means of its voting power in the Amalgamated company, to obtain control of that company as well. Inch's counter move to the action of Smith, Brain and their associates was the charge against them of conspiracy to cheat and defraud the shareholders and policy holders of the Amalgamated company. The board of the appellant society sanctioned and approved the acts of Inch.

Much there may be to condemn in the action of Smith, Brain and others, but the jury have negatived the conspiracy and have found that the prosecution was maliciously instituted, and without any

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Starke J.

genuine and honest belief in its justification. It was a serious charge, gravely affecting the reputation of Brain, and on which he suffered the indignity of arrest, and, but for one matter which I shall now state, the damages awarded, though large having regard to the circumstances of the case, could not well be disturbed by this Court.

In December of 1932 Sharpe and Stack, two directors of the Citizens and Graziers' Life Assurance Co. Ltd., issued a circular to the shareholders of that company requesting proxies, if they were unable to attend an annual meeting, so that the action of these directors in opposing calls in aid of the Amalgamated company pursuant to the agreement transferring assets to that company might be vindicated and maintained as the policy of the Citizens and Graziers' Co. Inch objected in the strongest terms to this circular, and invited the resignation of the two directors " for what on the circular appears to involve most treacherous conduct on your part." But he did more—he wrote to the Chief of the Criminal Investigation Branch drawing his attention to the circular, stating that it was obviously dishonest, and that Sharpe and Stack were seeking power to dominate the annual meeting of their company. Inch also told a witness, Cohen, that Stack and Sharpe were in the conspiracy with Page and others. The police inquired whether the circular gave any ground for a prosecution against Stack and Sharpe for publishing a false statement, but took no further action, and so informed Inch. At the trial, Stack was examined for the respondent, and deposed that he had never sent Page a telegram to the following effect: " Owing to turn of events we deem it inadvisable come Sydney for present. Apparently plans miscarried." It is undoubted that no such telegram was ever sent. But Detective-Sergeant Lawrence deposed that one Sayers, who was an accountant in the service of the Associated Dominions Assurance Society Ltd., had given him what purported to be a copy of such a telegram, and said that he had taken the copy from a telegram he had seen on the table of one Corkhill, who was the secretary of the Associated Dominions Assurance Society Ltd. Sayers rather evasively denied this assertion. Lawrence further deposed that he handed the document to Inch, and that it was again copied by a typist in Inch's office. But the copy which Lawrence deposed that Sayers had given him was not

produced at the trial of this action, and its disappearance or loss was not satisfactorily explained. The evidence in relation to this telegram arouses grave suspicion. The truth will probably never be known: was it concocted by the police and Inch, or was it concocted by Sayers for some purpose of his own or that of the Dominions company? It was much relied upon by the respondent and his counsel throughout the trial, in relation to the conspiracy charged. But what had it to do with the action of Brain for malicious prosecution? The learned Chief Justice said that the respondent was entitled to show what it was that the prosecutor had alleged to be the conspiracy and who the prosecutor had alleged were parties to the conspiracy in respect of which the respondent and others were prosecuted. The only conspiracy, however, in respect of which information was laid was that Smith, Brain, Corkhill and Page did amongst themselves conspire together to cheat and defraud divers shareholders and policy holders of the Amalgamated company. No information was ever laid against Stack and Sharpe upon a charge of conspiracy or any other charge. Intemperate as had been Inch's language as regards Stack and Sharpe, yet he did not, nor did the police, pursue the matter further. Indeed it was admitted that Stack had taken action against Inch in respect of his letter to the police and the publication of the telegram, but the action was settled and Inch paid the costs and was afterwards reimbursed by the appellant society. In my opinion it was not right to allow evidence implicating Stack and Sharpe in the charge of conspiracy laid against Smith, Brain and their associates. The respondent was thus enabled to assert that a telegram had been concocted by the police and Inch for the purpose of supporting a false charge. That assertion became a most important issue at the trial. It was used with great effect, as an illustration of the unreasoning nature and malicious character of Inch, and above all upon damages. The evidence raised a wholly false issue, and was well calculated to—and did, I feel convinced—inflame the jury against Inch and the appellant.

A new trial is, as the Chief Justice of the Supreme Court said, "a most deplorable result, not to be entertained upon any but the most solid grounds as the only means of redressing a clear miscarriage" (1).

(1) (1934) 35 S.R. (N.S.W.), at p. 47.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

But such a miscarriage occurred, I think, in the present case, and, unless the parties are willing to compromise upon the amount of damages, a new trial should be had, though I would, in all the circumstances, limit it to the question of damages.

DIXON J. In an action for malicious prosecution brought by the respondent against the appellant the respondent obtained a verdict for £3,000. The appellant appealed to the Full Court of the Supreme Court, which refused to set aside the verdict. From that decision an appeal is now brought to this Court. In the consideration of this important case, a consecutive account of the events out of which it arises became indispensable. In the course of piecing together from the evidence such an account some difficulties which had appeared formidable were found to be illusory. But many considerable difficulties remain which cannot be dealt with unless the material circumstances of the case are stated. Those circumstances form the incidents of a business struggle in the course of which measures of aggression and of defence were taken on each side which the opposite side calls the overt acts of a conspiracy. Unfortunately even a summary account of the genesis and progress of the contest cannot be brief.

The appellant, a company incorporated in New South Wales, now conducts no active operations but it holds a large part of the share capital of a life assurance company called the Commonwealth Life (Amalgamated) Assurances Ltd. That company was incorporated in October 1926 for the purpose of acquiring a life insurance business then carried on by the appellant company and so much of a life insurance business of another company as was not carried on in Queensland. The appellant company and the second company, by name the Citizens and Graziers' Life Assurance Co. Ltd., had agreed to unite their businesses, but they found that owing to Queensland legislation there was a difficulty in the new company's undertaking life insurance business in Queensland except upon mutual principles. Accordingly, the Citizens and Graziers' Co. continued to conduct its Queensland business but so far as possible for the benefit of the Amalgamated company. Otherwise the businesses of the two companies were transferred to the Amalgamated company

in exchange for shares which it issued. The uncalled capital of each of the constituent companies was to be at the command of the Amalgamated company. This Court has already been called upon to consider some of the difficulties to which the arrangement has given rise and in doing so has discussed more at large the nature and the terms of the combination between the original companies (*Citizens and Graziers' Life Assurance Co.* v. *Commonwealth Life (Amalgamated) Assurances Ltd.* (1)). The directors of the Amalgamated company, who at its inception were four in number, consisted for the first three years of two named members of the respective boards of directors of the two constituent companies. The prosecution of which the respondent has complained with so much success was instituted on 10th February 1932 against him and three others for a conspiracy the supposed object of which was to bring about a change in the control of the appellant company so as to force the Amalgamated company to dispose of its business to another insurance company to which the ultimate design was imputed of distributing the funds at the expense of the policy holders. The charge laid in the information was that they did amongst themselves conspire together to cheat and defraud divers shareholders and policy holders of the Commonwealth Life (Amalgamated) Assurances Ltd. of divers large sums of money. The respondent's connection with the appellant company began with its formation in 1926, when he was appointed a director. In the same year he was appointed for five years upon the staff of the Amalgamated company. He had been seriously ill and had lost his hearing. In the following year a new general manager was appointed to the Amalgamated company. Very soon the new general manager, whose name was James S. Inch, objected to the position occupied by the respondent. After a correspondence in which Inch's views were expressed without much restraint, the respondent's employment was terminated as from 4th May 1929. In the previous year under the former manager of the Amalgamated company some dissatisfaction had existed among a section of shareholders in the appellant company, some of whom were members of the Bank Officers' Association. The secretary of that body, Sydney Smith by name, one of the three persons charged with the respondent, took occasion to busy himself

(1) (1934) 51 C.L.R. 422.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

in the company's affairs, although his only personal interest was that he was his father's attorney under power and his father held a few shares. He interviewed the respondent and others and he formed what he called a "shareholders' association." As head of this somewhat shadowy organization, he issued circulars from time to time during 1928 and 1929. Then came a long intermission of his concern in the company's affairs. The respondent remained a director of the appellant company, but it was not unnatural that he should be antagonistic to Inch, the general manager of the Amalgamated company.

At the beginning of 1931 the directors of that company decided to change the existing constitution of their board and to add a fifth director to the two pairs of directors who represented the respective constituent companies. The plan was that Inch should become the fifth director. To give him the qualification prescribed by the articles of the Amalgamated company, shares in that company were transferred to him by the appellant company, but for a nominal consideration and subject to a condition that he should re-transfer them when required. The respondent objected to this course and after some time revived his objection with an increase of warmth. Upon one or two other questions the boards of the constituent companies seem to have found themselves in opposition, and the affairs of the three companies were conducted with less harmony than is commonly thought necessary for success. In August 1931 proposals were put forward by the chairman of the Citizens and Graziers' Co. for the acquisition by some undisclosed body of the appellant company's shares in the Amalgamated company. The directors of the appellant company had professed not to be averse from disposing of its assets, but the proposals were not accepted. Although the fact was not disclosed to the directors, who were left to find it out if they could, the proposals really emanated from the managing director of another small life insurance company, the Associated Dominions Assurance Society Ltd., a man named W. T. Page, who is another of the three persons charged with the respondent. The fourth man charged with conspiracy was the general secretary of that company, by name O. E. Corkhill. Earlier in the year, the directors of the appellant company had warned their shareholders

that attempts were on foot to remove them from office. The articles of association enabled the members of the company by an extraordinary resolution to remove any director and to appoint another in his stead for the residue of his term of office. In November 1931 the shareholders received a circular in aid of such an attempt. It purported to be signed by a number of shareholders and enclosed forms of requisition for a general meeting for the purpose of removing the directors. One ground of complaint made by the circular was the transfer to Inch of his qualifying shares. In a circular in answer, dated 25th November 1931, the directors referred to the unlikelihood of calls being made and said :—" Your directors have made no call upon you for some years and are not likely to do so in the immediate future. This bogey has often been raised for similar purposes." This statement was, unfortunately, soon to be falsified, as a result, it is said, of the change in the position of the Amalgamated company brought about by the reduction of interest upon Government loans. It was the appellant company's chairman of directors, Dr. Robinson, who signed this circular. Dr. Robinson, Senator McLachlan, J. S. Inch, the respondent Brain and one other formed the board. Dr. Robinson retired from office at the next annual meeting of the company, which was held on 14th March 1932, but he submitted himself for re-election. As afterwards appeared, W. T. Page had interested himself in the election and held a large number of proxies. But, partly because of an antipathy to Dr. Robinson's opponent, and partly because the man in whose name he obtained the proxies proved unruly, " deflected " is the phrase of Page, he supported Dr. Robinson. Inch was disturbed at the recurring attempts to obtain control of the company and submitted to the board of the Amalgamated company a memorandum suggesting that the four members of the board nominated by the constituent companies should resign and obtain fresh nominations for terms of three years expiring at the same time, a course which was adopted. The directors so nominated to the Amalgamated company's board by the respondent company were Dr. Robinson and Senator McLachlan, and by the Citizens and Graziers' Life Assurance Co. Ltd., Mr. Neville Cohen, a solicitor residing in Sydney, and Mr. F. R. Sharpe, a merchant residing in Brisbane. Upon the board of the Citizens and Graziers'

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

Co., a Mr. George Stack of Brisbane sat as a colleague of Messrs. Cohen and Sharpe. Mr. Stack included among his acquaintances the Brisbane representative of the Associated Dominions Assurance Society, with whom W. T. Page conducted a correspondence much of which, before the prosecution, fell into the hands of the police. From this correspondence it appears that, in June and July 1932, Page thus was obtaining from Stack information about the Commonwealth Life Amalgamated company and its constituent companies; that Page had formed a design of acquiring the business and assets of the Amalgamated company; that he was using as a "go-between" Sydney Smith, "a representative" from whom called upon him early in June; that he hoped to buy the concern on "a year's premium revenue basis"; that he believed Senator McLachlan, the chairman of the Amalgamated company, Dr. Robinson, and Mr. Cohen would be favourable, and that some of the advantages to the Associated Dominions Assurance Society discoverable in the proposal were that it would extend its business to every State but Tasmania and it would obtain an increase of premium revenue of £95,000 per annum and about £180,000 in funds, leaving that company with a shortage of £128,000 which it could expect to make up in three or four years. It further appears that Page gave much attention to planning the acquisition of the business and assets of other life insurance companies. Indeed he seems almost to have regarded it as routine practice in carrying on such an undertaking as he controlled. In its pursuit he did not find his sense of propriety offended by two expedients which others may consider less seemly than bold. If the directors of a company whose business he sought proved unwilling to sell, he was prepared to promote a campaign among the shareholders to replace the directors by a board more favourable to his proposals. To do so he would enlist or procure the services of a few shareholders by whom or in whose names a canvass of the whole body would be conducted. His second expedient concerns the source whence the purchase price might be paid if a sale were negotiated. His means of finding the price payable as the net value of the assets taken over after the deduction of liabilities, both actuarial and present, consisted in pledging for the purpose the free assets of the business acquired, including the insurance fund to which policy holders might be considered entitled to look.

The " representative " of Sydney Smith was a discredited exponent of the art of life company wrecking named Partridge, who apparently had not very long before stood his trial with others as a result of his complicity in the operations and downfall of a company called the People's Prudential Assurance Co. Ltd., of which he had been managing director. He seems to have been notorious amongst life insurance men and when Stack was informed of his entry into the negotiations he expressed his disapproval ; nor did Sydney Smith's participation give him pleasure. In consequence, it may be, of the disclosures in the People's Prudential case, some attention seems to have been given by the police to the doings of small life insurance companies. The work fell to a detective-sergeant named Lawrence, with whom another detective-sergeant, named Clifford, acted. Lawrence, in the course of familiarizing himself with the organization of the Amalgamated company and its two constituent companies, had met Senator McLachlan, who says that Lawrence warned him against, and asked him to report, any outside attempts to get control of the constituent companies and through them of the funds of the Amalgamated company, a warning which he renewed in 1931.

W. T. Page had been very sanguine in July 1932 of the success of his negotiations for the Amalgamated company's business. But they did not prosper as he had hoped. On 1st August Sydney Smith says that he interviewed Senator McLachlan and obtained from him some general expressions of willingness to dispose of the Amalagmated company's business coupled, however, with a request to tell him the source of the inquiry, a request with which Smith said that he was unable to comply.

On 29th August 1932 W. T. Page addressed to Senator McLachlan, as chairman of the Amalgamated company, a formal offer to purchase the business of that company at a price arrived at by deducting the excess of the actuarial liability upon policies over the company's assets from the amount of one year's premium revenue—a sum which would work out at between thirty-five and thirty-six thousand pounds. This offer he entrusted to Sydney Smith, who with Partridge journeyed to Canberra, where they spent the week-end. Sydney Smith says that Senator McLachlan agreed to consider the matter. Partridge was left outside and there is a conflict between

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

the evidence of Senator McLachlan and Sydney Smith on the question whether he was mentioned. Smith swore that neither he nor Partridge had been promised commission or other reward, but, not without reluctance, he admitted that Page found the expenses for the expedition to Canberra. On his return, Sydney Smith sent a letter to Senator McLachlan. The letter enclosed an estimate of the price as it would work out and of the items. It also gave the names of four companies which the Associated Dominions Assurance Society had already absorbed. While this offer was under consideration, Sydney Smith and Partridge visited Mr. Cohen, whom, no doubt, as a representative of the Citizens and Graziers' Co. which feared calls upon its capital, they considered likely to support a proposal to sell the business. According to Mr. Cohen's evidence, he received them with ironical expressions of scepticism, which, however, did not deter them from the impropriety of offering him the legal work if the sale was arranged. He says he wrote to W. T. Page confirming the interview and to Senator McLachlan telling him of the bait held out to him. When the latter had been interviewed by Sydney Smith in Canberra a fortnight before, he says that Sydney Smith intimated that one or two thousand pounds would be provided for him if he retired from the directorate. He says that he replied that he regarded Smith's proposal as improper.

The next step in the negotiations was that Higgs, the general secretary of the Amalgamated company wrote to W. T. Page asking on behalf of the directors for complete information regarding his company and to that end to see a copy of the company's valuation report or, alternatively, for authority for the respective actuaries to consult. On 27th September 1932 W. T. Page replied declining the request and saying that the valuation of his society's liabilities was not yet due. On 10th October 1932 the board of the Amalgamated company resolved to decline the proposal and W. T. Page was notified accordingly. The letter of notification referred to the communication to Senator McLachlan of 29th August 1932, to "a communication made, as on your behalf, by Mr. Sydney Smith on the 6th September last, also to a joint representation made to another director of the company" (sc., Mr. Cohen) "by Mr. Smith and Mr. Partridge." Corkhill, the secretary of the Associated Dominions Assurance Society, formally

acknowledged the letter, but W. T. Page wrote a personal letter to Senator McLachlan as follows :—" A serious misstatement has been made in the letter referred to, inasmuch as Mr. Sydney Smith was not acting on my behalf at any time during the negotiations for the purchase by this society of the business of your company. The facts are :—Mr. Partridge called upon me in July last and stated that he had called to see me at Mr. Smith's request, and stated that Mr. Smith would be pleased if we could make an offer for the purchase of the business of the Commonwealth Life (Amalgamated) Assurances Limited. After due consideration, I agreed to meet Mr. Smith in connection with the matter, after which the offer referred to was made by this society. I have received a letter from another director of your company under date 17th September ; a similar misstatement is made in that letter. I did not reply, but in telephonic communication with the director referred to, I made the position perfectly clear, this is to obviate any possible misapprehension on your part as to how the negotiations first opened up." A failure on the part of Senator McLachlan and Inch to give implicit credence to the statements contained in this letter might be pardoned.

Next day W. T. Page again wrote to Senator McLachlan, making a cash offer of £35,000 for the whole undertaking of the Amalgamated company and adding : " The present offer also is made at the express request of Mr. Sydney Smith." A reply over the signature of Inch was made in the following terms :—" The chairman of this company has handed in a letter received from you, dated 12th inst., having reference to some proposal which you indicate has been made by you at the express request of another party. Please note that this correspondence is unsought, undesired and cannot be continued. There is no prospect of this company doing any business of the kind suggested with your company, either now, or in future. This ought to be abundantly clear to you from your knowledge of our knowledge of you and your business."

In these negotiations it does not appear that the respondent Brain had taken any part, except that he says that Higgs, the secretary of the Amalgamated company, requested him in September to interview Smith and to find out what he could about the proposal. He says that he did interview Smith and was impressed with the advantage

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

of the proposal. The principal concern of the directors of the two constituent companies was a notice, which, in July, each company had received from the Amalgamated company, requiring it to make a shilling call upon its shares in order to provide in part for a deficiency of £60,660 disclosed by the actuarial calculation, or ascertainment, of the liability of the Amalgamated company. The directors of the appellant company, including the respondent Brain, resolved to make the call, and, on 12th July 1932, sent a circular to their shareholders explaining that it was necessitated by the actuarial disclosure of the Amalgamated company's position coupled with the unexpected reduction of interest upon the company's Government securities —an explanation which, no doubt, the directors were impelled to make in view of their chairman's circular of 25th November of the previous year stating that they were unlikely to make a call in the immediate future. But the Citizens and Graziers' Co. delayed compliance with the Amalgamated company's request. At length, on 10th October 1932 at a board meeting of the Amalgamated company Mr. Cohen said that he had been directed to obtain counsel's opinion on the question whether the Citizens and Graziers Co. was bound to make the call, but that the board of that company unanimously undertook that, if counsel's advice was that the Amalgamated company could enforce against that company an obligation to make a call, the board would make it without further controversy and pay it over.

While matters were in this position, the respondent Brain suddenly revived the question of Inch's appointment as managing director. On 2nd November 1932 he sent a request in writing that a meeting of the board of the appellant company should be convened. At the meeting, which took place on 4th November, he moved that Inch be informed that the directors of the appellant company had decided to exercise their right to call upon him to re-transfer the 506 shares in the Amalgamated company which had been transferred into his name to qualify him to sit on the board of the Amalgamated company. The motion was rejected.

About this time, a circular letter to the shareholders of the appellant company was put in preparation. It was expressed to come from Sydney Smith " as chairman of the shareholders' committee " and

was dated as from the address of the United Bank Officers' Association. The circular referred to the making of the call notwithstanding the directors' earlier statement that there was no likelihood of calls. It "claimed" that shareholders of the appellant company were not legally bound to pay calls to meet a deficiency of the Amalgamated company. It contained the following passage :—"For some time I have been very much alarmed at the course our company was taking and I set about, in your interests, to find a way out. My efforts met with success. I secured a written offer from another insurance company to purchase the business of the Commonwealth Life (Amal.) Assurances Ltd. on a cash basis. This offer would have meant the saving of further calls on shareholders and a small return for what you probably look upon as already lost. To my surprise the proposition was turned down. Apparently the directors have their own interests at heart rather than those of the shareholders." It ended by asserting : "We [*sic*] feel sure that" the shareholders were convinced that a change in the administration of the society's affairs was imperative, and by asking for signatures to an enclosed requisition for a meeting and proxies. The requisition was for an extraordinary general meeting to consider and review the affairs and management of the appellant company and also what changes should be made in the personnel of the board of directors and administrative officers. Who actually composed this letter must be uncertain, although Smith claims its authorship. When sent, it bore the date 22nd November 1932. At some time before that date, through Smith, the respondent, Brain, met Partridge. As a result, Partridge accommodated Brain in an office he occupied under the stairs in Manning Chambers, Elizabeth Street. There Brain received the circulars from the printers. He says he took them home in batches and addressed them and sent them out. They were accompanied by a circular letter over his name bearing the same date. It stated that "the movement which is being taken in the interests of the shareholders" had his support, that he had resigned from the board and that if they thought he was right he requested the shareholders to sign and return the enclosed proxies. Smith's account of the circular is that, after speaking to several members of his old committee, including Brain and his wife, he decided to

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

send it. Brain says it was drawn up before he " came into it." He sent in his resignation as a director of the appellant company and dated it also 22nd November 1932. His resignation was accepted on 28th November, and on 10th December Higgs, who resigned the secretaryship, was appointed in Brain's place. Inch was appointed general secretary. At the previous meeting of the board, which took place on 5th December, Inch had produced copies of the circulars which had come into his hands and the board resolved that he, the actuary and Higgs be appointed a committee to take whatever action and to incur any expense they might think necessary to protect the interests of shareholders and policy holders. Late in November, according to Inch's report to his directors, a Mr. J. Sutherland interviewed Inch and said that he had come from New Zealand, that he was acting on behalf of a syndicate which proposed to amalgamate a number of life offices and that gentlemen named Cull, Clapham and Sawyer would become the directors if the Amalgamated company was acquired. He offered first £25,000 and then £35,000 for its business.

On 6th December Sergeant Lawrence and Sergeant Clifford were called in. Sergeant Lawrence interviewed Sutherland at the Amalgamated company's office. He does not appear to have obtained much information from him. But from that time Lawrence undertook the investigation of the relations of Page, Smith and Brain to the Commonwealth life companies.

In the office of the Associated Dominions Assurance Society Ltd. was an accountant named Sayers, who had formerly been employed by the People's Prudential Insurance Co. and had given evidence for the Crown in the prosecutions which arose out of that company's collapse. According to Lawrence, he had seen Sayers not long before in relation to some other matter. Sayers now communicated with him and told him that mysterious people were coming and going from the company's office, including Brain and Partridge, and that Corkhill, the secretary, was very worried. Later on he produced a paper containing a copy of a letter which he said he had copied from some new carbon paper used in a typewriter which Corkhill's typist used. W. T. Page was away in Melbourne and the letter appeared to be from Corkhill to him. The original paper said to

have been produced to Lawrence by Sayers is not forthcoming, and its loss is not adequately accounted for. But Sayers deposed to the substantial accuracy of Lawrence's narrative, and a copy of the paper was put in evidence. The letter refers to Cull and says that he will not see Lawrence. It refers to a visit Lawrence had paid to a solicitor named Payne with a view to discovering the identity of the syndicate offering to buy the Amalgamated company's business. It includes the statement: "Partridge told me this morning that Sutherland does not want any commission." The production of the copy of this letter by Sayers is ascribed to a date about 10th December. On that day Inch explained to the appellant's board "what action he had taken in the matter and who the men were really behind Mr. Brain." A draft circular to shareholders was approved. The circular, which bore the date 12th December 1932, commenced:—"Once again comes a determined effort to capture the management of your company and to hand it over to individuals in whom to put it mildly your directors have no confidence. It is the old tactics in a new and dangerous form." It then dealt at length with the making of the call. It referred to the proposal from the Associated Dominions Assurance Society and quoted from Page's letter of 11th October 1932 a passage in which Partridge's name occurs; it proceeded to remind shareholders who Partridge was, and it concluded with an expression of the directors' resolve to have no dealings directly or indirectly with him. A circular letter bearing the same date was issued to the shareholders of Citizens and Graziers' Co. This circular was sent out by Sharpe and Stack, the directors residing in Brisbane, in anticipation of the company's annual meeting. It sought proxies. The signatories claimed to have pursued a policy of avoiding the making of calls and ended the letter:—"Since this company has been controlled by us in Queensland instead of in Sydney we have successfully met all commitments and the company is on a better footing than it has been for years. Consequently our continued efforts will be to prevent further calls."

Detective-Sergeant Clifford gave evidence that on 12th December he and Lawrence, who bore him out, interrogated W. T. Page and that the latter admitted knowing Sutherland, Cull, Payne, Sydney Smith and Brain but denied all knowledge of any syndicate to acquire

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

the interests of either Commonwealth company, and said that he would not now consider purchasing the business. They also, on that day, interviewed Sydney Smith and Brain, whom they found together at the Bank Officers' Association. They each told the detectives in effect that they were dissatisfied with the directorate, particularly with the refusal by the directors of the offer made by the Associated Dominions Assurance Society, and that they proposed to have the present directors removed and others, including Brain, appointed who would agree to a sale. Brain is said to have admitted knowing Partridge, Page, Corkhill and Cull. He informed the police that, in his opinion, the shareholders would have obtained from the transaction four shillings a share instead of having to pay a one shilling call.

On 18th December Lawrence and Clifford seized in Smith's office the proxies which Brain and Smith had received in response to the circular. Next day, according to the evidence of Lawrence, Clifford and a Miss Foster, who was Inch's clerk and typist, the police were in possession of a copy of a telegram from Stack to Page. The message ran :—" Owing to turn of events we deem it inadvisable come Sydney for present. Apparently plans miscarried." No such telegram was in fact ever sent or received and no satisfactory explanation of the matter has been given. Miss Foster's account of her part is as follows :—" It was on 19th December in the afternoon. The police called, and after speaking to Mr. Inch for a few minutes Sgt. Lawrence came over to my machine at the other end of the room and said ' I want you to take down something for me.' I got down my note-book and pencil and I took down from his dictation. He read from something he had taken from his pocket-book, and I took it down and typed it. I took it down first of all in shorthand. I have the actual note that I typed from the detective's dictation on that date, 19th December." Her shorthand note-book was then produced and she continued :—" That is the note-book that I was using at that time. I can definitely fix the date from records that I have here, because the 19th was a Monday and I had ruled off on the Saturday, and I had the 17th, and I had no dictation on the Monday till I took down this telegram, this is immediately following it. I can transcribe the shorthand that I took down in the book as the detective dictated it to me. I have ' Brisbane ' with a ring round

it, then 'Owing to turn of events we deem it inadvisable come Sydney for present apparently plans miscarried,' and I have 'St' for Stack." At the trial of the action the respondent's counsel attacked her evidence and her book. He suggested that the shorthand had been written in after a circular cancellation had been made of the space where it appears. The jury were furnished with a powerful glass under which, it was said, it could be seen that this was the order in which the circular pencil and the shorthand were written. Probably it is impossible, except under a microscope, to tell which was the order of the strokes. But, whatever the jury concluded from its inspection of the note-book, the evidence about the supposed telegram could scarcely fail to arouse some uneasiness. In the first place, neither the document from which Lawrence read nor a contemporary transcript by Miss Foster of her note could be produced and no satisfactory explanation of the reason was furnished. Lawrence's account of the matter is as follows:—"At another time Sayers showed me another document; on one occasion he said he had received or had seen a wire on Corkhill's office table, and he said he thought it may be of some interest, and he took a copy of it and handed me a slip of paper which purported to be a copy of a wire. That was also in the presence of Sergeant Clifford. He gave me a piece of paper; I did not keep the piece of paper, I handed that to Mr. Inch and he called Miss Foster over and asked her to take a copy of the wire, I saw her doing it in his presence, she made notes in a shorthand book. I do not know what became of the original, it was left with the company; it is not an original, it was just a piece of ordinary paper, a piece of ordinary white paper with the typewritten words of what appeared to be a wire on the piece of paper, a small piece of paper. It was something about 'think inadvisable come Sydney at present.' I believe it had on top of it 'Page' and it was signed I think by Stack. That was given to me by Sayers at that time. That is all I had to do with Sayers." He further said: "I cannot fix the date when the copy telegram was shown to me by Sayers, it was round about 9th or 10th December 1932; there is no way I can fix the date by looking at my records." Clifford said in his evidence:—"On one occasion Sayers handed Lawrence a piece of paper which he said was a copy of a wire seen

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

in the A.D.A. . . . The telegram was something to the effect not to come to Sydney." He said that later the telegram and the letter Sayers gave them were shown to Inch and in his presence the contents of each was dictated to Miss Foster.

Although Sayers corroborated the two detectives about the letter, he denied the telegram altogether. Inch was not called as a witness. But, according to the evidence of Mr. Cohen, on 21st or 22nd December 1932 Inch informed him that his fellow directors of the Citizens and Graziers' Co., Sharpe and Stack, were " in this conspiracy up to their neck with Page and the others." He said that the police had told him that they were to be present on 19th December at Page's office at a meeting of those concerned in the campaign ; that the police intended going there and arresting everybody there on a charge of conspiracy and that he had definite evidence of it, consisting of a telegram the police had found, which he read from a slip of paper.

Stack, who gave evidence, said that he had known W. T. Page for twenty-five years, during which they had both worked in insurance business, and that, whenever Page came to Brisbane, Page communicated with him. He said that Cohen told him by telephone of the telegram in December. Stack came to Sydney on 29th December when the annual meeting of his company was held, and Cohen told him that an attempt was being made to connect him with Page, Partridge, Smith and others whom, he said, he did not know even by sight, and that for that reason he refrained from visiting Page, whom he had not seen for six months. Soon afterwards Cohen went to Brisbane and inquiries were made at the post office. From the correspondence between Page and his Brisbane representative, whose name was Long, it appears that before Christmas Stack, who was inclined to disparage the Associated Dominions Assurance Society and was viewed with misgiving by Long, had informed Long " with a good deal of gusto " that the detectives had stepped in and seized all the correspondence between Page and Corkhill and there was a leakage in Page's office. He advised Long to be careful with his correspondence with Page. It also appears that on 6th January 1933 Stack told Long that the detective had obtained a wire " supposed to have been signed George, reading ' Owing miscarriage

of plans we consider it inadvisable to come down.' " He asked Long whether he sent such a wire. Long replied: "No," but obligingly added that if it would help Stack he would say he had sent it on account of his own business. In his reply to Long, Page assured him "that there is no leakage in this office, and that no correspondence has got out of here other than that we desired to get out"; that he had searched exhaustively for the telegram and no such telegram had reached him and that the detectives had taken no papers or anything else from his office.

On 1st February 1932, when Stack came to Sydney because of the extraordinary general meeting of the appellant company which was fixed for the following day, he complained to the Under-Secretary and the Commissioner, who referred him to Lawrence. According to him, Lawrence said that he had never heard or seen anything at all about such a telegram. Cohen had supplied Stack with the date, 19th December, and the text of the supposed telegram and this he read out to Lawrence. Stack rang Cohen up at a meeting of the board which was then in progress and repeated what Lawrence had said. Cohen gave evidence, which was not denied, that he returned to the board room and in Inch's presence said that Stack had telephoned from the detective office where he had just seen Lawrence and Clifford, who assured him that they had not heard of such a telegram. Inch said nothing. A day or two afterwards, Cohen went to see Lawrence and Clifford and obtained their confirmation of the statement that they had not seen or heard of the telegram and Stack's visit was their first information. Lawrence and Clifford, in their evidence, denied that they told Stack or Cohen that they knew nothing of such a telegram, but said that they had informed them they had not seen the original. Cohen then gave notice of motion that Inch be called on to explain his conduct in various respects, including "in stating that he had knowledge of a telegram sent by Mr. Stack to Mr. Page in the following words" and quoting them. The motion was lost. Senator McLachlan said that the police told him at this time that they were convinced that there was such a telegram. On the other hand, he appears to have told Cohen that he did not believe it existed, and in letters to him Cohen repeated all that he said occurred without contradiction.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

Sayers swore that Lawrence said to him in March: "I suppose you know nothing about the telegram." Lawrence and Clifford admitted that they had made no attempt at any stage to obtain the original from the Postal Department and it was not denied that it had never been sent. Subsequently Stack brought an action of slander and libel against Inch based on the incident and it was settled at the company's cost.

In the meantime, another circular over Sydney Smith's signature to the appellant company's shareholders was prepared. It was dated 30th December. It besought them to sign forms of proxies in favour of Brain which were enclosed, and emphatically declared that Partridge, who was mentioned in Higgs' circular, was "in no way connected with the movement." The two detectives interviewed Page and Corkhill, who appear to have said nothing incriminating, and one of the detectives interviewed Brain.

On 4th January 1933 Inch wrote a strong letter to Sharpe, calling upon him to explain his conduct in sending out the circular which he and Stack had issued upon 12th December. On 6th January he wrote a long letter to the Chief of the Criminal Investigation Branch, in the course of which he described Brain as "totally deaf and possibly at the mercy of the Partridge, Page, etc. group." The letter said that Brain had handed in 169 requisitions for a meeting, which accordingly would be called for 2nd February, and asked that proxies seized by the police be handed to him. This request was complied with upon the report and recommendation of Lawrence. On 9th January Inch again wrote to the Criminal Investigation Branch, this time about the circular of 12th December of Stack and Sharpe which was enclosed. He wrote: "The intention of the circular is obviously dishonest, and in the public interest your attention is drawn thereto." No departmental stamps appear on this document. But, on the same day, Lawrence and Clifford submitted a report to their Chief stating that Inch complained that the last paragraph of the circular is grossly misleading and untrue and asking that a copy be forwarded to the Brisbane police to interview Sharpe and Stack and ascertain whether they were responsible for it, and, if so, that a prosecution should be considered. The paragraph referred to was the apparently innocent claim that under their

control in Queensland the Citizens and Graziers' Co. had successfully met all commitments and was now on a better footing than it had been for years. The inference is clearly open that this recommendation was made at the instance of Inch, who handed the two detectives directly the letter of the same date. Inch then wrote to the Bank Officers' Association complaining of Sydney Smith issuing circulars to his shareholders from the association's address. Sydney Smith ultimately resigned from his position of secretary of that association, but not, as it seems, before March 1933. While all this was going on, the balance-sheet of the Associated Dominions Assurance Society was under examination and the detectives were obtaining assistance from a brother of W. T. Page, named Frank Page, who, owing to a quarrel, had been dismissed from the society. They also interviewed an accountant, named Stone, who had done some work for the society.

Towards the end of January it was decided, but by whom and upon whose authority does not appear, that W. T. Page and Corkhill should be prosecuted upon a charge of issuing a false balance-sheet. Frank Page was taken before a magistrate by Lawrence and laid an information on which warrants were granted. They were arrested on 30th January. Frank Page signed a statement to the police, which he dated 25th January 1933, but as in the course of it he refers to Sydney Smith as "until recently secretary of the Bank Officers' Association" it may be doubted whether it was actually composed before March. Stone signed a statement which bears the date 7th February 1933. Frank Page's statement attributes to his brother assertions that he had formed a syndicate, comprising Sawyer, Cull and Clapham, to purchase the Commonwealth Life company for £30,000, which the bank had agreed to lend on overdraft. It relates how Partridge, Brain, Smith, Cull, Clapham and Sawyer visited the office and repeats expressions of misgiving by Corkhill. Stone's statement contained matter connecting Partridge, Smith, Sawyer and W. T. Page in an organized attempt to bring about a sale of the Amalgamated company's business to the Associated Dominions Assurance Society through pressure on the directors.

Senator McLachlan gave evidence that, on 1st February, Lawrence came to see him and said that the police had seized a large number

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

of documents, that they had evidence of a continuous attempt for two years to get hold of the assets of the company by persons not prepared to protect the policy holders, that Page, Partridge, Smith and Brain were concerned and the police intended to take criminal proceedings against them. He said that the volume of material and the unfamiliarity of the police with such matters made it desirable to have legal assistance in the conduct of proceedings and asked Senator McLachlan to put the board's solicitor at their service and to provide counsel. Senator McLachlan consulted the Commissioner of Police. The prosecution of Page and Corkhill upon Frank Page's information for a false balance-sheet was conducted by counsel briefed by the appellant's solicitors at its expense, and after the Crown Solicitor had given his concurrence this course was followed in the subsequent prosecution for conspiracy.

The general meeting summoned in compliance with the requisitions handed in by the respondent, Brain, was held on 2nd February 1933. So far from removing directors, resolutions were passed in favour of the existing board, which had obtained a large number of proxies. The proxies obtained by Smith and Brain which had been seized were not surrendered to them. What else happened in the eight days between the meeting and 10th February 1933, when the information against Page, Corkhill, Smith and Brain for conspiracy was laid by Lawrence, does not clearly appear. The detective-inspector of police in charge of the Criminal Investigation Department gave evidence that, at a time he fixed as about the middle of January, Lawrence and Clifford discussed with him "the matter of Brain and Smith endeavouring to obtain proxies to get the voting power of the Commonwealth Life Association and that another man, named Partridge, was in the background and that there was no evidence against him." They produced some statements, all of which he did not read. He authorized a prosecution for conspiracy. Other evidence was given that the counsel instructed by the company's solicitors advised that there was no evidence against Partridge.

Both prosecutions resulted in committals for trial. But in each case the Attorney-General refused to file an indictment. Upon the charge of conspiracy to defraud the policy holders and shareholders of the Amalgamated company the four defendants were committed on

28th March 1933, and the decision that an indictment would not be filed was reached on 2nd August 1933. The costs of the proceedings were paid by the appellant company. Sayers received some payments as a witness and possibly otherwise. Sums of money were disbursed in connection with the matter between 12th and 30th December 1932 amounting to £60 10s., but who received the money was not shown in spite of an early challenge by counsel for the respondent. In the meantime, Mr. Cohen had objected to the part played by the company in the proceedings. On 4th April 1933 Inch "reported to the appellant's board the action taken by the committee in accordance with the power granted by the minute passed at the directors' meeting held on 5th December 1932" and "this was noted and approved." On 11th May 1933 at the annual meeting of the appellant company's shareholders the chairman, in the course of his address, made observations capable of the interpretation that the directors had brought about the prosecutions.

In June 1933 Smith says that Inch had an interview with him in which he suggested that the prosecution might be stopped if Smith and Brain made statements that they had been duped by Page, and that their expenses might be fixed up. He also said that Inch gave as a reason for the prosecution that they were determined that general meetings should not be held interfering with the directors. In the December and January following, overtures for an arrangement of sale or amalgamation between the Amalgamated Life company and the Associated Dominions company were renewed and consideration was given to them by the appellant's directors.

The trial of the respondent's action, which was based upon these facts, occupied twelve days. Questions were submitted to the jury, which they answered as follows :—

1. Has the plaintiff satisfied you that he is not guilty of conspiracy with Smith, Page and Corkhill or with any or either of them to defraud the shareholders and policy holders as so charged in the prosecution ? Yes.

2. Was the prosecution of the plaintiff instigated by the defendant company ? Yes.

3. If so, did the defendant company genuinely and honestly believe that the prosecution was justified ? No.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

4. If the defendant company instigated the prosecution was it actuated by malice in so doing? Yes.

5. If questions 2 and 4 are answered in the affirmative what damages do you find? Three thousand pounds (£3,000).

A sixth question was asked but not answered. It was:—

"6. (*a*) Was the prosecution determined upon by the police officers in the ordinary course of their duties and upon their independent judgment as a result of their own investigations and/or the information supplied by the defendant company? (*b*) Was misleading information consciously supplied by the defendant company to the police officers and if so was the bringing of the prosecution a result of the supply of such information?"

Unfortunately, upon the paper containing the questions handed to the jury the word "or" appeared between the third and fourth questions and the jury at first did not answer the third question, considering it to be alternative with No. 4. Without giving the jury any further direction or explanation, the learned Judge presiding at the trial requested the jury to answer it, whereupon after a little further consideration they returned the answer: No.

The first question which naturally arises upon these answers and upon the state of the evidence is whether it was open to the jury to find that the appellant company "instigated" the prosecution for conspiracy in such a sense as to be responsible civilly in an action for malicious prosecution. There is some authority for the position that, if a prosecution already instituted is adopted and carried on by a stranger to its institution, he may be civilly liable for doing so if it is unsuccessful and he acts maliciously and without reasonable and probable cause (see *Fitzjohn* v. *Mackinder* (1), per *Bramwell* B. (2), per *Cockburn* C.J. (3), and *Daniels* v. *Telfer* (4)). The declaration contained a count based upon this view of the law, but, as the jury failed to answer the question directed to it, it need not be considered. The damages upon the two causes of action are not necessarily the same, for the defendant could not be made responsible for the arrest and injury done by the actual institution

(1) (1861) 9 C.B. N.S. 505; 142 E.R. 199.
(2) (1861) 9 C.B. N.S., at pp. 522, 523; 142 E.R., at p. 205.
(3) (1861) 9 C.B. N.S., at pp. 527, 531; 142 E.R., at pp. 207, 209.
(4) (1933) 34 S.R. (N.S.W.) 99; 51 W.N. (N.S.W.) 29.

of the proceedings. The verdict found could not now be supported upon the ground that it implies findings sufficient for that count.

The legal standard of liability for a prosecution which is instituted neither by the defendant nor by his servant is open to criticism on the ground of indefiniteness. It is clear that no responsibility is incurred by one who confines himself to bringing before some proper authority information which he does not disbelieve, even although in the hope that a prosecution will be instituted, if it is actually instituted as the result of an independent discretion on the part of that authority (*Danby* v. *Beardsley* (1); *Fanzelow* v. *Kerr* (2)). But, if the discretion is misled by false information, or is otherwise practised upon in order to procure the laying of the charge, those who thus brought about the prosecution are responsible (*Pandit Gaya Parshad Tewari* v. *Sardar Bhagat Singh* (3); *Black* v. *Mackenzie* (4)). Further, the Privy Council has said in a judgment delivered by Lord *Dunedin* :—" In any country where, as in India, prosecution is not private an action for malicious prosecution in the most literal sense of the word cannot be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. If that is done and trouble caused an action will lie." Their Lordships, however, held in the case before them that, as the information supplied to the police was ample cause for the initiation of prosecution proceedings, the plaintiff must, in order to succeed in his action, go the whole way of showing that it was false to the defendant's knowledge (*Balbhaddar Singh* v. *Badri Sah* (5), a case containing dicta apparently inconsistent with the decision of this Court in *Davis* v. *Gell* (6)). The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgment are vicariously responsible for the proceedings. If the actual prosecutor acts maliciously and without reasonable and probable cause, those who aid and abet him in doing so are joint wrongdoers with him.

The expression " instigate " is not altogether free of ambiguity but it is used by Sir *John Salmond* (*Law of Torts*, 7th ed. (1928), p. 618),

(1) (1880) 43 L.T. 603.
(2) (1896) 14 N.Z.L.R. 660.
(3) (1908) 30 All. 525; 24 T.L.R. 884.
(4) (1917) N.Z.L.R. 729.
(5) (1926) *The Times*, 17th March, p. 5.
(6) (1924) 35 C.L.R. 275.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

whence the learned Judge seems to have taken the language of the questions put to the jury. In his charge, his Honor said :—"When I use the word instigated in that question, I mean really do you come to the conclusion that the police were not acting in the ordinary course of their duties and on information received in arriving at a decision but were in effect the agents of the defendant company as has been suggested. In other words, was the position dominated by the defendant company, and was the police action really action through that of the defendant company."

Counsel for the plaintiff (the respondent) had made a very strong attack upon the conduct of Inch, Lawrence and Clifford, and had suggested that not only had the two detectives lent themselves to the purposes of Inch, but that they had been rewarded for doing so out of the fund under Inch's disposal in connection with the matter. It appears to me that no fault is to be found with the direction given by the learned Judge upon the question whether the prosecution was instigated by the defendant (the appellant company) unless it be that his Honor should have instructed the jury that there was no evidence that Lawrence or Clifford had received any money or recompense from the company. He was not, however, asked to do so, and under rule 151B of the New South Wales *Supreme Court Rules* that objection to his summing up cannot now be relied upon.

In my opinion the finding that the prosecution of the respondent Brain was instigated by the appellant company was open to the jury upon the evidence. The acts of Inch in reference to the prosecution must be taken to be the acts of the appellant company. I do not understand this now to be disputed. A wide discretion to act for the protection of the shareholders and policy holders was given to a committee of three of which he was a member, and afterwards he became general secretary of the respondent company. With the knowledge of the directors, he was actively dealing with the whole matter throughout the next two months. He called in the two detectives and evidently remained in frequent and close consultation with them during the progress of the counter-attack upon Page. The two detectives were co-operating with Inch, first, in the seizure of the proxies, secondly, in the utilization of Sayers,

for whom Inch provided money in addition to raising his expectation of future advantage, and thirdly, in the unjustifiable attempt to use the Queensland police against Sharpe and Stack. Whatever be the true explanation of the fictitious telegram, it appears to me that, as the evidence stands, the right of the jury to place a sinister construction upon it cannot be denied. The respondent's counsel relied upon it at the trial as an attempt on the part of Inch and the two detectives, by the use of material they knew to be false, to implicate Stack as a confederate of W. T. Page in his machinations. Indeed so much reliance appears to have been placed by the respondent's counsel upon the affair of the fictitious telegram that the appellant company complains that it became a false issue. It may well be that the extreme inference which the respondent's counsel contended for is one which a wise jury might hesitate to draw. But, in the absence of any satisfactory explanation of the matter, it appears to me to be open to the jury to regard the conduct of Inch and the two detectives in relation to it as additional evidence of the close alliance among them in furthering by all available means a counter-attack upon those opposing the existing administration of the Commonwealth Life companies. If Detective-Sergeant Lawrence was not acting independently of Inch but under his direction or influence, support is not lacking for the jury's finding that the prosecution was instigated by the appellant company. The detectives were in consultation with the company's counsel before the prosecution was launched. They had repeatedly seen its solicitors. Subsequently its counsel and solicitors appeared at its expense to prosecute. The action taken by Inch was approved by the directors. According to the report of its next annual meeting sent out by the company, the chairman of directors claimed credit for the course taken by the company in terms capable of covering the institution of the prosecution. Some inadmissible evidence of his actual oral statement was led, but I do not think it sufficient to invalidate the finding. It added but little to the report and might have been made admissible in cross-examination of Senator McLachlan, or as a prior inconsistent statement. It is true that the detective-inspector sanctioned the prosecution. But upon his evidence it was open to the jury to take the view that he did not in the exercise of an

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

independent judgment direct the prosecution, but, upon an account of the matter given to him by Lawrence with the view of obtaining his assent to a course already agreed upon between Lawrence, Clifford and Inch, as Lawrence's superior officer, he authorized him to proceed. What written reports or statements Lawrence placed before him was not proved. But the doubt as to the time when Frank Page's statement was composed makes it appear unsafe to treat it as part of the then available material. For these reasons I think that the appellant company fails in its attack upon the jury's finding that the appellant company instigated the prosecution.

Upon the issue of the absence of reasonable and probable cause the jury were asked one question only, namely, whether the appellant company genuinely and honestly believed that the prosecution was justified. In the circumstances of this case, I think that it was desirable, if not necessary, to put the question to the jury and that the answer given to it, unless set aside, makes it impossible for the Court to decide that there was not an absence of reasonable and probable cause for the prosecution of the respondent Brain.

When it is not disputed that the accuser believed in the truth of the charge, or considered its truth so likely that a prosecution ought to take place, and no question arises as to the materials upon which his opinion was founded, it is a question for the Court to decide whether the grounds which actuated him suffice to constitute reasonable and probable cause. In such a case, unless there be some additional element of an exceptional kind, there is no further fact needed to enable the Court to judge whether the prosecutor was warranted in proceeding. I repeat what I said in *Sharp* v. *Biggs* (1): —"The ultimate inference, whether or not the facts of the case amount to a want of reasonable and probable cause, is for the Court, but it is for the jury to determine what are the facts of the case. Reasonable and probable cause does not exist if the prosecutor does not at least believe that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted. Such cause may be absent although this belief exists if the materials of which the prosecutor is aware are not calculated to arouse it in the mind of a man of ordinary prudence and judgment." The

(1) (1932) 48 C.L.R., at p. 106.

question submitted to the jury was aptly framed to obtain their opinion as to the existence of the requisite belief. If that belief had been found to exist, the question would have remained whether the materials were enough to arouse it in a man of reasonable prudence and judgment, and this latter question it would have been for the Court to decide. It is a question which might well be answered against the appellant company. It depends entirely upon the reasonableness of an inference from the circumstances that Brain was privy to any purpose of cheating and defrauding the shareholders or policy holders of the Amalgamated company, if such a purpose existed in the minds of others. In the statement that I have made of the facts of the case, the distinction is not made between matters known at the time of the institution of the prosecution and those subsequently ascertained. I think that Inch was unaware of very few of the facts I have set out. Senator McLachlan, perhaps, was less well informed. Of course, the more extensive the accuser's knowledge of facts which may reasonably be considered incriminatory, the greater the difficulty on the part of the accused in discharging, as plaintiff, the onus of establishing an absence of reasonable and probable cause. But the accuser's knowledge of exculpatory facts is to his disadvantage. The less he knows of these, unless it appears he ought to have known or discovered them, the greater a plaintiff's difficulty. In the present case, the point seems to lie in Brain's complicity in the alleged purpose to cheat and defraud, supposing it to exist. It would not have been unreasonable to infer that he was acting in combination with Sydney Smith and Page in an attempt to supplant the directors of the appellant company, and that he was doing so with the ultimate purpose of bringing about a sale of the Amalgamated company's business to Page's company. Such a transaction might or might not be for the advantage of the shareholders or policy holders. Probably the advantage, if any, to shareholders would be immediate and would be accompanied, even if good faith were observed, by a corresponding disadvantage to policy holders, unless and until it was countervailed by an expanding premium income. The purpose of cheating and defrauding policy holders, if it were entertained, could not be carried into effect until the business had been transferred. It would require some fraudulent or illegal

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

diversion of the assets which otherwise should answer the actuarial liability upon policies. The grounds for ascribing an ultimate intention to Page were far from strong. The audacity of his attack upon the appellant company's directorate, his readiness to use the assets of an acquired company to secure an advance for its acquisition, his tolerance of the disreputable Partridge and his use of Sydney Smith's unreal organization of shareholders make a very unfavourable impression, and would perhaps justify the worse construction of ambiguous conduct. But none of these things is illegal, although, perhaps, that they are not so is a reproach to the law of New South Wales. None involves a fraudulent application of money for his own benefit. All the facts of the case were consistent with the view that, although Page would permit himself any latitude in an endeavour to absorb other concerns and amplify the enterprise he controlled, he did not intend any definite fraud upon policy holders, still less shareholders. After all, the charge was conspiracy to cheat and defraud and this means a purpose of fraudulent gain. But, whatever inference might reasonably be drawn as to Page's intent, there is less ground for attributing such a purpose to Brain. Inch himself had described him as totally deaf and possibly at the mercy of the group that Page led. He had long evinced a hostility to Inch, a hostility originating in the way in which Inch had terminated his services in May 1929. His views and proceedings had been antagonistic to the board. The opinion that he professed that, in the interest of shareholders of the constitutent companies, the Amalgamated company should sell was not irrational. Brain had long been associated with the Commonwealth companies and his character had been found not incompatible with the office of director. In all these circumstances, I think a Court might hesitate to hold that, even if the person responsible for the prosecution of Brain acted upon an honest belief in his probable guilt of the charge preferred, his belief was based upon sufficient grounds. But the jury have taken the view that such a belief was not held in fact. The finding means, I think, that Inch did not believe that the prosecution of Brain was justified. Upon the circumstances of the case I think they were at liberty so to do. At the trial, the good faith of Inch's proceedings was attacked, and from an early stage. He was not called as a witness, and the jury did not

have the advantage of hearing his explanation of the matters relied upon by the respondent's counsel. But the materials which were available or said to be available to Inch before the prosecution were before the jury. They may well have appeared a slender foundation for a belief that Brain was privy to any intent to defraud or cheat. Further, it was open to the jury to find that Inch had attempted in disregard of the facts to implicate Stack in the same charge. To do so they may have thought that he used the fictitious telegram, in the authenticity of which the jury may have considered that he could never have believed. They might reasonably think that he could not have been bona fide in his use of the police against Sharpe and Stack in reference to their circular and that, again, he was willing to use any means to implicate opponents in the charge. Among the statements put forward as existing information sufficient to justify the prosecution was that of Frank Page, which might reasonably be found to be of later date and yet antedated. Negatively, the jury may have disbelieved much of the evidence of Lawrence and Clifford. Then the renewal of the negotiations with Page and the conversation with Smith suggesting the dropping of the charge might be taken into account as tending to support the view that Inch took no very serious view of the actions of Page and of Smith, the leader and the lieutenant. Yet, on his own statement, he regarded Brain as "at the mercy of the group." All these were matters for the jury, and, in my opinion, they could not be withdrawn from it.

The learned Judge's charge to the jury upon this issue was criticized upon this appeal, but I do not think it was calculated to mislead them in any material matter. It was unfortunate that the question was at first made to appear to the jury as if it were alternative with that relating to malice; and perhaps it would have been more satisfactory if the learned Judge had given them a further direction when he asked them to reconsider it. But it must be remembered that upon the facts of this case the issue of malice was not so remote from that of the honest belief of Inch in the justness of the prosecution. The case made against him, in brief, was that he caused a charge in which he did not believe to be preferred in order to suppress a movement against himself and some of his

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Dixon J.

co-directors. It was not denied that the evidence of malice was ample to support the finding of that issue.

But an attack was made upon the amount of the verdict as excessive. Doubtless the sum of £3,000 awarded by the jury is a very large one. But it is evident that they took a strong view of the impropriety of Inch's conduct. Whether they were right or wrong in so doing we are not concerned. Our province is to decide whether, upon the state of the evidence submitted to them, reasonable men might adopt views which would support the jury's conclusions. In my opinion reasonable men might adopt such views. Upon findings that an innocent plaintiff has been prosecuted upon the serious charge of conspiracy with intent to defraud life policy holders and that he has been so prosecuted maliciously and without any genuine belief that the prosecution was justified, I cannot say that a verdict of £3,000 is so excessive that no reasonable man could award it.

Although I may have attached less importance to some circumstances and possibly more to others than was done in the judgment of the Supreme Court, which was delivered by *Jordan* C.J., I am substantially in agreement with the reasons he gave.

In my opinion the appeal should be dismissed with costs.

EVATT AND MCTIERNAN JJ. This is an appeal from the judgment of the Full Court of the Supreme Court, which dismissed the application by the present appellant to set aside a verdict for the respondent for £3,000 in an action for malicious prosecution tried before *Halse Rogers* J. and a jury.

The first ground upon which counsel for the appellant attacked the verdict was that, as, upon their face, questions 3 and 4 appeared to be alternative, the jury must be taken to have understood each to relate to the issue of malice which question 4 expressly raised. When the jury first returned to Court, it was pointed out that they had omitted to answer question 3, which was: "If so, did the defendant company genuinely and honestly believe that the prosecution was justified?" The explanation of this was given by the jury themselves. The jury then retired again, at the direction of the Judge and with the concurrence of counsel on both sides, for the

express purpose of considering question 3. Subsequently the jury returned to Court, and answered question 3—set out above—in the negative.

After the discussion which took place, it is impossible to conclude that the jury could have understood that question 3 bore upon the issue of malice, even if it could be surmised that they were at first of that opinion.

This ground of objection was not adverted to during the appeal to the Full Court, it was not included in the grounds of appeal to this Court, and it must fail.

The next contention of the appellant was that there was a substantial misdirection in the following passage in the summing-up :—

> "Now, the suggestion is made to you that this prosecution was initiated in order to block a meeting of shareholders, which the plaintiff and Smith had a perfect right to call. If that was so, that would be an improper motive, and it would help you perhaps in a decision on the point as to whether or not they honestly believed that the prosecution was justified. Of course you may think it possible that they may have had an indirect motive and still honestly have believed that the prosecution was justified, but in this case you will probably find that those two things could not co-exist together. The question of honest belief is one that you will have to consider in the light of all the circumstances."

The contention is that, even if the jury found that the object of the defendant company, acting through their manager, Inch, was to block a meeting of its shareholders, that finding could not determine the separate question of honest belief. It is true that an improper motive may co-exist with an honest belief either that a prosecution is justified or that the person prosecuted is guilty. While that is made clear in the above passage, it also emphasizes that, if, as the plaintiff charged, the prosecutor's motive was to defeat the plaintiff's legitimate activities because they were opposed to the prosecutor's personal interests, that motive was hardly compatible with genuine or honest belief in the propriety of the prosecution.

The next question is whether the jury's answer to question 3 should be regarded as concluding the issue of reasonable and probable cause.

In *Broad* v. *Ham* (1), which was decided in 1839, the jury were directed that, if " the defendant himself believed the plaintiff had

(1) (1839) 5 Bing. N.C. 722; 132 E.R. 1278.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Evatt J. McTiernan J.

not committed a felony, that was some evidence of the absence of probable cause " (1). A rule nisi to set aside the verdict was obtained upon the ground that, if the plaintiff acted in such circumstances that a reasonable man would believe that he had committed a felony, the defendant's belief was immaterial upon the issue of absence of reasonable and probable cause. As the rule was discharged, the case is only authority for the proposition that a defendant's belief in the absence of the plaintiff's guilt constitutes evidence of the absence of reasonable and probable cause. But *Tindal* C.J. seemed to go further in his judgment when he said :—

> " In order to justify a defendant, there must be a reasonable cause—such as would operate on the mind of a discreet man ; there must also be a probable cause—such as would operate on the mind of a reasonable man ; at all events such as would operate on the mind of the party making the charge ; otherwise there is no probable cause for him ; I cannot say that the defendant acted on probable cause, if the state of the facts was such as to have no effect on his mind " (2).

In his judgment, *Erskine* J. clearly laid it down that

> " it would be a monstrous proposition, that a party who did not believe the guilt of the accused, should be said to have reasonable and probable cause for making the charge " (3).

The question was again discussed in *Turner* v. *Ambler* (4). The only issue left to the jury by Lord *Denman* C.J. was that of malice, but part of the argument for the plaintiff at the trial (5) referred incidentally to the question of the plaintiff's belief in the defendant's guilt. On the application to set aside the verdict, counsel for the defendant stated that the plaintiff had not suggested that the jury should have been asked specifically whether the defendant bona fide believed that a felony had been committed (6). Counsel for the plaintiff contended, however, that the defendant was endeavouring to support the propriety of a charge of felony, originally made without cause, by proof of facts and circumstances which had come to his knowledge afterwards. But Lord *Denman* C.J., after pointing out the importance of *Broad* v. *Ham* (7), said that, if the case had been cited at the trial,

> " I should have left it to the jury to say whether or not the defendant believed the felony had been committed. But the case went to them, not

(1) (1839) 5 Bing. N.C., at pp. 722, 723 ; 132 E.R., at p. 1279.
(2) (1839) 5 Bing. N.C., at p. 725 ; 132 E.R., at p. 1279.
(3) (1839) 5 Bing. N.C., at pp. 727, 728 ; 132 E.R., at p. 1280.
(4) (1847) 10 Q.B. 252 ; 116 E.R. 98.
(5) (1847) 10 Q.B., at p. 254 ; 116 E.R., at p. 99.
(6) (1847) 10 Q.B., at p. 257 ; 116 E.R., at p. 100.
(7) (1839) 5 Bing. N.C. 722 ; 132 E.R. 1278.

distinctly on that point, but on the general question whether the defendant acted on such a belief or on a different motive" (1).

This case recognizes the principle in *Broad* v. *Ham* (2), for, although the rule nisi was discharged, Lord *Denman* said :—

"But among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them ; and also the defendant's belief that the facts amounted to the offence which he charged, because otherwise he will have made them the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute. In other words, the reasonable and probable cause must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding ; and perhaps whether they did so or not is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the Judge, to whom the legal effect of the facts only is more properly referred" (3).

In *Smith's Leading Cases*, 13th ed., vol. I., p. 290, it is stated of *Broad* v. *Ham* (2) and *Turner* v. *Ambler* (4) :—

"In both these cases, the decisions seem to have stopped short of the proposition that such proof affords conclusive evidence of want of reasonable and probable cause ; but *Erskine* J., in the former case, clearly considered this to be so ; and this seems to be the only logical view ; for even where circumstances existed which might have afforded reasonable and probable cause for the institution of a prosecution by somebody else, the fact that the defendant had no belief in the plaintiff's guilt shows that these circumstances had no effect upon his mind."

This comment, however, somewhat understates the effect of the two cases. Any remaining doubt about the general principle was resolved in *Haddrick* v. *Heslop* (5). In that case, *Wightman* J. asked the jury whether the prosecutor believed that there was reasonable ground for indicting, and, upon the jury answering this in the negative, the Judge himself held that the indictment was without reasonable and probable cause. The Court refused a rule so far as it related to such matter. Lord *Denman* C.J. said :—

"I think that belief is essential to the existence of reasonable and probable cause : I do not mean abstract belief, but a belief upon which a party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense. Proof of the absence of belief is always almost involved in the proof of malice. In *Turner* v. *Ambler* (4) there was no point made directly at the trial as to want of belief :

(1) (1847) 10 Q.B., at pp. 259, 260 ; 116 E.R., at p. 101.
(2) (1839) 5 Bing. N.C. 722 ; 132 E.R. 1278.
(3) (1847) 10 Q.B., at p. 260 ; 116 E.R., at p. 101.
(4) (1847) 10 Q.B. 252 ; 116 E.R. 98.
(5) (1848) 12 Q.B. 267 ; 116 E.R. 869.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Evatt J. McTiernan J.

the only question was whether the facts of themselves bore out the probability and reasonableness. But, where a plaintiff takes upon himself to prove that, assuming the facts to be as the defendant contends, still the defendant did not believe them, we ought not to entertain any doubt that it is proper to leave the question of belief as a fact to the jury " (1).

Coleridge J. said :—

" Here it is sufficient that the prosecutor did not believe in such cause, and instituted the prosecution from the corrupt motive of suppressing evidence. It was, therefore, right to ask the jury whether he did believe that there was probable cause for indicting, and whether he instituted the prosecution from such a motive " (2).

And *Erle* J. said :—

" The defendant made the charge upon information given to him : it was left to the jury whether he believed that information : and they found that he did not. It would be monstrous to say he had reasonable and probable cause " (3).

Sir *John Salmond* in his textbook on *Torts*, 5th ed. (1920), p. 548, stated the position as follows :

" There is no reasonable and probable cause unless the defendant genuinely and honestly believed that the prosecution or other proceeding complained of was justifiable."

" Belief that there was reasonable cause for indicting "—the phrase used by *Wightman* J. in *Haddrick* v. *Heslop* (4)—is a substantial equivalent for *Salmond's* expression.

With Sir *John Salmond's* statement of the position may be compared that of *T. A. Street*, who says :—

" Moreover, where the accused is in fact innocent, but the circumstances are such as to cause suspicion to fall upon him, and to afford reasonable ground for believing him guilty, the prosecutor, when sued for malicious prosecution, cannot take advantage of such reasonable ground unless he knew the suspicious circumstances and credited them. This all means that the prosecutor must act in entire good faith in order to be able to claim the protection of legal privilege where it turns out that the accused person is innocent. If the prosecutor knows, or believes, that the person accused is innocent, circumstances, however damning, will not justify the prosecution " (*Foundations of Legal Liability* (1906), vol. I., p. 330).

The actual decision of this Court in *Sharp* v. *Biggs* (5) is directed to a different aspect of the action of malicious prosecution, because, in that case, in answer to a specific question (see the report (6)), the jury

(1) (1848) 12 Q.B., at pp. 274, 275 ; 116 E.R., at pp. 871, 872.
(2) (1848) 12 Q.B., at pp. 275, 276 ; 116 E.R., at p. 872.
(3) (1848) 12 Q.B., at pp. 276, 277 ; 116 E.R., at p. 872.
(4) (1848) 12 Q.B. 267 ; 116 E.R. 869.
(5) (1932) 48 C.L.R. 81.
(6) (1932) 48 C.L.R., at p. 83.

found that the defendant at the time he laid the information against the plaintiff, honestly believed that the plaintiff had been guilty of the criminal charge. Consequently, the decision turned upon the further question whether the defendant's belief, although genuinely entertained, was based on reasonable grounds.

The precise form of the question for the jury relating to the prosecutor's belief has been disputed. *Jordan* C.J. suggests that there is no reasonable and probable cause for prosecuting unless the prosecutor believed that the accused was "probably guilty" of the offence. *Hawkins* J. stated the requirement as being "an honest belief of the accuser in the guilt of the accused" (1). And, most recently, in *Sharp* v. *Biggs* (2), *Dixon* J. said:

> "Reasonable and probable cause does not exist if the prosecutor does not at least believe that the probability of the accused's guilt is such that upon general grounds of justice a charge against him is warranted."

This statement of the law by *Dixon* J. differs in no essential way from that of Sir *John Salmond*. It therefore appears that the third question was in such a form that the answer to it is conclusive against the appellant on the question of whether there was reasonable and probable cause for the prosecution.

We are therefore of opinion that there is no validity in the objection to the form of question 3; and the transcript of the proceedings placed before us strongly suggests that this and the other questions were the result of the combined efforts of counsel for both parties.

The appellant not only criticized the third question as bad in point of form, but contended that there was not sufficient evidence to support the jury's answer to that question, or to question 2, which was: "Was the prosecution of the plaintiff instigated by the defendant company?"

In the course of the summing up the Judge explained the meaning of question 2 and asked the jury to determine whether the police

> "were in effect the agents of the defendant company as has been suggested. In other words, was the position dominated by the defendant company, and was the police action really action through that"

(*sic*, throughout?)

> "of the defendant company."

These two contentions render necessary an analysis of many of the facts and documents. The judgment of *Jordan* C.J. contains

(1) (1878) 8 Q.B.D., at p. 171. (2) (1932) 48 C.L.R., at p. 106.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Evatt J. McTiernan J.

a detailed account of all the facts of the case and it is unnecessary to repeat them in detail. It may be assumed in favour of the appellant company that there were sufficient circumstances surrounding the actions of the plaintiff and other persons charged with the conspiracy to have formed the foundation for a reasonable belief that the charge was justified. The evidence with which we need be concerned is that relating to the question whether the company honestly and genuinely entertained such a belief, and whether it prosecuted the plaintiff.

On December 5th, 1932, the board of the company had under its consideration the circular letter distributed on November 22nd to its shareholders by Smith and Brain. It was resolved that Inch, Traversi and Higgs be appointed a committee "to take whatever action, and to incur any expense they may think necessary to protect the interests of shareholders and policy holders."

On the following day, December 6th, Lawrence, a detective-sergeant, interviewed Inch at the company's office. From this time forward, Inch and Lawrence worked in close collaboration. Inch assumed sole control of the operations of the committee, Higgs being away from Sydney from about December 18th until early in January. Inch spent large sums of money under the authority conferred by the minute of December 5th, and these included the expenses of the prosecutions. Higgs said in evidence:—

> "When an amount like £600 of this company's funds was paid out we would not necessarily get the approval of the board of directors; we are doing it every hour of the day. The board put it into a trust of three and they allowed us to draw cheques or to handle the thing as we saw fit. That was the committee. A part of the work that they did was to pay for this prosecution. We were not only to send out the proxies, we would handle the case as it came along."

On December 12th, the detectives, acting upon the representations of Inch, interviewed Smith and Brain, and certain proxies obtained from shareholders as a result of the circulars were collected and retained by the police.

Between December 6th and 15th the detectives were continuously in touch with Inch. According to Lawrence, Sayers (who was an employee of W. T. Page's company, and from whom a statement was obtained) produced to the detectives a document purporting to be a copy of a telegram. The matter of this alleged telegram

assumed considerable importance at the trial. It was said that it purported to have come from Stack (of the Citizens and Graziers) to W. T. Page (of the Associated Dominions Assurance Society Ltd.), and to read :—" Owing to turn of events we deem it inadvisable come Sydney for present. Apparently plans miscarried."

In his evidence Lawrence said that he did not retain the document given to him by Sayers, but handed it to Inch, who directed his typist to take a copy. Lawrence also swore that he did not know what became of the document after it reached Inch's custody. He said :—

> " I do not know what became of the original, it was left with the company ; it is not an original, it was just a piece of ordinary paper, a piece of ordinary white paper with typewritten words of what appeared to be a wire on the piece of paper, a small piece of paper. It was something about ' think inadvisable come Sydney at present.' I believe it had on top of it ' Page ' and it was signed I think by Stack. That was given to me by Sayers at that time. That is all I had to do with Sayers."

On December 12th, 1932, the defendant company issued a circular to its shareholders in reply to those issued by Brain and Smith. In the course of this circular it was said that a determined attempt was being made to capture the management of the company, and to hand its control to persons in whom the directors had no confidence. It was also said that one Partridge was active in the attempt of W. T. Page, managing director of the Associated Dominions Assurance Society Ltd., to purchase the company's undertaking, and that the board refused to have any dealing with Partridge, directly or indirectly.

On the same day (December 12th, 1932) Sharpe and Stack, directors of the Citizens and Graziers, sent a circular to its shareholders, referring to the annual meeting of the company to be held shortly in Sydney, and asking for proxies to assist their efforts to prevent further calls being made.

Stack, who was called as a witness, swore that he had never sent a telegram to Page to the effect that plans had miscarried, or that he deemed it inadvisable to come to Sydney, and he also swore that he did not send Page a telegram of any description. Moreover, Sayers, who was also called as a witness, swore that he did not show Lawrence or any other detective a document purporting to be a copy of such a telegram. On February 11th, 1933, two days

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Evatt J. McTiernan J.

before the arrest of Smith, Sayers lost his position with W. T. Page at the Associated Dominions Assurance Society Ltd. He at once tried to get a position with the defendant company, and obtained an interview with Inch. According to Sayers,

> "When I went up to see Mr. Inch the first time he said 'I suppose you do not know anything about that telegram?' I said 'No.' I think that was all he said. He did not show me a telegram. As a matter of fact I did not know what he was talking about, I never heard about any telegram being mentioned."

Mr. Neville Cohen, solicitor, gave evidence that Inch told him that there was a conspiracy by Brain, Page (of the Associated Dominions Assurance Society Ltd.), Smith and Partridge to capture the control of the defendant company as a stepping-stone to obtaining control of the assurance fund of the Amalgamated company. Subsequently, about December 21st or 22nd, Inch said to Cohen: "I have definite evidence from the police that Sharpe and Stack are in this conspiracy up to their neck with Page and the others." Cohen also swore that Inch told him that the police had informed him (Inch) that a meeting was to be held in Page's office on December 19th by the people concerned in the campaign to obtain control of the defendant company and the Amalgamated company, and that Stack and Sharpe were to be present at the meeting. Cohen replied to Inch that he could not believe the story, but Inch persisted that he had definite evidence of the conspiracy, and that the police had found a telegram from Stack to Page, the contents of which Inch read to Cohen from a slip of paper. Cohen swore: "He said 'Page is the addressee, deem it inadvisable to come to Sydney at present apparently plans miscarried Stack' and the 19th December."

Thereupon Cohen told Inch that he would not have believed it otherwise, and Inch said: "They are in it up to their necks, Stack and Sharpe." Cohen also swore that he had further conversations with Inch in which he (Cohen) asked for details of the telegram. At this point, Inch said:—

> "If I were you I would let matters remain as they are at the present time, the police hold the original telegram. I said 'That is precisely what I want, they cannot hold the original because it was supposed to be sent from Brisbane and the original would be in Brisbane, and my object in getting this information is to go to Brisbane and have the original turned up and then confront Stack

with it.' He said 'If you take my advice you will leave matters where they are, the police have the matter well in hand.' "

Cohen, who was interested in the affair as the solicitor for the Citizens and Graziers' Co, made a special trip to Queensland, interviewed Sharp and Stack, the two directors concerned, and the Commissioner of Police in Brisbane. Finally, Cohen attended a board meeting on February 1st or 2nd, and made the following statement in Inch's presence :—

"I was just speaking to Stack on the telephone, he told me he was ringing from the C.I.B., he told me he had just seen Detective-Sergeants Lawrence and Clifford in relation to this telegram and they both assured him that was the first they had ever heard of it.

Q.: Did Mr. Inch say anything then ? A.: No.

Q.: What did Mr. Inch do when you said that ? I do not know that he did anything, he was sitting and he remained sitting."

In his evidence Stack said that he came to Sydney for the special purpose of interviewing the Chief Commissioner of Police, who arranged an appointment between him and Detectives Lawrence and Clifford. Stack swore that he spoke to Lawrence as follows :—

"I said 'I complained to the Commissioner about a telegram supposed to be in your possession ; Mr. Inch has told the directors of the Amalgamated company that the police have a telegram supposed to have been sent by me from Brisbane to Page, and he is trying to connect me up with other people ; I want to see that telegram or to know what you know about it, if you have seen that telegram.' He said 'No, I have never seen nor heard anything at all about such a telegram.'

Q.: Did you describe it as a telegram or give the words ?

A.: I gave him the exact words. I had no date on it then but I told him it was supposed to have been sent on the 19th December, it was headed Page, I read it out, I had a slip in my pocket at the time.

Q.: Who had given you that ?

A.: Mr. Cohen. I read 'We deem it inadvisable to come to Sydney at present, apparently plans miscarried, Stack.' "

Clearly the jury were at liberty to accept the evidence of Sayers that he had not given to the officers of police a copy of any such telegram from Stack to Page. The jury were also at liberty to accept the evidence of Stack that Lawrence and Clifford subsequently admitted that they had never heard of any such telegram. The jury were also at liberty to accept Cohen's evidence of his conversation with Inch. It follows that the jury were at liberty to infer that the existence of the inculpatory telegram was invented by Inch in order to corroborate his assertions that there was a connection between the two groups

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Evatt J. McTiernan J.

of persons who were threatening his control of the companies, one group being Stack and Sharpe, who were opposing his policy within the Citizens and Graziers, the other group consisting of W. T. Page, Smith and Brain, who were opposing Inch among the shareholders of the defendant company itself. The jury were at liberty to infer, particularly as Inch, though available as a witness, was not called, that Inch was prepared, not only to assert that his opponents were engaged in the same criminal conspiracy with the object of raiding the assets of the Amalgamated company after obtaining control of its two associated companies, but deliberately to concoct a document in order to remove all doubt from the minds of those who were sceptical of Inch's assertions. It is also undeniable that the jury were at liberty to infer that the detectives lent themselves to this desperate move on the part of Inch.

Such an association of Inch with the detectives in relation to the working up of the conspiracy charges could be regarded by the jury as bearing on the two questions, first, whether the company through Inch was from the commencement the real actor in the prosecution of the plaintiff, and second, whether Inch really believed in the existence of any criminal conspiracy at all.

On January 6th, 1933, Inch as general secretary for the defendant wrote to the Criminal Investigation Branch at Sydney. This letter referred to the proxies which had been given in favour of the plaintiff. The latter was referred to as being " totally deaf and possibly at the mercy of the Partridge-Page group." In this letter Inch requested the department to hand the detained proxies to him, and to furnish any other information to the chairman of the defendant company, Senator McLachlan.

Later in the year 1933 an action was brought by Stack against Inch for slander and libel, the slander alleged being based upon statements made to Cohen by Inch, including the allegation by Inch concerning the telegram of December 19th, 1932. The third count of the declaration was based upon a letter written by Inch on January 9th, 1933, to the Criminal Investigation Branch, Sydney, stating that Sharpe and Stack, in issuing their circular to the shareholders of the Citizens and Graziers on December 12th, 1932, had shown an intention which was " obviously dishonest." This action

of Stack was defended on behalf of Inch by the defendant company, and was compromised. All the legal expenses in relation to it were borne by the company, and regarded as being covered by the resolution of December 5th, 1932, already referred to.

It is here that reference may be made to the prosecution in which Frank Page, the brother of W. T. Page, appeared as informant.

On January 25th, 1933, Frank Page made a statement which was put in writing, and this statement related to Partridge, Brain, Smith and Corkhill. This statement contained an incidental reference to a false balance-sheet of the Associated Dominions Assurance Society Ltd., but the point to be stressed is that its main purport was to assert the existence of the conspiracy, to which Inch had referred in his conversations with Cohen. Frank Page had been dismissed by his brother, and there is internal evidence in the statement which rather suggests that the former was hardly a trustworthy source of information. On January 30th a warrant was issued for the arrest of W. T. Page and Corkhill on a charge relating to the false balance-sheet of the Associated Dominions Assurance Society Ltd. And the person in whose name the process was instituted was none other than Frank Page himself. Although he was the nominal prosecutor, the jury probably regarded it as certain that the real prosecutor was the defendant company. We find the minutes of the board meeting of February 1st, 1933, stating that the defendant company's solicitor

> "reported the steps taken to protect the assets of the society and the Amalgamated company against the plans of Mr. W. T. Page (managing director of the Associated Dominions Assurance Society) and others, and he was authorized to appear with counsel for Mr. Frank Page in the prosecution now pending as it forms part of such protection."

Further, the jury must have regarded the coincidence that Page and Corkhill were arrested immediately prior to the extraordinary general meeting of the defendant's shareholders, which was held on February 2nd, as being too beneficial to Inch's plans to be the result of mere chance.

At this extraordinary general meeting, those in control of the affairs of the defendant company were successful in warding off the attack of the shareholders who desired a change in the policy or control of the directorate. On February 10th, 1933, Lawrence laid the

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Evatt J. McTiernan J.

information against Smith and Brain for having conspired with Corkhill and W. T. Page to defraud the shareholders and policy holders of the defendant company. On February 13th Smith was arrested, and on February 16th Brain was arrested.

Various remands took place, and, on March 2nd, the Metropolitan Superintendent of Police made a recommendation to the Commissioner that, in relation to what was described as the " prosecution of Page, Corkhill, Smith and Maddison-Brain ",

> " permission be given for Mr. *Dovey* to conduct this prosecution, his costs to be paid by the companies who have been victimized as arranged herein. The matter might, however, be referred to Mr. Clarke, Crown Solicitor, as an urgent matter."

The Crown Solicitor of New South Wales reported on March 3rd that " except in special cases the practice is, as I understand it, that public prosecutions are not to be conducted by private persons."

In this instance the practice was departed from, and the defendant company was given authority to instruct solicitors and counsel, and conduct the prosecution, although it was in the name of a police officer as informant. Mr. *Dovey*, as counsel, instructed by the appellant's solicitors, conducted the case for the prosecution before the magistrate at the Police Court. On March 28th the magistrate committed for trial the plaintiff and the three other alleged conspirators.

The board meeting of the defendant company on April 1st, 1933, was recorded thus :—

> " False balance-sheet .. .. 2 charged.
> Interference with witness .. .. .. 1 charged.
> Conspiracy .. .. 4 charged.
>
> All committed for trial.
>
> This was noted. The general secretary reported on the action taken by the committee in accordance with the power granted by the minute passed at the directors' meeting held on 5th December, 1932. This was noted and approved."

Subsequently, at the annual general meeting of shareholders of the defendant company, on May 11th, 1933, the chairman of directors, referring to the employment of counsel and solicitors to secure the committal of the plaintiff and the other alleged conspirators, stated that certain action had to be taken by the defendant to protect the interests of the Amalgamated company, it being obvious that the

control of the defendant company would give control of the Amalgamated. The chairman of directors also stated that the publicity side of the recent prosecution had earned the company the approval of the New South Wales insurance companies.

There was evidence before the jury that the chairman of directors, in answer to a protest by one of the shareholders (Dr. Hunter) against the action of the directors in connection with the prosecution, said that " he was glad he had authorized and instructed the action." The shareholder had pointed out that the matter should have been left to the police.

In June, 1933, while the matter of filing a bill was still pending with the Attorney-General, Smith, one of the persons committed for trial, had a conversation with Inch, in the course of which Smith complained about " the atrocious action " taken against Brain and himself. Inch then told Smith not to blame him (Inch), but to blame the police, whereupon Smith said that the chairman had expressly stated that the defendant company had authorized the action. Inch then changed his ground, and stated that he was determined that extraordinary general meetings, interfering with directors, were not going to be held again. Inch also suggested that the defendant company could stop the prosecution where it was at the present moment and Smith could go abroad, provided that Smith made a statement that he was the tool of Page, and also induced Corkhill and Brain to make similar statements. It was also suggested by Inch that Smith's expenses might be paid by the defendant company.

On August 2nd, 1933, a *nolle prosequi* was filed by the Attorney-General.

But for the evidence of Inspector Prior that he was not advised by Inch or any other officer of the defendant company, the finding of the jury that the defendant was the prosecutor would be unassailable. For Inspector Prior stated that everything he did was based upon the action and reports of Lawrence and Clifford, and that he made no independent inquiries, nor did he direct any such inquiries. Further, Inspector Prior knew nothing of the arrangement made with the defendant company for the conduct of the prosecution.

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Evatt J. McTiernan J.

It is clear that, if A and B conjointly decide to prosecute C upon a criminal charge, and C subsequently brings an action against A for malicious prosecution, the latter makes no answer by relying upon the fact that B has not been joined with him as a defendant. If Inch, who was the appellant's agent, combined with the detectives to procure the arrest by warrant on the information of Lawrence and to carry on the proceedings thereby initiated, the appellants became liable to be sued alone without the necessity of joining the detectives as defendants. In our opinion, there was abundant evidence upon which the jury could find that, by the conjoint action of Inch and the detectives, the plaintiff was arrested, brought before the magistrate and committed for trial; and that the dominant member of this combination was Inch. The jury had before them evidence of the proceedings against Page and Corkhill in relation to the false balance-sheets. In those proceedings, although Frank Page was the selected informant, it is not disputed that the real prosecutor was Inch. Yet Inch had the active support and co-operation of Lawrence in such prosecution, although on that occasion Lawrence did not lay the information. It is significant that Frank Page got in touch with the detectives, not directly, but only through the intervention of the solicitors of the defendant company, who were responsible to Inch. The prosecution of W. T. Page and Corkhill in respect of the false balance-sheets cannot be dissociated from the subsequent prosecution of the same two persons together with Brain and Smith. There is sufficient evidence to support a finding that the detectives either acted under Inch's direction, or allowed Inch to assume control at a very early stage of the matter. Although Inch was not the informant in his own name, it was for the jury to determine whether, at the time of the plaintiff's arrest, Lawrence and Inch were working together, so that the former was to all intents and purposes Inch's agent and instrument. The decision of the Crown's legal advisers to convert what appeared on the surface to be a police prosecution into a private prosecution is only explicable because those advisers acted upon the information and report of Lawrence; but the decision tends to corroborate the jury's finding that, from first to last, the prosecution was in reality a private, and not a police, prosecution. In our opinion, the jury were entitled to

find that the responsibility for the arrest and prosecution of the plaintiff is to be imputed to the defendant company, acting through Inch, its agent. It was not disputed before us that Inch did possess the necessary authority to undertake and continue criminal proceedings against those who, in his judgment, were threatening the interests of the defendant company.

Upon the question whether there was evidence to support the finding that, at the time of the arrest and prosecution, Inch did not believe that the criminal proceedings were justified, *Jordan* C.J. relied mainly upon the conversation between Inch and Smith, which took place several months after the committal for trial. He regarded this conversation as evidencing the fact that Inch, by his then conduct, could be regarded as evidencing his disbelief or non-belief in the propriety of prosecuting Smith and Brain. Whilst the jury may have regarded this conversation as of importance, they had also to consider the significance of the letter to the Sydney Criminal Investigation Branch which Inch himself wrote on January 6th, 1933. In that letter Inch suggested without obscurity the possibility or probability that Brain was an innocent dupe of the real conspirators. If the jury accepted this as indicative of Inch's state of mind, they might well conclude on the whole case that Inch never considered that Brain was a party to any criminal combination prejudicial to the interests of the defendant company. Moreover, there is a good deal to support the view that Inch never regarded the combination to promote and forward the purchase of the defendant company by the company controlled by W. T. Page as being unlawful. Inch was not called as a witness, but the chairman of directors, Senator McLachlan, said in his evidence :—

"Q.: Can you tell me anything else that you thought was objectionable in the methods of these people, anything unconstitutional ?

A.: Nothing unconstitutional.

Q.: And anything illegal ?

A.: Nothing illegal.

Q.: So, as far as their methods were concerned everything was constitutional and legal ?

A.: Quite so.

Q.: And as shareholders they were entitled to get a majority if they could ?

A.: Quite so.

Q.: But you were out to prevent them getting a majority if you could ?

A.: Quite so."

H. C. OF A. 1934-1935.

COMMONWEALTH LIFE ASSURANCE SOCIETY LTD. v. BRAIN.

Evatt J. McTiernan J.

Partridge's association with the combination was alleged to be the sole reason, or, at any rate, the main reason, for imputing impropriety or illegality to the combination, but he was not prosecuted at all. The jury may have regarded this as indicating (1) that Inch did not believe that any prosecution of Partridge was justified, and (2) that, as he had nothing more against Brain than against Partridge, he did not believe that criminal proceedings against Brain were justified.

In all the circumstances, we consider that there was sufficient evidence before the jury to justify the conclusion that Inch believed that Brain was not a party to any combination of a criminal character, and that no criminal proceedings against Brain were justified or justifiable.

Finally, a short reference may be made to a point as to damages, which were faintly suggested by the appellant to be excessive. Before the Full Court the question was not adverted to at all. The verdict is to be taken as based on the first count of the declaration, which alleged that the company was an actor in the prosecution from the commencement, and legally responsible for the original charge and arrest of Brain, as well as for the conduct of the Court proceedings. Having regard to the seriousness of the charge, the ruinous effect which it was likely to have on the plaintiff's reputation, and to the conduct of the company, it is impossible to regard the verdict of £3,000 damages as being in any way unreasonable.

The appeal should be dismissed.

Appeal dismissed with costs.

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

H. D. W.