PRIVY COUNCIL.

BABOO GUNNESH DUTT SINGH (PLAINTIFF) *v.* MUGNEERAM CHOWDHRY AND OTHERS (DEFENDANTS).

P. C.* 1872 *July* 25.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Malicious Prosecution—Libel—Witnesses' Privilege—Evidence—Onus Probandi.

Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. If their evidence be false, they should be proceeded against by an indictment for perjury.

In an action for damages for a malicious prosecution, it is not sufficient to prove merely the dismissal of the charge. It must be proved that the prosecution was without reasonable and probable cause.

This was an appeal from a decision of the High Court (Bayley and Pundit, JJ.) of the 7th March 1866 (1), reversing a decree of the Principal Sudder Ameen of Tirhoot of the 24th June 1865.

The suit was brought by the plaintiff, who was a near relative of the Raja of Durbungah, against three landholders in the district and two of their servants, to recover damages for defamation of character.

Disputes had for some time been going on between the Chowdhrys (defendants) and the plaintiff. An affray took place between a tenant of the plaintiff and the Chowdhrys, and one of the latter, Kirtee Narain Chowdhry, was killed. On the 8th December 1863, the respondent Mugneeram Chowdhry appeared before the Assistant Magistrate at Durbungah, and stated, *inter alia*, that the deceased and the respondent Seetaram Chowdhry had on the 6th December accompanied two peons of the Court of the Principal Sudder Ameen, who had come to attach the crops on the ground in dispute; and that on their arrival there they

* *Present* :—THE RIGHT HON'BLE SIR JAMES W. COLVILE, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR LAWRENCE PEEL.

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found the crops cut, and the appellant there with armed men, whom he ordered to attack the deponent party, which was done, and Kirtee Chowdhry killed. On this information, the Magistrate, on the same day, ordered the arrest of the appellant and his son, together with others charged by Mugneeram, and on the following day at noon, the appellant appeared and surrendered himself to the Magistrate. He was kept in arrest, and afterwards sent forward in arrest to Durbungah, and on the following day, the 9th of December, enlarged on entering into his own recognizance and giving security, but he was obliged to attend the Magistrate's Court from day to day till the conclusion of the enquiry as against him. On the 14th of December, Bhugwant Chowdhry, one of the respondents, gave his deposition before the Magistrate, in which he stated that he had gone on the 6th to the scene of the affray, and there found the corpse of Kirtee and certain wounded persons, and had been told that the attack had been made by the men belonging to the appellant and his son. He had, in his information given on the 6th, when he appeard, not as a mere informant, but as a complainant along with the other Chowdhrys respondents, charged the appellant with the murder of the deceased Kirtee. The other respondent Chowdhrys also gave their depositions against the appellant. On the 14th of December, the Magistrate also examined the Court peons, Keramut Khan and Deedar Bux, who said they had gone to attach the grain on the lands in dispute. They spoke to an affray having taken place, but did not depose to recognizing the appellant as being present there, or his son. On the 29th of December 1863, the Magistrate, having heard all the evidence for the prosecution, dismissed the case as against tha appellent and his son, but committed Sookun Lall thakoor, the appellant's tenant and others, to the Sessions. On the 2nd of January 1864, the Magistrate made a further order, in which he said that the evidence offered had failed to show that the appellant was present, but fined him Rs. 500 on a wholly different viz. ground, under the provisions of s. 154 of the Indian Penal Code, for not giving timely information of, and exerting himself to prevent, an apprehended affray. Of the parties committed to the Sessions, all were acquitted except

one, Sheikh Lallun, who was convicted and sentenced to four years' imprisonment on the 22nd March 1864. On the 31st of August, the respondent Seetaram Chowdhary presented a petition to the High Court, in which he repeated all the same accusations against the appellant, and charged him with having given orders for the attack on Kirtee Chowdhry, and complained of the irregularity of the proceedings of the Magistrate and Judge, and asked that the High Court should, under its powers of supervision, direct the Judge to proceed with the case, after ordering the Magistrate to commit the defendants to his Court. On the 21st of November 1864, the High Court called on the Judge for an explanation which was given by the Judge on the 16th December 1864, and on receipt of it the High Court declined to interfere. In the explanation submitted by the Judge, the following passage occured :—" The Assistant Magistrate, who committed several persons on charges of riot, &c., spoilt the case by sending in two sets of witnesses for the prosecution, who contradicted each other."

The appellant, having been required to give bail and enter into recognizances, on the 29th of September 1864, filed his plaint in the Court the Principal Sudder Ameen of Zillah Tirhoot against the respondents, together with two other defendants, to recover damages for the defamation of his character, on the ground that the charges made against him were false and malicious.

The respondents Gouree Dutt Chowdhry, Ajmut Roy, and Bhugwant Narain Chowdhry, put in their written statements. The two first named asserted that they had nothing to do wtih the case, further than having been called as witnesses, and were not liable to the plaintiff's claim, and the last submitted that the mere fact of his having been the person to give information did not make him liable. None of these three at all repeated or attempted to justify the imputation made against the appellant. On the 2nd of March, the respondents Mugneeram and Seetaram Chowdhry put in their written statements in which they justified the imputation to the fullest extent, and maintained that the appellant was guilty of the charge, and that it was well proved before the Magistrate :—

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On 14th March 1865, the following issues were settled:—

"1. Is there any proof of the existence of any enmity between the litigant parties previous to the commencement of the criminal prosecution? If it be in the affirmative, then, whether or not the charge of complicity in the wilful murder of Kirtee Chowdhry, deceased, preferred against the plaintiff by the defendants of the first party, simply originated from motives of humiliating the plaintiff, and was therefore entirely groundless; and if the charge did emanate from such malicious motives, then, how far has the plaintiff been disgraced by it; to what damages can he be entitled for it; and against which of the defendants can such damages be adjudged?

"2. Whether the allegations of the defendants Nos. 1 and 5 of the first party as to the truthfulness of the charge of complicity preferred by them against the plaintiff, and to his having sustained no loss of honor by his attendance before the Magistrate on bail, is true or not?

"3. Is the statement of the remaining defendants of the first and second parties, regarding an absence of all connection on their part with the criminal case in question, fit to be admitted by the Court?"

The plaintiff examined four witnesses, *viz.*, Amarut Ali who deposed to the effect that he was a servant of the plaintiff and in constant attendance on him; that bad feeling had existed between his master and the Chowdhrys in consequence of their unsuccessful attempts to obtain land; and that an affray took place between Sookhun Thakur and the defendants, when Kirtee Chowdhry lost his life, of which the defendants took advantage, and charged the plaintiff with murder. He spoke to the plaintiff's being arrested and kept in custody and then bailed.

The second Nisheeb Nusser deposed that Ram Dutt Chowdhry conducted the criminal case against the plaintiff, and that Gouree Dutt and Ajmut Roy were his servants.

The third Sunker Dutt Jha, one of the plaintiff's managers, deposed to the same effect as the first witness.

The fourth witness Bhurea Doss deposed to Ram Dutt Chowdhry having managed the case.

Evidence as to the plaintiff's character was also given.

The defendants did not offer their own evidence, or call any witness, to prove that the plaintiff had been present at the affray, or had given orders to attack, or that he had been in any degree connected with it.

On the 24th of June 1865, the Principal Sudder Ameen gave his decree in the case, awarding the appellant as damages 20,000 rupees with costs to be paid by the respondents, and dismissed the suit as against the defendants Ram Dutt Chowdhry and Nund Coomar Chowdhry.

He held on the first issue that it was proved by the evidence that the plaintiff and defendants had been at variance before the death of Kirtee Narain Chowdhry, and that the plaintiff having been successful in the litigation which arose as to the digging of a tank, and the alleged rent-free lands, it had "engendered feelings of enmity and spite in the minds of the defendants." On the second issue he held that it appeared from the evidence generally that "the charge against the plaintiff was wholly groundless, and was preferred by them solely from motives of enmity, and for the satisfaction of a grudge." On the third issue he held that the plaintiff was a person of high rank and dignity, and was much humiliated and degraded by his arrest, and being put to bail, but that having regard to all the circumstances, 20,000 rupees damages would meet the justice of the case.

On the 7th March 1866, the High Court on appeal reversed the decree of the lower Court, and dismissed the plaintiff's suit with costs (1). The grounds on which the judgment of the Court proceeded were that, as to the appellant Bhugwant, he was merely an informant at the Police office at the request of the wounded men, and had said nothing of his own knowledge, and was not therefore liable to damages, and as to the other appellants, the Court doubted whether they also could properly be called prosecutors, or any thing more than informants to the Police, over whose action they had no power of control. Without however deciding this latter point, the Court held that the plaintiff had failed to make a case against them, even, supposing them to be prosecutors, inasmuch as he was bound to prove the innocence of the charge made, and had given no proof of it except "the order of the Magistrate by which he released the plaintiff for want of proof," which, in the opinion of

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the Court, did not prove the appellant's innocence, but only that he was not proved to be guilty; and, further, that even if such release did make for the plaintiff a *primâ facie* case of innocence, it was binding on the Civil Court, or on the defendants, who were at liberty to plead and prove that the charges against the plaintiff were well founded, and that the defendants had so done, and the plaintiff had not produced any proof to rebut the defendants' evidence of his guilt. The judgment concluded in these terms :—

"Now, even if we be inclined to hold that the plaintiff and his son were not present as deposed to by these appellants, we are quite satisfied that the quarrel arose out of a claim to rents made by the plaintiff regarding certain lands alleged to be purchased by Mugneeram and others, which they asserted were lakhiraj, and that the lease of the village in which these lands were situated to the plaintiff's servant was a nominal transaction by the plaintiff while he kept himself in the back-ground. We are not in a position to say that it was not the plaintiff who caused certain persons to go to the place of the riot; and that when by these acts the affray took place, the plaintiff was legally as well as morally responsible for those acts which led to the murder of the brother of Mugnee, and the wounding of several others. We admit the plaintiff had a remedy against these acts by prosecuting them for perjury in stating from motives of enmity and malice that he and his son were present, when they were not present at all, but he did not do this. Under all these circumstances we think a decree for any damages to the plaintiff is not proper, and we accordingly reverse the decision of the lower Court, and dismiss with costs the plaintiff's case, and decree this appeal with all costs."

From that decree the plaintiff appealed to Her Majesty in Council.

Mr. *Doyne* for the appellant.—The High Court were wholly wrong on the evidence as to Bhugwant being a mere informant put in motion by the others; for it is clear on the evidence that the Chowdury respondents were a joint family, having the same interest in the subject of the suit, and at all times acting in concert, and all fully possessed of the actual facts of the whole case. Besides this, it is clear that Bhugwant was not a mere informant, but a prime mover, and joined with the other members

of his joint family as complainant, and that, if the charge against the appellant were untrue, it was so to Bhugwant's knowledge. The doubt thrown out as to the other appellants to the High Court being more than informants is opposed to the whole evidence, as they appear first to have sent Bhugwant to inform, and afterwards to have conducted the prosecution, and the defendant Seetaram had, after the discharge of the appellants repeated the slanders against the appellant in a petition to the High Court. The order of the Magistrate releasing the appellant is not of the doubtful character apparently imputed to it by the Division Bench, but is as express as such orders usually are. It may be admitted that it was open to the defendants to have pleaded and proved that he was guilty of the death of Kirtee Narain, and that the Civil Court was not in anywise concluded by the order of the Magistrate, if such an allegation had been made by the defendants, and proved to the satisfaction of the Court; but it is wholly erroneous to say that the defendants generally did so plead, inasmuch as only two of them, Mugneeram and Seetaram, ventured to repeat the charge against the plaintiff (appellant) in this suit, and no evidence whatever was offered by any of the defendants to justify such a charge. Under this state of facts, there was no evidence to rebut, and on the whole record it appears that there never was any *boná fide* ground for making so grave and unfounded a charge against the plaintiff It is also to be observed that there is no evidence whatever to show that the lease to Sookhun was nominal, or that the appellant was the real though secret mover in the affray, and that the whole evidence points to the affray having been brought about the the lawless conduct of the Chowdhry respondents. It cannot be contended that the charges made by the respondents against the appellant were privileged, and the respondents were clearly bound to show the truth of them, on pain, in default of so doing, of having a decree given against them for damages. But even supposing the charges to be *primâ facie* privileged, they are taken out of the privilege by their manifest malice and falsehood. Independently however of the other evidence in the case, the order of the Magistrate discharging the appellant, when combined with the fact that no further criminal proceedings

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were taken against him, was, supposing the privileged character of the charges, sufficient *primâ facie* proof of the appellant's innocence and the respondent's malice to have shifted on them the burthen of proving the truth or *bona fide* of the said charges which they have not even attempted to do.

The respondent did not appear.

Their LORDSHIPS delivered the following judgment :—

The material facts in this case may be very shortly stated. It would appear that an affray took place between the partisans of the Chowdhrys, who were the defendants in the suit below, and of Baboo Gunnesh Dutt Singh, who was the plaintiff in the suit below. The cause of the affray and the circumstances attending it are involved in some obscurity, but their Lordships think it sufficiently appears that it originated in some attempt on the part of the partisans of the Chowdhrys to assert some real or pretended right which was resised by the partisans of the Baboo Gunnesh Dutt Singh, and that in the course of that affray one of the Chowdhrys was killed, and some were wounded. It would appear that some of the Chowdhrys who were defendants in the suit below preferred a charge against Gunnesh Dutt Singh of having been accessory to this murder by inciting his partisans to violence, and Gunnesh Dutt Singh was brought before the Magistrate, who, however, upon hearing the case, dismissed it as against him for want of proof, and declined to commit him for trial. Thereupon Gunnesh Dutt Singh brought the present action.

This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion, with the High Court, that if it had been, strictly speaking, such an action, it could not have been maintained; for they agree with that Court that witnesses cannot be sued in a Civil Court for damages, in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim which certainly has been recognized by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justices that witnesses giving their evidence on oath in a Court

of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury. But it appears to their Lordships that the suit of the plaintiff in the Court below, although called a suit for defamation of character, may be substantially supported (the question is one of substance rather than of form) as an action for a malicious prosecution; and that being so, if we apply the principles of English law to the case, the burden of proof lying upon the plaintiff would be this,—he would have to prove in the first place that the defendants were the prosecutors of the criminal proceeding against him: next that they were actuated by malice, and further that their proceeding was without any reasonable or probable cause.

It appears to their Lordships that the issues of fact as stated do in substance raise the same questions which would by raised in an action for malicious prosecution in this country. We find the first issue of fact to be stated thus:—"Is there any proof of the existence of any enmity between the litigant parties previous to the commencement of the criminal prosecution? If it be in the affirmative then, whether or not the charge of complicity in the wilful murder of Kirtee Chowdhry, deceased preferred against the plaintiff by the defendants of the first party, simply originated from motives of humiliating the plaintiff, and was therefore entirely groundless." The other issues of fact appear to their Lordships to substantially state the same questions which would come before a Judge and jury in an action for malicious prosecution in this country.

With respect to the proof of those issues, it appears to their Lordships that the plaintiff did substantially prove that the defendants, or at all events two of them, were the prosecutors on this occasion, although some little doubt is expressed upon that subject by the High Court. It appears to their Lordships also that some evidence was given by the plaintiff of malice on the part of the defendants. That evidence was not of a very clear or conclusive kind, but their Lordships are disposed to say that the case of the plaintiff on this issue was on the whole sufficiently made out.

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We now come to the third issue, namely, whether or not the plaintiff has given any proof of the want of reasonable and probable cause, or, as it is put in the statement of the points in the Court below, that the proceeding was altogether groundless. Their Lordships are of opiuion that it rested upon the plaintiff to prove this, or at the least to give *primâ facie* evidence of it calling for an answer. Their Lordships agree with this statement which they find in the judgment of the High Court :— "We find on the record of the case that the plaintiff has given no other proof of his innocence and of the falsehood of the statement of these four appellants except a copy of the order of the Magistrate by which that officer released the plaintiff for want of proof." The plaintiff, it is true, give in evidence certain depositions of the defendants ; but those depositions, taken by themselves, were evidence of his guilt, not of his innocence Then what evidence does he give to rebut them ? He puts in the decision of the Magistrate, which was neither more nor less than this (although it is a good deal amplified by the Sudder Ameen in the Court below,) that the case is not proved against him in the opinion of the Magistrate. Their Lordships are of opinion that this decision was no evidence whatever against the defendants of the groundlessness of the prosecution. To hold that every person whom a Magistrate refuses to commit for trial is entitled to maintain an action for malicious prosecution, on the bare proof (without more) of the dismissal of the charge, might very injuriously affect the adminstration of the criminal law. It was in the power of the plaintiff himself to go into the witness-box and give evidence of his own innocence. He might have proved where he was and what he did at the time of the affray. He might have stated all the circumstances within his knowledge. But he declines to give evidence. Undoubtedly in this country, where a man sues for defamation of character, whether in the form of an action for a malicious prosecution or of libel or slander, it is expected that he who of all men is best able to give evidence of his own innocence should be put into the witness-box ; and it is very rarely indeed that a plaintiff in any such suit obtains substantial damages if

he does not give evidence or a good reason for not giving it. not only does the plaintiff not give evidence himself, but although he calls witnesses for the purpose of showing malice on the part of the defendants, he calls none for the purpose of establishing his own innocence, or of disproving the charge against him.

Under these circumstances their Lordships concur with the judgment of the High Court, which appears to be substantially based upon the ground that in their opinion no proof had been given, not even *primâ facie* proof, certainly not such as the plaintiff if he had been an entirely innocent man would have had it in his power to give, of the groundlessness of the charges preferred against him; in other words, that there was no evidence of the part of the plaintiff of want of reasonable and proper cause for the institution of this prosecution.

Their Lordships do not think it necessary to follow the High Court in some observations which they have made as to the effect of the evidence upon the plaintiffs character; a subject on which they give no opinion; but on the ground already stated, namely, that they substantially agree with the finding of the High Court that no sufficient evidence was given on the part of the plaintiff of this being a malicious and a groundless prosecution, their Lordships will humbly advise Her Majesty that the decision of the High Court should be affirmed, and this appeal dismissed.

Appeal dismissed.

Agent for the appellant: Mr. *Wilson.*